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Decision of the Minister of Economic Affairs of May 6, 2014, No. WJZ/14052830, containing the policy rule regarding the application by the Netherlands Authority for Consumers and Markets of Section 6, paragraph 3 of the Dutch Competition Act in anticompetitive arrangements that have been made for the purpose of sustainability

The Minister of Economic Affairs,

Considering Section 21, paragraph 1 of the Framework Act on Autonomous Administrative Authorities, and Section 5d of the Dutch Competition Act,

Decides:

Article 1

In this policy rule, arrangements are understood to include the following: agreements between undertakings, decisions by associations of undertakings, and concerted practices of undertakings.

Article 2

When applying the provisions laid down in Section 6, paragraph 3 of the Dutch Competition Act to anticompetitive arrangements that have been made for the purpose of sustainability, the Netherlands Authority for Consumers and Markets (ACM) takes into account in its assessment of whether the criteria have been met the following aspects that are specific to sustainability:

- a. With regard to the criterion that the arrangements are to contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, the long-term benefits for consumers are also taken into account;
- b. With regard to the criterion that consumers are to be allowed a fair share of the benefits resulting from the improvement of production or distribution, or from the promotion of technical or economic progress, the long-term benefits for consumers are also taken into account;
- c. In the assessment of the criterion that the arrangements are not to impose any restrictions that are not indispensable to the attainment of the sustainability objectives, in each case, it is taken into account the fact that, if an undertaking carried out activities for the purpose of sustainability on its own, that undertaking could lose market share or lose profits due to increased production costs, thereby possibly taking away the incentive for that undertaking to launch sustainability initiatives;

- d. In the assessment of the criterion that the arrangements are not to afford undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question, the possibilities of sufficient competition on other competition parameters than the sustainability element with regard to the product or service are taken into account.

Article 3

This policy rule shall be cited as 'Policy rule on competition and sustainability' (in Dutch: '*Beleidsregel mededinging en duurzaamheid*').

Article 4

This policy rule shall enter into force starting the day after the publication date of the Dutch Government Gazette in which it is published.

This policy rule and its explanatory notes shall be published in the Dutch Government Gazette.

The Hague, May 6, 2014.

*The Minister of Economic Affairs,
H.G.J. Kamp*

EXPLANATORY NOTES

1. Introduction

1.1. Background and scope

On January 24, 2013, Members of the Dutch House of Representatives Mr. Elbert Dijkgraaf and Mr. Jaco Geurts proposed a motion, which asks the Dutch Government to set policy rules for the Netherlands Competition Authority (now: the Netherlands Authority for Consumers and Markets) containing instructions about offering room for arrangements in the agricultural and nutritional chain regarding public interests such as animal welfare and the environment¹. This policy rule is the implementation of that motion. The policy rule establishes several aspects that are specific to sustainability, which the Netherlands Authority for Consumers and Markets (ACM) is to take into account in assessments of whether or not the exception from the cartel prohibition laid down in Section 6, paragraph 3 of the Dutch Competition Act may apply. As a result, a general framework that is specific to sustainability is created within which ACM can make its concrete, individual assessments in order to carry out its tasks, while retaining its freedom of judgment, and which is in accordance with the national and European antitrust frameworks. The policy rule not only applies to sustainability initiatives in the agricultural and nutritional chain, but also to sustainability initiatives in other sectors.

1.2. Sustainability

This policy rule applies to arrangements that have been made for the purpose of sustainability. The policy rule does not include a definition of the term 'sustainability.' Sustainability is a broad concept, one that is not easily defined. The UN Brundtland Commission in 1987 defined sustainable development as '*development which meets the needs of current generations without compromising the ability of future generations to meet their own needs*'. This definition explains that sustainability is about the scarcity of those resources with which welfare can be created, both now and in the future. In this context, one can think of environmental protection and ecology. In addition, public health, animal welfare and fair trade are often also understood to fall under sustainability. The following aspects may be associated with sustainability, among other aspects:

- Developments in production methods that combat environmental pollution, for example, by preventing CO₂ emissions from being released into the air or by preventing the generation of waste.
- Developments in production methods that combat the loss of biodiversity, for example, by preventing overconsumption of fish species that have not been regulated or on which no quotas have been introduced.
- Developments in production methods that increase animal welfare to a level that significantly exceeds relevant animal-welfare regulations, for example, in

¹ *Parliamentary Papers II*, 2012/2013, 33 400 XIII, No. 99

meat production.

