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The sustainability guidelines of the Netherlands Authority for Consumers and Markets: an impetus for a modern EU approach to sustainability and competition policy reflecting the principle that the polluter pays?

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ABSTRACT

In October 2020, the European Commission (EC) published a call for contributions on how competition rules could support the Green Deal. With this initiative, the EC followed in the footsteps of several national competition authorities which had already issued guidance on competition policy and sustainability initiatives. The Netherlands Authority for Consumers and Markets (ACM) is, to date, the only authority to publish draft Sustainability Guidelines with progressive, practical guidance. In this paper, we explore the extent to which ACM's Sustainability Guidelines could serve as a source of inspiration for a modern EU approach to sustainability and competition policy. We will conclude that while these Guidelines constitute a clear compromise, ACM has created an intelligent modus operandi to allow for more cooperative sustainability initiatives under the third paragraph of Articles 6 Dutch Competition Act and 101 TFEU without itself having to take decisions about public policy. Sustainability – Green Deal - fair share - polluter pays – ACM - Netherlands - Article 101 TFEU.

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1. Introduction

"So the time has come to launch a European debate on how EU competition policy can best support the Green Deal".[1]

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[1]Margrethe Vestager, 'The Green Deal and Competition Policy' *Renew Webinar* (22 September 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en>.

These words, with which Vice-president Margrethe Vestager kicked off a European debate on competition policy and sustainability,[2] reflect the fact that the proper functioning of markets does not on its own suffice to achieve sustainability goals. The debate seeks to clarify the circumstances in which a restriction of competition can be justified based on environmental protection considerations. There are basically two schools of thought. According to the "traditionalist view", of which the economist Schinkel is a proponent, there are more incentives for businesses to make "green" investments when they compete than when they collude.[3] It is argued that if investment in more sustainable production methods is costly, businesses which are allowed to coordinate have an incentive and the means to reduce their investment to a level below the level required in a competitive market.[4] Legal scholars such as Loozen similarly suggest that strict competition enforcement, rather than a more flexible approach, is the way forward to promote welfare.[5] According to Loozen, problems of under-regulation (including as concerns minimum environmental requirements) should be addressed by the State.[6] Others, such as Dolmans, Holmes and Snoep, have adopted what one could call, a "heterodox narrative". They object to the assumption that consumers are willing to pay whatever is needed to avoid climate damage.[7] They accept that where consumers are willing to pay the full costs of "going green" competition is generally a better way to generate sustainable outcomes. However, this scenario is the exception rather than the rule. As Dolmans explains:

> *Producers and consumers impose costs on society – including climate change, large scale pollution, and loss of biodiversity – that are not included in the monetary price consumers pay. This leads to overconsumption and a "tragedy of the*

[2]The Green Deal aims to transition the internal market into a sustainable economy.

[3]M Schinkel and L Treuren, 'Corporate Social Responsibility by Joint Agreement', Amsterdam Center for Law & Economics Working Paper (2021) 1; M Schinkel and Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 International Journal of Industrial Organization 371.

[4]M Schinkel, 'Sustainability Agreements and Antitrust: None of the Above' (Chillin'Competition blog d.d. September 2021) <https://chillingcompetition.com/2021/09/15/sustainability-agreements-and-antitrust-none-of-the-above-by-maarten-pieter-schinkel/>.

[5]E Loozen, 'Strict Competition Enforcement and Welfare: A Constitutional Perspective on Article 101 TFEU and Sustainability' (2019) 56(5) Common Market Law Review 1265.

[6]Loozen (n 5).

[7]M Dolmans, 'Sustainability Agreements and Antitrust – Three Criteria to Distinguish Beneficial Cooperation from Greenwashing', blog (9 September 2021) <https://chillingcompetition.com/2021/09/09/sustainability-agreements-and-antitrust-three-criteria-to-distinguish-beneficial-cooperation-from-greenwashing-by-maurits-dolmans/>; S Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8(2) Journal of Antitrust Enforcement 354; M Snoep, 'Speech Sustainability and Cooperation' *GCR Connect* (28 April 2021) <https://www.acm.nl/en/publications/speech-sustainability-and-cooperation-martijn-snoep-gcr-connect-april-28-2021>.

