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Dutch guidelines for sustainability initiatives

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Markets that work well for people and businesses

Agenda

- Introduction
 - Background of the guidelines on sustainability agreements
 - Purpose of the guidelines
- Dutch competition law
- The draft Guidelines
 - Definition and overview of main points
 - Room for cooperation under section 6.1 Competition Act
 - Requirements for exception: section 6.3 Competition Act
 - Practical policy and enforcement
- Questions/discussion

Background of Sustainability Guidelines

- Sustainability is an important issue for Dutch society since a long time
- Government needs to effectuate significant measures on sustainability (Dutch Supreme Court in Urgenda ruling) and so do companies (Dutch court in Shell ruling)
- Government relies heavily on self-regulatory measures to attain sustainability goals
- There is a widespread perception that private initiatives are hindered by competition law
- The ACM feels the responsibility to do what is possible to take barriers to cooperation on sustainability away
- The ACM published a vision document on sustainability agreements in 2014, new draft guidelines in June 2020, and after consultation a second draft in January 2021

Why new Guidelines?

- Competition law was still seen as an obstacle for sustainability agreements
- The ACM wanted to do whatever was possible to take unnecessary fear for competition law away
- The purposes of the new guidelines are threefold:
 - More attention for initiatives that do not hinder competition law
 - Scope of Section 6 (3) with exception to the rule has been expanded
 - Greater willingness to give informal advice
- Ultimate aim: a harmonized approach in Europe

Section 6.1 Dutch Competition Act: anti competitive agreements are prohibited

- Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have the intention to or will result in a restriction of competition on the relevant market are prohibited
- Protection of competition is the central element of competition law
- In principle every undertaking has to determine its own market behaviour
- Agreements on prices or division of markets between competitors are prohibited
- Cooperation between competitors is allowed if it does not restrict competition in an appreciable way

Section 6.3 Dutch Competition Act: exemption

- The cartel prohibition does not apply to agreements:
 - which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress,
 - while allowing consumers a fair share of the resulting benefits,
 - and which do not impose restrictions on the undertakings concerned which are not indispensable to the attainment of these objectives,
 - or which eliminate competition in respect of a substantial part of the products and services in question.
- Undertakings or associations of undertakings have to provide proof that the conditions of this paragraph are met

Guidelines: definition of sustainability

- Sustainability is a broad concept that is hard to define
- UN definition of sustainable development: the development towards an economically, socially and environmentally sustainable future for the earth and present and future generations (UN Resolution 66, 288, 2012)
- The ACM does not use a strict definition of sustainability agreements
- Sustainability agreements: agreements between companies that are aimed at identifying, preventing, limiting or restoring the negative impact of economic activities on people, animals, environment or nature
- Examples: agreements that aim at the protection of the environment, biodiversity, climate, public health, animal welfare, fair trade and human rights

Guidelines: room for cooperation under Section 6.1

1. Non mandatory joint ambitions
2. Codes, standards, labels, quality marks
3. Supply restriction with no noticeable effect on price and variety
4. Introduction of new products, techniques etc. where cooperation is necessary
5. Agreements to respect legal rules from abroad (for example through ICSR covenants)

Guidelines: requirements Section 6.3

Requirement 1: efficiency improvements

- Sustainability improvements can be considered as efficiencies: reduction of negative external effects, improvement of the quality of the product, cost efficiencies
- Sustainability advantages must be objective improvements: description of the improvements and the magnitude of the benefits
- The improvements must be substantiated:
 - Quantitative (CO2-reduction)
 - Qualitative (innovation, animal welfare)

→ Undertakings must show the degree of probability that the improvements materialize

Guidelines: requirements Section 6.3

Requirement 2: a fair share for consumers

The ACM makes a distinction between:

- Environmental-damage arrangements which aim at reducing negative external effects that make an efficient contribution to the realization of a standard to which the government is bound >>> full compensation for consumers is not required.
- Other arrangements, aimed at animal welfare, fair wages, the environment ‘beyond or outside of standards’ >>> full compensation of consumers is required

Substantiation of the interpretation of “a fair share” in case of environmental damage agreements

- Debate in ECN: can we take out of market efficiencies into account?
- No legal obligation to compensate consumers always in full
- Environmental damage is especially serious and urgent (efficient use of common resources)
- Condition 1: a standard exists to which the government is bound (democratic legitimization)
- Condition 2: the arrangement makes an efficient contribution to the standard (society as a whole will be better off)
- Condition 3: the consumers are part of society that benefits from the agreement, and thus enjoy the same benefits
- It is fair that consumers that cause the damage also bear (in full or partially) the costs

Example of environmental damage agreement

- The government is required to reduce CO₂-emissions by 25% (Supreme Court of the NL in Urgenda ruling)
- 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 (the shadow price)
- It is possible that the negative effects for consumers (price increase) are larger than the benefits of the environmental gains
- This is not a problem, because there is no need for fully compensating consumers for the costs (if they are part of society that benefits from the environmental gains)

Guidelines: requirements Section 6.3

Requirement 3 + 4: necessity and rest competition

- The agreement must be necessary to realize the benefits
- Companies must make a plausible case that:
 - no alternative measure is possible that is less anticompetitive, and
 - all anticompetitive elements of the agreements are essential to the realization of the objective.
- Examples: - market participants are economically not able to realize changes to its production or distribution that result in a more efficient usage of resources;- undertakings have a lack of expertise or scale; and the costs are as low as possible
- Important questions for rest competition:- which part of the undertakings participate in the agreement; - what is the influence of the sustainability agreement on the key competition parameters

The ACM practical policy

- Self-assessment remains necessary
 - If doubts companies are invited to discuss their initiatives with the ACM
 - When the agreement restricts competition, the ACM does not impose fines if:
 - 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

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Questions/Discussion

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