- Developments in production methods that combat human health risks or where producers in developing countries receive a fair price for their products, for example, in food or textile production.

1.3. Reasons for cooperation between competing firms with regard to sustainability

Different reasons for cooperation with regard to sustainability are conceivable such as situations where smaller market participants are not able to take such initiatives on their own or where a joint label could give consumers assurance that the sustainable product in question is indeed what it claims to be. Another reason for cooperation between competing firms with regard to sustainability may be that a firm wishes to limit or prevent negative external effects, but that it decides not to go at it alone, because consumers are likely to switch to the non-sustainable variant if the firm includes the increased production costs (because of the more sustainable production method) in the price of its product. This could lead to a loss of market share and profits. Negative external effects (negative externalities) are spillover effects of production, which have not been included in the price of the end-product because they fall outside the price and market mechanism such as in cases of environmental pollution, loss of biodiversity, and deteriorating public health. These effects are borne by society as a whole, but are not reflected in market prices. In order to prevent or limit such negative externalities, joint initiatives with regard to sustainability can be launched by competing market participants, so that firms are not confronted with the so-called 'first-mover disadvantage.' After all, the 'first mover disadvantage' can remove the incentive for firms to launch initiatives independently for the purpose of sustainable development, whereas in such cases, arrangements between competing firms with regard to sustainability can sometimes be the only option to limit or prevent negative externalities of the production process such as environmental pollution and overfishing of fish species that have not been regulated or on which no quotas have been introduced.

1.4. Vision document on competition and sustainability

In its Vision document on competition and sustainability, ACM gives its opinion on what room for sustainability initiatives it sees under the cartel prohibition. By clarifying the legal and economic frameworks of the question how sustainability fits in competition law, ACM wishes to avoid that sustainability initiatives that benefit society fail to be realized. ACM's vision document and this policy rule are consistent with one another. In the vision document, ACM clarifies the way it will apply this policy rule in practice.

1.5. EU legal framework

The prohibition of anticompetitive arrangements and the possible exception from this prohibition is a field of economic policy that has been regulated in Article 101 of the

Treaty on the Functioning of the European Union (TFEU). The European Commission enforces compliance with this prohibition. Article 101 TFEU has a direct effect in the EU Member States, and is also enforced by the national competition authorities and courts. ACM is responsible for public enforcement in the Netherlands. Section 6 of the Dutch Competition Act is based on the European cartel prohibition, and is applied by ACM in accordance with European competition law, as is intended by the Dutch legislature. That is why, when this policy rule was drafted, the EU legal framework was taken into account, which is composed of the interpretation of the European Commission (such as the guidelines and its decisional practice), and rulings of the European Court of Justice. In addition, the European Commission was unofficially consulted about this policy rule.

2. Legal framework

2.1. Cartel prohibition (Section 6, paragraph 1, Dutch Competition Act)

Under Section 6, paragraph 1 of the Dutch Competition Act, agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings (hereafter: arrangements), which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited. If the arrangement in question concerns key competition parameters such as price, quality or quantity, and, as such, has a negative impact on consumers, it is prohibited.

If an arrangement does not concern a key competition parameter, it is likely that competition is not impeded, and that the arrangement is allowed. Examples of such arrangements can be those that concern purely technical aspects of the production process, which thus have no appreciable effects on competition such as joint establishment of certain standards.