> *commons", the degrading of our environment, due to overuse. These supply- and demand-side market failures are hard to resolve – why should a supplier produce cleanly if that means higher costs and rivals taking market share; why should a consumer buy green at a higher price if the neighbours keep buying polluting goods?*[8]

In its 2004 Guidelines on the application of (now) Article 101(3) TFEU, the European Commission (EC) expressed a rather traditionalist view in stating that the requirement that consumers must receive a "fair share" of the benefits of the agreement implies that the consumers must be fully compensated for any negative impact caused to them by the restriction of competition.[9]

Several scholars, including Monti and Mulder, claim that the EC takes too narrow a view of the circumstances in which private sustainability initiatives are permissible.[10] They draw on the constitutional provisions of the EU treaties and remarks by leaders such as Vestager to argue that competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change.[11] Snoep, chairman of the Netherlands Authority for Consumers and Markets (ACM), suggests that the EC's interpretation is unnecessarily restrictive.[12] It does not follow from EU law or case-law.[13] Dolmans refers to Article 191(2) TFEU which indicates that EU policy, including competition policy, "*shall be based on the […] principles […] that environmental damage should as a priority be rectified at source and that the polluter should pay*".[14] Reference can also be made to Article 11 TFEU, which demands that "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*".

This debate is not merely academic. In response to a survey of the law firm Linklaters 57% of the respondents referred to concrete examples of sustainability projects which were allegedly not pursued because the legal (competition law) risks were considered to be too high.[15]

[8]Dolmans (n 7).
[9]Communication from the Commission—Notice—Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, pp. 97–118); European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 49 (Hereafter: Horizontal Guidelines).
[10]G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives' (2017) 42(5) ELR 635.
[11]Holmes (n 7).
[12]Snoep (n 7).
[13]Ibid.
[14]Dolmans (n 7).
[15]Linklaters, Competition Law Needs to Cooperate: Companies Want Clarity to Enable Climate Change Initiatives to be Pursued (2020) <https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/

In the course of this debate, EC asked for concrete proposals on how competition rules could support the Green Deal.[16] Numerous stakeholders submitted their views.[17] On 4 February 2021, the EC discussed the input during a conference dedicated to this subject.[18] The EC has subsequently published a staff working document on its evaluation of the Horizontal Block Exemption Regulations on Research & Development and Specialisation Agreements and the Horizontal Guidelines.[19] The accompanying evaluation study notes that revision and clarity are needed for sustainability agreements.[20] The EU states that it

> *[…] intend[s] to include in the Horizontal Guidelines guidance that would assist stakeholders in the self-assessment of, for instance, […] horizontal cooperation agreements that pursue sustainability goals.*[21]

With these initiatives, the EC is following in the footsteps of several national competition authorities (NCAs) which have, in previous months and years, debated this topic and issued guidance on competition policy and sustainability. Four Member States (Germany, Greece, Lithuania, and the Netherlands) submitted memoranda for an OECD Roundtable on competition and sustainability.[22] Fifteen Member States submitted their views to the EC in response to its call for contributions. Of these, eleven included statements from the relevant NCAs.[23] On a practical level, NCAs are building up know-how and expertise in understanding

2020/april/linklaters_competition-law-needs-to-cooperate_april-2020.ashx?rev=2c2c8c7d-91a8-496f-99fb-92a799c55cb2&extension=pdf&hash=6641BEDB36EC877CA43C7D995BD6EEDA> accessed 23 September 2021; European Commission, 'Evaluation Support Study on Applicable to Horizontal the EU Competition Rules Cooperation Agreements in the HBERs and the Guidelines' 144 <https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers_en>.

[16] European Commission, 'Competition Policy Supporting the Green Deal – Call for Contributions' <https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf>.

[17] In total 187 submissions. This included 17 academic papers, 112 papers from the industry, 16 papers from law practitioners, 26 papers from public authorities, and 18 from other stakeholders, such as Greenpeace.

[18] European Commission, 'Competition Policy Contributing to the European Green Deal – Conference' (4 February 2021) <https://ec.europa.eu/competition/information/green_deal/conference_programme.pdf>.