Example

A recommendation that is developed collectively to reduce the fat content in food items does not impede competition, because participant undertakings are still able to compete on price, quality, flavor, image, etc². A similar case is an arrangement aimed at reducing the sodium content in food products³.

Other arrangements that do not impede competition are conceivable.

Example

² See section 330 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011, C 11/01.

³ At the instigation of the British government (*Food Safety Authority, FSA*), British food manufacturers agreed to gradually reduce the sodium content in their food products.

Through arrangements about using antibiotics in animal breeding with care, the risk of the development of antibiotic-resistant bacteria is reduced. Existing antibiotics can be used in animals effectively. As a result, these arrangements serve animal health, and thus promote animal welfare. If such arrangements do not lead to higher prices of the products made from these animals, they do not impede competition.

In addition, it is conceivable that a certain arrangement covers a very limited part of the market, thus leaving enough room for competition outside of the arrangement in question, while not having any appreciable anticompetitive effects on consumers. In certain situations, it is possible that a market-wide arrangement indirectly influences a competition parameter of importance, but that this influence is very limited, and thus does not create any appreciable impediment to competition. At the same time, it is critical that undertakings continue to have control over all other competition parameters, so that competition on price, quality and service remains intact, and markets and customers are not divided.

Example

In 2008, ACM ruled on an arrangement that sought to reduce the practice of castrating boars without the use of anesthesia⁴. If viewed separately, the arrangement itself did not concern a competition parameter of significant importance, yet there was upward pressure on prices. However, that pressure was limited and lasted shortly. The arrangement included a temporary contribution made by supermarkets of 3 cents per kilo of purchased meat. ACM said that it could not be concluded in advance that the arrangement impeded competition. ACM based its opinion in part on the fact that the arrangement was not a market-wide arrangement, which meant that consumers still had enough options.

In addition, arrangements that are solely aimed at informing consumers better about the quality of certain products, so that upward pressure on prices is not created, are also conceivable.

Example

Quality labels such as the 'Choose Consciously' ('Kies Bewust') logo for healthy nutrition, which is an initiative of several major food producers and supermarket chains. The logo is awarded by an independent committee based on objective criteria.

Section 6, paragraph 1 of the Dutch Competition Act concerns arrangements that enable undertakings to impede competition on the market, thereby reducing consumer welfare. Arrangements that concern competition parameters of significant

⁴ Informal opinion of ACM in case 6456 (2008).

importance such as price, quantity and the location of trading, are considered to be some of the most serious impediments to competition, and are usually prohibited under Section 6, paragraph 1 of the Dutch Competition Act.

Example

Several supermarket chains wanted to charge consumers an additional ten cents (Dutch Guilders) per liter of milk (the 'milk dime') in order to compensate the increased purchasing costs as a result of an outbreak of foot-and-mouth disease⁵. ACM ruled that this arrangement violated the cartel prohibition.

The general rule is that, barring exceptional circumstances, undertakings must always set their prices individually. Arrangements in which competitors agree on passing on a certain cost component to buyers (indirect price-fixing agreements) will usually not be allowed. ACM ruled differently⁶ in such cases, depending on the specific circumstances in each case. In most cases, it was not accepted to pass on costs mandatorily⁷.

2.2. Exceptions to the cartel prohibition (Section 6, paragraph 3 of the Dutch Competition Act)

If an arrangement between undertakings does appreciably impede competition, it is possible that the statutory exception from the cartel prohibition is applicable under Section 6, paragraph 3 of the Dutch Competition Act. Under Section 6, paragraph 3 of the Dutch Competition Act, the cartel prohibition does not apply to arrangements that contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, provided that consumers are allowed a fair share of the resulting benefits, and that do not:

- a. impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or
- b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.

⁵ Case 2432 (2001).