[19] European Commission, 'Commission Staff Working Document – Evaluation of the Horizontal Block Exemption Regulations' SWD(2021) 103 final.

[20] European Commission, 'Evaluation Support Study on Applicable to Horizontal the EU Competition Rules Cooperation Agreements in the HBERs and the Guidelines' <https://ec.europa.eu/competition-policy/system/files/2021-05/kd0221603enn_HBERs_evaluation_study.pdf>.

[21] European Commission, 'Inception Impact Assessment - Revision of the Two Block Exemption Regulations for Horizontal Cooperation Agreements and the Horizontal Guidelines' Ares (2021)3714309, 3.

[22] OECD, 'Sustainability and Competition' <https://www.oecd.org/daf/competition/sustainability-and-competition.htm>.

[23] The other four Member States submitted papers from other public authorities. For example, the Danish Competition and Consumer Authority did not submit a contribution, but the Danish Chambre of Commerce and the Ministry of Industry, Business and Financial Affairs did.

sustainability issues. For instance, the French Competition Authority has established a working group of case-handlers to research the topic and is informally cooperating with sector regulators to share good practices and coordinate efforts.[24] Further, several NCAs (including the Dutch, German and Greek competition authorities) have published general working papers or made sustainability an area of priority in their action plans. The Dutch ACM has taken the lead by publishing (revised) draft Sustainability Guidelines with concrete and practical guidance towards pro-sustainability cooperation. ACM's approach has several novelties including a distinction between "environmental-damage agreements" and "other sustainability agreements" whereby only for environmental-damage agreements it should be possible to consider the benefits for the wider society as a whole instead of only the benefits for the users of the products involved. A paper issued by the Greek competition authority contains progressive ideas to "*facilitate the transition to a green economy*".[25] One of those ideas is called the "sustainability sandbox". Within this sandbox, the Greek authority creates a safe space for undertakings to try out different cooperation strategies without risking any fines or sanctions.[26] The Greek authority also supports a broad reading of the "fair share of benefits for consumers" condition of Article 101(3) TFEU.[27] The German competition authority, on the other hand, takes a more conservative view. In a working paper it questions the possibility of coherent quantification of the benefits of sustainable cooperation.[28] It also appears unwilling to exempt sustainability initiatives from competition rules beyond those cases where the benefits outweighing competition concerns are shared with the immediate set of affected consumers.

The focus in the Netherlands on concrete, practical guidance with several progressive elements is perhaps not surprising. In competition law circles, the Netherlands is known for its assessment of several society-driven sustainability initiatives. Examples are the "Energy Agreement"[29], the

[24]Isabelle de Silva, 'France' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 416 and 420.
[25]Hellenic Competition Commission, 'Draft Staff Discussion Paper on Sustainability Issues and Competition law' <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html> para 110.
[26]Hellenic Competition Commission (n 26) para 114.
[27]Ella van den Brink and Jordan Ellison, 'Article 101(3) TFEU: The Roadmap for Sustainable Cooperation' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 51 and 52.
[28]Ibid 53.
[29]An agreement on the closure of obsolete coal-fired power plants under the SER Energy Agreement (the "Energy Agreement").

"Chicken of Tomorrow" initiatives,[30] and the "Covenant on Sustainable Clothing and Textiles".[31] The Dutch Climate Agreement 2019 is also, at least in part, a socially rather than politically orchestrated initiative. These initiatives seek to safeguard public interests, namely the reduction of negative externalities: the effect of the production and consumption of products on the environment and living conditions of humans or animals.[32] In the Netherlands, the sustainability transition is largely seen as a task for citizens, businesses, local government, social organizations, and academia, together. It is a task which has far-going effects on the organization of society.