⁶ The Stichting Wit- en Bruingod case is an example of where such was allowed. The objective of the collaboration was that manufacturers and importers of domestic appliances jointly collected and processed domestic appliances that were no longer used by consumers. Consumers paid a so-called waste-disposal fee when purchasing a domestic appliance. This fee was passed on mandatorily to the next link in the production chain. Those that collected and processed domestic appliances were compensated using these fees. The mandatory passing on of costs was allowed for the period that was needed to cover the costs of the 'historical inventory' (which refers to the appliances that were already in circulation for which no so-called waste-disposal fee was charged at the time of purchase). In another unusual case, the Stichting Papier Recycling case, a mandatory passing on of costs was accepted, too. In this case, the arrangement aimed to secure at all times the collection and recycling of paper and cardboard waste of households. This did not interrupt the product cycle, not even when the price for paper and cardboard waste was low. The mandatory passing on of costs to the next link in the production chain was accepted because it enabled the system to be created in the most efficient manner.

⁷ The Dutch Flower Auctions Association (VBN), case 492 (1999), and Stibat, case 51 (1999).

Four exception criteria are listed in Section 6, paragraph 3 of the Dutch Competition Act. These criteria are cumulatively applicable. Anticompetitive arrangements are only allowed if they meet these criteria. The criteria must be applied in relationship to each other. This means that, in practice, each of the criteria is not necessarily given the same weight. For example, if an arrangement that aims to improve the quality of the product in question covers just a small part of the market, the criterion that the arrangement's restrictions to competition cannot be indispensable is more easily met, provided that the presence of enough residual competition ensures there are enough options left for consumers⁸. It is also possible that, if the efficiency benefits that an anticompetitive arrangement yields are very high, it may, in the overall assessment, compensate for the negative effects of the elimination (full or partial) of residual competition. In principle, the restrictions resulting from the anticompetitive arrangements are tested against Section 6, paragraph 3 of the Dutch Competition Act within the boundaries of the relevant market(s) which the arrangement in question concerns.

When assessing the four criteria, the harm to consumers as a result of the restriction to competition as well as the benefits for consumers are identified. Efficiencies can have added value by reducing the cost price of production of a specific product, by increasing the product's quality, or by creating a new product. Efficiencies increase the welfare of users. If the positive effects of an arrangement outweigh the negative ones, the arrangement is, on balance, welfare-enhancing. The net effect of such arrangements is offering better products than those that would have been offered without an arrangement. With regard to sustainability initiatives, too, the undertakings involved, and, where necessary, ACM, must assess whether the sustainability element of the product or service in question yields efficiencies to such a degree, that the restriction to competition is allowed.

2.3. How the exception works (Section 6, paragraph 4 of the Dutch Competition Act)

Under Section 6, paragraph 4 of the Dutch Competition Act, businesses must assess themselves whether their conduct impedes competition and, if such is the case, whether the arrangement may fall under the exception criteria of Section 6, paragraph 3 of the Dutch Competition Act, and thus may be allowed after all. Businesses that make arrangements for the purpose of sustainability must be able to make a sufficiently plausible case that the arrangements will actually realize the efficiencies that they anticipate. They must also be able to demonstrate that the restrictions to competition in question do not go beyond what is necessary. It is up to ACM to assess whether or not the criteria of Section 6, paragraph 3 of the Dutch Competition Act have been met. If the benefits of the sustainability initiative have been justified insufficiently, the initiative cannot be considered to be excepted from

⁸ See ACM's Vision document on Competition and Sustainability (www.acm.nl).

the cartel prohibition. This burden of proof is to prevent businesses from using improper reasons to conclude anticompetitive arrangements. In order to prevent undertakings from concluding arrangements under the banner of sustainability that impede competition and that, in the end, offer consumers no benefits, ACM will continue to assess critically whether the arrangements do not impose any restrictions that are indispensable to the attainment of these objectives, or whether they afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question. As the profitability of the undertakings involved in genuine sustainability initiatives not always increases, an incentive may arise to conclude an anticompetitive arrangement (next to the sustainability initiative), which has no connection with the sustainability interest. In such cases, no exception of the cartel prohibition is granted.