In this context, ACM now wishes to make its contribution to the society-driven sustainability efforts for which the Netherlands is known. To this end ACM submitted on 9 July 2020 a draft version of its Sustainability Guidelines for consultation. On 26 January, ACM circulated a second draft of the Guidelines (hereafter: the "Guidelines").[33] With the Guidelines, ACM aims to clarify and broaden the possibilities for cooperation between competing companies (and social organizations) in the field of sustainability.[34] In addition, ACM aims to reduce the risk of a "chilling effect" of the competition rules on legitimate sustainability agreements.[35]

While it is commendable that ACM and several other NCAs are trying to include sustainability concerns in the competition law framework, the results of the EC's consultation made one thing very clear: there is a need for guidance at the EU level. The public consultation revealed that there is legal uncertainty about the proper competition law assessment of sustainability agreements. Stakeholders emphasize that the Green Deal requires and encourages companies to take sustainable initiatives for which legal certainty is needed.[36] The EC, however, does not have to start from

[30] Agreements regarding the boycott of certain regularly produced chicken meat ("Chicken of Tomorrow").
[31] With this Covenant on Sustainable Clothing and Textiles, parties are committed to, among other things, human rights and the health and safety of employees.
[32] TR Ottervanger, 'Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld' (Oratie aan de Universiteit Leiden 2010). These are initiatives that affect the core activities of companies, i.e. purchasing, the production process and the commercialization of products and services.
[33] ACM, 'Leidraad Duurzaamheidsafspraken – Mogelijkheden binnen het mededingingsrecht' <https://www.acm.nl/sites/default/files/documents/2e-concept-leidraad-duurzaamheidsafspraken.pdf>. The Guidelines will replace the Vision Document on Competition and Sustainability from 2014 (hereinafter: the "Vision Document 2014") and the Basic principles for ACM's supervision of sustainability agreements from 2016 (hereinafter: the "Basic principles 2016").
[34] News item ACM 9 July 2020, 'ACM offers more opportunities for cooperation between companies to achieve climate targets'.
[35] After all, the direct benefit for companies taking sustainability measures is not always certain while the potential risks of violating competition rules are considerable.
[36] European Commission, 'Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulation' SWD (2021) 103 final, 57–58.

scratch. Martijn Snoep, the chairman of ACM, clearly stated that one of the main goals of the Dutch Guidelines is to:

> "[…] *propel a European, if not global, debate on the need to issue guidance to companies along the lines of our draft Guidelines*".[37]

In this paper we explore the extent to which ACM's Guidelines could serve as a source of inspiration for a modernized EU approach to sustainability and competition policy. To reach a conclusion, we (i) describe the context and content of the Guidelines (Section 2), (ii) analyse to what extent the Guidelines could be improved (Section 3), and (iii) reflect on the possible (partial) transposition of the Guidelines to the EU level (Section 4).

2. The Sustainability Guidelines: a revolution or natural evolution?

2.1. The run-up to the Sustainability Guidelines

To fully appreciate the choices made in ACM's Guidelines it is helpful to consider the cases, policy papers and legislation that preceded the Guidelines.

The first relevant Dutch case was the Energy Agreement for Sustainable Growth (Energy Agreement 2013).[38] This agreement, which was drawn up by more than forty parties, including energy producers, environmental interest groups and central, regional, and local government bodies, sought to achieve several goals, including energy savings, increased employment, and the production of clean energy. One specific goal was to reduce CO2 emissions by 80–95% by 2050. To this end, the parties agreed to close five coal-fired power plants dating back to the 1980s.[39]

ACM found that the Energy Agreement restricted competition.[40] ACM then examined whether the agreement could be exempted from the prohibition of restrictive agreements based on Article 6(3) DCA and Article 101(3) TFEU. In that context, ACM stated that

[37] Martijn Snoep, 'Preface: Can Competition Authorities Consider Sustainability in their Decision-Making?' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 393.

[38] SER 'Energieakkoord voor duurzame groei' *Report* (September 2013). See <www.energieakkoordser.nl>.

[39] For the closure of the power plants, the association Energie-Nederland asked ACM for an analysis.

[40] Analysis of ACM on the proposed agreement to close coal-fired power plants in the context of the SER Energy Agreement, 26 September 2013. The Energy Agreement would reduce the energy production capacity in the Netherlands by 10%. ACM concluded that closing the power plants and switching to renewable energy would lead to the use of more expensive capacity. As a result, the Energy Agreement would lead to upward pressure on prices.

environmental measures could in principle lead to an improvement in welfare. However, it took the view that the energy producers had failed to demonstrate that these benefits outweighed the negative effects in the form of increased prices.[41] ACM also found that the Energy Agreement would not lead to a reduction in CO2 emissions as other market players would acquire the emission rights.[42] ACM therefore concluded that the benefits of the agreement to close the power plants did not outweigh its negative effects on the users.

In May 2014, the Dutch Minister of Economic Affairs promoted a progressive interpretation of the exemption criteria in its Policy Rule for Competition and Sustainability (*Beleidsregel voor de mededinging en duurzaamheid)*, including that ACM should consider long-term benefits and benefits for future customers.[43] In its subsequent Vision Document 2014, ACM clarified that

> "*the principle of compensation can also be applied in such a way that, within the scope of paragraph 3, it may be possible that current consumers, on balance, are disadvantaged by an arrangement if that arrangement is beneficial to future consumers*".[44]

About a year after evaluating the Energy Agreement, ACM was asked to carry out an analysis of the so-called "Chicken of Tomorrow" case. This concerned sustainability arrangements made between producers and retailers about completely replacing from 2020 regularly produced broiler chicken meat that was at the time part of the standard product range of supermarkets. All the Dutch supermarkets participated in the "Chicken of Tomorrow" agreement which meant that the consumer could only buy regularly produced broiler chicken meat outside the supermarket. However, the ACM pointed out that most consumers buy their meat in the supermarket, so this agreement considerably affected the consumer's choice.[45] The agreements in this case were aimed at

[41] Given the social and political importance of the Energy Agreement, ACM carried out its own research into the expected consequences of the agreement. In doing so, ACM relied in part on calculations made by ECN on behalf of ACM. ACM carried out an 'avoided costs' analysis and found that the reduction of certain exhaust gases would probably lead to the avoidance of costs that would otherwise have had to be incurred to improve the environment. However, this was not enough to compensate for the expected increase in electricity prices.

[42] The fact that the power plants will emit no more CO2 is unlikely to lead to an overall reduction of that gas, as other market players will obtain the emission rights, according to ACM.

[43] Decree of the Minister of Economic Affairs dated 6 May 2014, no. WJZ/14052830, Stcrt. 2016, containing policy rules regarding the application by ACM of Article 6 paragraph 3 of the DCA in case of restrictive agreements with a sustainable goal.

[44] ACM, 'Vision document Competition and Sustainability', 9 May 2014, 15.

[45] ACM, 'Analysis ACM of sustainability agreements Chicken of Tomorrow, 26 January 2015, 4.

ensuring a better standard of living and included environmental measures.

ACM first established that the sustainability arrangements concerning the "Chicken of Tomorrow" led to a restriction of competition in the consumer market for chicken meat.[46] As such, the arrangements were considered fall within the scope of the cartel prohibition. ACM subsequently investigated whether the agreements could be exempted under the third paragraph of Articles 6 DCA and 101 TFEU. It instructed its economic experts to investigate the advantages and disadvantages of the agreements for consumers. ACM used two different methods: the *Choice-based Conjoint*, in which consumers were presented with different options, and the *Contingent Valuation Method*, in which the respondents were asked directly about their willingness to pay. The *Choice-based Conjoint* is ultimately central to ACM's research because the *Contingent Valuation Method* presents a risk that the way in which questions are asked could lead to a distorted picture. According to the report, consumers were willing to pay between EUR 0.39 and EUR 1.06 extra per kilo for chicken which had been farmed according to the minimum standards.[47] ACM calculated that the agreements would lead to a price increase of EUR 0.40 to EUR 1.07 per kilo. As this was more than consumers were willing to pay, ACM advised the parties to adjust their plans. This led to a wide public debate on whether ACM's competition enforcement forms an obstacle to achieving socially desirable sustainability benefits.

The Minister then drew up a draft amended policy rule (Policy Rule 2016)[48] containing more possibilities for the exemption of sustainability measures. The concept stipulated that if agreements consist of a package of measures, the package should be assessed as a whole. Moreover, benefits for society (and not only for direct users or users in a specific

[46] As a result of the arrangements, consumers from 2020 would no longer be able to purchase regularly-produced chicken meat in Dutch supermarkets. The consumers' freedom of choice would thus be restricted. On top of that, by far the biggest share of chicken meat that was sold in the Netherlands to households was sold in supermarkets. ACM therefore believed that the sustainability arrangements concerning the 'Chicken of Tomorrow' also would have a considerable effect (real or potential) on the consumer market for chicken meat. According to ACM, the arrangements would also have cross-border effects, thereby also violating Article 101(1) TFEU.