3. Applying this policy rule to sustainability initiatives

3.1. General

This policy rule establishes a number of aspects that are specific to sustainability, which ACM as a regulator must take into account when assessing whether or not the exception criteria of the cartel prohibition apply. In addition, this policy rule may offer undertakings certainty, if they wish to explain why their arrangements meet the exception criteria of Section 6, paragraph 3 of the Dutch Competition Act. A broad welfare concept is used in this policy rule. Future benefits are also taken into account when assessing whether or not the arrangement is welfare-enhancing. Particularly in the case of sustainability initiatives, the benefits to consumers are mostly reaped in the long run. If only those benefits were taken that can be reaped immediately, it would be difficult for undertakings that are involved in sustainability initiatives to demonstrate that, at the end of the day, the arrangement in question is welfare-enhancing. Any anticompetitive arrangement that has been made for the purpose of sustainable development must be assessed, on the basis of this policy rule and on a case-by-case basis, whether or not the arrangement in question meets each of the four exception criteria of Section 6, paragraph 3 of the Dutch Competition Act. This policy rule therefore does not grant a general exception from the cartel prohibition in the case of arrangements that have been made for the purpose of sustainable development.

3.2. First criterion of Section 6, paragraph 3 of the Dutch Competition Act: efficiencies

According to the first criterion of Section 6, paragraph 3 of the Dutch Competition Act, the anticompetitive arrangement must contribute to the improvement of production or distribution, or to the promotion of technical or economic progress (= efficiency). With regard to this first criterion, it must be assessed what the efficiencies are that the arrangement yields. In order to invoke Section 6, paragraph 3 of the Dutch Competition Act successfully, the positive effects of an arrangement must outweigh the anticompetitive effects thereof, and it must be examined what the relationship is

between the arrangement and the efficiency claims, and what value those efficiencies represent.

Efficiencies may, for example, include reductions of the cost price of producing a certain product, improvements in the quality of the product, or the creation of a new product. This also includes the situation where consumers attach value to certain qualitative properties of the product, and are willing to pay a higher price.

Example

Several producers agree to cooperate to introduce new products in the market. These new products are animal-friendly or have been produced based on fair trade. The consumers of this product attach value to the fact that these products are animal-friendly or that they were produced based on fair trade, and are thus willing to pay a higher price.

Efficiencies in the case of sustainability initiatives

In cases of classic violations of the cartel prohibition such as price-fixing agreements, market power is created with negative consequences for consumers such as higher prices. In sustainability initiatives, it is different: the market power that the arrangement creates, is used to bring about more sustainable products and, in some cases, to solve a negative externality. This may have positive effects on welfare. It is possible, for example, that, as a result of the arrangement, fewer resources are used in the production of consumed products, or that products are manufactured that last longer, thereby using up fewer resources. Both situations lead to increased efficiency. Both the future benefits as the prevention of future costs can be taken into account in this first criterion. Whether or not the arrangements lead to increased welfare, and, if so, what time frame is expected for this to happen must be assessed on a case-by-case basis.

What does this policy rule regulate with regard to this criterion?

This policy rule stipulates that, in the assessment of this criterion, the benefits to consumers that will arise in the long run be also taken into account. When dealing with sustainability initiatives, it is appropriate not to limit the assessment of efficiencies to just the benefits for consumers in the relevant market in the present. Sustainable development mostly has consequences for the future. With regard to 'the benefits to consumers that will arise in the long run,' one could think of the benefits of the sustainable product in question that current consumers will enjoy in the future, and of the benefits of the sustainability initiative that future generations of consumers will enjoy. If the benefits of sustainability initiatives that will arise in the long run were not taken into account, the arrangements would be considered

anticompetitive more easily. However, future benefits can only be taken into account if it is sufficiently likely that they will actually arise.