[47] ACM, 'Analysis ACM of sustainability agreements Chicken of Tomorrow' 26 January 2015, 6; On 1 September, ACM published the results of a study into the quality of chicken meat in supermarket shelves: Welfare Chicken of Today and Chicken of Tomorrow, August 13, 2020. This shows that consumers are now willing to pay more than the price increase expected for the Chicken of Tomorrow, but for an improvement in welfare that goes beyond what the Chicken of Tomorrow demands.

[48] Minister of Economic Affairs, 'Draft Policy Rule Published for Consultation' 23 December 2015. The full text is available on the government website: <www.internetconsultatie.nl/mededingingenduurzaamheid/details>.

market) and both qualitative and quantitative criteria must be considered. The EC took the view that the Policy Rule 2016 was contrary to EU law. Both the proposal to include benefits for society as a whole and the consideration that the overall package should be considered when determining whether the agreements have led to benefits were considered problematic.[49] The EC was clearly of the opinion that the best approach would be to include sustainability goals in legislation.

The Minister subsequently changed course. The Policy Rule 2016 no longer required ACM to include benefits outside the relevant market (such as positive effects in low-wage countries).[50] The Minister announced that he would draw up a bill to facilitate sustainability initiatives.[51] ACM subsequently performed a so-called Implementation and Enforcement test on the adjusted Policy Rule 2016. It concluded that it could be implemented and enforced except for a provision which deals with the question of what ACM should test if the anti-competitive agreement is part of a package of sustainability measures. However, it was clear that ACM shared the opinion of the Minister regarding the importance of sustainability initiatives. With respect to its enforcement policy, it informed the Minister that:

- it would not take enforcement action in the case of sustainability agreements that are widely supported by society, if all parties involved (government, companies, NGOs, and social bodies) support these agreements. ACM was of the opinion that in such a situation all relevant interests would be protected;
- it would start an investigation if there were (negative) signals or complaints about the sustainability agreements;
- it was prepared to cooperate in seeking quick and effective solutions to problems that arise in the field of sustainability initiatives. It would

[49]Director-General of the Competition DG of the European Commission, Johannes Laitenberger, letter to the Dutch Secretary General of the Ministry of Economic Affairs, Maarten Camps, February 26, 2016. Available as an appendix to Parliamentary Papers II 2016/17, 30196, 463:

> *If certain policy goals are considered valuable for society as a whole, while not to consumers in the relevant market, regulation is the right tool to safeguard them and not competition law. In other words, competition law does not stand in the way of regulation to achieve these goals but cannot substitute for the absence of such regulation.*

[50]Minister of Economic Affairs, letter to the Lower House of Parliament dated June 23, 2016, *Kamerstukken II* 2015/16, 30196, 463 and Decree dated September 30, 2016, no. WJZ /16145098, *Kamerstukken II* 2016/17, 30196, no. 480, containing the policy rules regarding the application of Article 6 paragraph 3 DCA by ACM in case of restrictive agreements with a sustainability goal.

[51]He also agreed to continue communicating with the Commission since, according to him, there is more room for sustainability initiatives within the competition rules than the Commission is currently willing to acknowledge.

only impose fines if parties failed to adjust the agreements, to which ACM objected.[52]

One month after ACM announced its approach, the Covenant on Sustainable Clothing and Textiles (the "Covenant") between the Minister for Foreign Trade and Development Cooperation, the textile industry, trade unions and civil society organizations was signed.[53] The Covenant covers nine topics: discrimination and gender; child labour; forced labour; freedom of association; liveable (minimum) wages; a safe working environment; raw materials; water pollution and use of chemicals and animal welfare. It provides that together with their suppliers, the Parties will draw up a plan of action, in which they will strive to achieve the higher level of welfare envisaged by the Covenant. In the Covenant[54] the parties explicitly affirm that they respect the competition rules and that they will consult ACM if they are of the opinion that their agreements restrict the market or limit competition. To date, ACM has not published anything about the Covenant.[55]