Example

A large share of European manufacturers and importers of domestic laundry machines agreed to no longer produce or import into the EU the least energy-efficient laundry machines in order to reduce energy consumption, and, by extension, air pollutant emissions in electricity generation⁹. Having weighed the pros and cons of the arrangement for consumers, the Commission in 2000 ruled that an exception was applicable. The benefits that could be identified were benefits for both consumers (energy bill savings) and for society (reduced CO2 emissions). Reduced CO2 emissions yield benefits to future consumers, because they incur fewer costs to reduce the negative effects of CO2 emissions (climate change).

3.3. Second criterion of Section 6, paragraph 3 of the Dutch Competition Act: a fair share for consumers

According to the second criterion of Section 6, paragraph 3 of the Dutch Competition Act, consumers are to be allowed a fair share of the benefits resulting from the improvement of production or distribution, or from the promotion of technical or economic progress. This criterion thus guarantees that the benefits that result from an arrangement are not only enjoyed by the producers involved, but that a fair share of those benefits is also reaped by consumers. The phrase 'fair share' means that the passing on of benefits must at least compensate consumers for any negative effects (actual or anticipated) that they incur as a result of the restriction to competition¹⁰.

Example

Standardization arrangements relating to sustainability may concern, for example, logistics, distribution or product packaging. Apart from the benefits for the undertakings involved, it may be desirable from an environmental point of view to use standardized packaging that can be reused multiple times (crates, trolleys, bottles). Reusing packaging offers cost benefits, and if these are passed on to consumers sufficiently, and not just to the producers involved, then consumers are given a fair share of the benefits of the anticompetitive arrangement.

However, if prices did increase, compensation could also be, for example, better quality of the products (current or new) in question. Yet if consumers are worse off as a result of the arrangement, the second criterion is not met: the net effect must be at

⁹ Case IV/36/178 CECEDE, OJ 2000, L187/47

¹⁰ See section 85 of the *Commission Guidelines on the application of Article 81, paragraph 3 of the Treaty*, OJ C 101/97, 27 April 2004.

least neutral for consumers that are affected by the arrangement.

What does this policy rule regulate with regard to this criterion?

This policy rule stipulates that, in the assessment of this criterion, the benefits to consumers that will arise in the long run must also be taken into account. The previous section (about the first criterion of Section 6, paragraph 3) gave an interpretation of that rule. In this approach, the benefits to existing consumers in the future as well as the benefits to future consumers of the product/service in question are taken into account, as it is about a longer time frame than just the here and now.

3.4. Third criterion of Section 6, paragraph 3 of the Dutch Competition Act: the indispensability of the restrictions

According to the third criterion of Section 6, paragraph 3 of the Dutch Competition Act, the anticompetitive arrangement cannot impose any restrictions that are not indispensable to the attainment of the efficiencies that are realized by the arrangement. The arrangement therefore cannot go beyond what is strictly necessary. This means that there cannot reasonably be any alternatives that are feasible and have a reduced anticompetitive effect to realize the efficiency improvements. By testing against this criterion, it is prevented that the arrangements go beyond what is strictly necessary for the improvement of the product's sustainability. As such, it is also prevented that, next to concluding a sustainability arrangement, an anticompetitive arrangement is concluded that has no relationship to that arrangement's sustainability interest, and which has negative consequences for consumers.

Example

Control measures have been laid down in the Management Plan MSC Shrimp Fishing Industry (*Managementplan MSC Garnalenvisserij*) to catch fewer shrimps in order to protect the Brown-shrimp population. This restriction of supply had an upward effect on prices. However, studies revealed that the shrimp population was not in danger. Therefore, the catch limits were considered not indispensable by ACM¹¹ in 2011.

What does this policy rule regulate with regard to this criterion?

This policy rule stipulates that, in the assessment of this criterion, ACM takes into account in each case the fact that, if an undertaking carried out activities for the purpose of sustainability on its own, that undertaking could lose market share or lose profits due to increased production costs, thereby possibly taking away the incentive for that undertaking to launch sustainability initiatives. After all, that undertaking would fear that consumers switched to a non-sustainable alternative because of a

¹¹ Informal opinion on MSC certificate shrimp industry, case 7011, 2011.

price increase. It is thus acknowledged that the existence of the so-called first-mover disadvantage could be a valid argument to start cooperating, and that cooperation between competing undertakings with regard to sustainability could actually be helpful in enhancing consumer welfare, particularly in cases where negative externalities are reduced or prevented. However, the policy rule does not alter the fact that the arrangement cannot go beyond what is necessary for the realization of the sustainability objective.

3.5. Fourth criterion of Section 6, paragraph 3 of the Dutch Competition Act: competition cannot be eliminated

According to the fourth criterion of Section 6, paragraph 3 of the Dutch Competition Act, the anticompetitive arrangement is not to afford undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question. Sufficient residual competition must continue to exist. With this final criterion, it is acknowledged that competition between undertakings is a key driver of welfare, which includes dynamic efficiencies, meaning innovation. Residual competition could, for example, mean that several undertakings, other than the ones involved in the arrangement, are active in the relevant market.

What does this policy rule regulate with regard to this criterion?

This policy rule stipulates that, in the assessment of this criterion, ACM takes into account the possibilities of sufficient competition on other competition parameters than the sustainability element with regard to the product or service. An arrangement that restricts competition for the purpose of sustainability could meet the necessity criterion if competition for all other parameters (other than the sustainability aspect) remains unrestricted such as price, other quality elements or service. In individual cases, the criterion of sufficient residual competition can also be met, if enough market entry opportunities remain for the undertakings that do not participate in the arrangement.

4. Consultation

The consultation of this policy rule was held between July 15 and September 9, 2013 through www.internetconsultatie.nl. A total of five reactions to the draft policy rule were received.

In several of the reactions to the consultation, respondents asked for additional clarification and practical examples for businesses that wished to have an easy-to-understand explanation of the underlying policy rule, where sustainable development is the basic principle. This has led to a more detailed clarification of several definitions, the structure of the explanatory notes has been adjusted, explanatory paragraph headings

have been added, and a large number of examples have been included. In addition, the answers to specific questions that had been asked in the reactions to the draft policy rule have been incorporated into the explanatory notes as much as possible.

With regard to the scope of the policy rule, several have indicated that they wished to have the policy rule not only apply to sustainable developments in production methods and that the policy rule not give an exhaustive list of protected public interests, but that it also leave room for an interpretation in the real world. As a result, the term sustainability has not been precisely defined in the body of the policy rule itself, but it has been explained in the explanatory notes in a non-exhaustive manner.

Finally, several respondents asked to what extent the European Commission had been consulted with regarding the draft policy rule, and what the policy rule's relationship with ACM's Vision document on competition and sustainability was.

The draft policy rule has been discussed with the European Commission, and the European Commission issued an informal reaction in writing. As a result, it has been clarified that a general framework specific to sustainability would be explained in the policy rule, within which ACM can make its concrete individual assessments in order to exercise its powers, while retaining its freedom of judgment and in accordance with national and European antitrust frameworks. It has additionally been clarified that, while it is possible to take into account future benefits to consumers, Section 101, paragraph 3 of TFEU requires that the benefits are enjoyed by the consumers of the products or services in question (and that, in that context, taking into account the benefits to society as a whole cannot be accepted). This policy rule and ACM's Vision document on competition and sustainability have been harmonized so that they are consistent with each other.

5. Regulatory burden

This policy rule has no effects on the regulatory burden, because no new mandatory activities are assigned to undertakings or to ACM.

6. Entry into force

This policy rule enters into force on the day after the publication date of the Dutch Government Gazette in which this policy rule is published. Therefore, the commencement term of two months, which is in accordance with the basic principles of the fixed amendment moments for entry into force of regulations, does not apply. It was decided to have this policy rule enter into force immediately after its publication, as to prevent any unwanted harm to the corporate sector.

The Minister of Economic Affairs
H.G.J. Kamp