Despite the more flexible approach to sustainability initiatives announced and implemented by ACM, the Minister proposed new legislation.[56] The bill "Room for Sustainability Initiatives" (*Wetsvoorstel ruimte voor duurzaamheidsinitiatieven*) aims to help parties realize sustainability initiatives by creating the possibility to have their initiatives converted into generally binding regulations.[57] Through such legislation the government avoids taking a leading role. A considerable burden is placed on the shoulders of parties who have sustainable development in mind. The delegation of powers by a government to private parties may however be seen as a means of encouraging or condoning what are essentially anti-competitive practices. The case-law of the CJEU on the conditions under which such delegation is legitimate is not clearly established.[58] In this case, the scope which parties have under

[52]Minister of Economic Affairs, letter dated 23 June 2016, *Kamerstukken II* 2015/16, 30196, no. 463. ACM has published these main points in its annual report 2016 (p. 49) and on its website with the title "ACM principles on sustainability agreements".
[53]SER, 'Covenant on Sustainable Clothing and Textiles', 9 March 2016, signed on 4 July 2016.
[54]Clause 5.4, point 4.
[55]It is possible that the Covenant and related agreements have not been reported to ACM or that ACM, in view of its prioritization policy, has decided not to take action.
[56]*Kamerstukken II* 2018/19, 35247, no. 2.
[57]*Kamerstukken II* 2018/19, 35247, no. 3.
[58]More on this topic: Judit Szoboszlai, 'Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test' [2006] 29(1) World Competition 73–87 and Harm Schepel, "Delegation of Regulatory Powers to Private Parties Under EC Competition Law: Towards a Procedural Public Interest Test" [2002] 39 Common Market Law Review 31–51.

competition law to engage in sustainability initiatives is not the subject of the bill. The question is, however, whether this bill will ever be adopted, in view of strong criticism from the Council of State, an advisory body for the Dutch government as concerns proposed legislation. It indicates that under this bill:

> "*it is plausible that many requests will have to be rejected because they are in conflict with existing legislative complexes and Union law, or may present a challenge to or undermine the useful effect of competition law*".[59]

In conclusion, it is striking that the current enforcement of competition law by the EC and ACM is still to a large extent based on the protection of consumer welfare, especially measured in quantifiable terms, where the financial benefit to direct and indirect customers is considered decisive. As the Chicken of Tomorrow initiative demonstrates, the situation may arise where the customer does not attach sufficient value to - and is therefore not willing to pay sufficiently for – a product/service for which the costs of avoiding negative externalities have been passed on in the price. At the same time, ACM has adopted a policy of inaction in respect of socially widely supported sustainability agreements if all parties involved, such as the government, representatives of citizens and companies, are positive about the agreements. In case of complaints or negative competition law signals about sustainability agreements, ACM can start an investigation. This is obviously not an optimal solution; such a policy creates uncertainty and tension for companies when planning to enter into sustainability agreements (despite the undertaking not to impose a fine if the companies cooperate) and may therefore lead to an undesired chilling effect.

On 9 July 2020, four years after it announced its policy of inaction, ACM presented its draft Guidelines for consultation.[60] The reason given by the ACM for publishing such document is, the significant increase in recent years in social, political, and legal attention to climate change and sustainable development and the binding standards that have been established in that respect.

[59] *Kamerstukken II* 2018/19, 35247, no. 4. For example, it is questionable to what extent, on the basis of the INNO doctrine, a (delegated) government may convert an infringing agreement into a legal regulation. See for the first time ECJ 16 November 1977, 13/77, INNO, ECLI:EU:C:1977:185, points 30–31. It follows from this doctrine, among other things, that Member States may not encourage or enforce agreements or market conduct of undertakings which would allow private undertakings to evade the prohibitions of Articles 101 and 102 TFEU. Such government action may be contrary to the antitrust rules of the TFEU combined with the general loyalty obligation of Member States not to frustrate the *effet utile* of EU law.

[60] See <https://www.acm.nl/nl/publicaties/concept-leidraad-duurzaamheidsafspraken> accessed 16 August 2020.

Examples include the concrete agreements made in the Paris Climate Accord (2015), the Climate Accord (2019) and the Climate Act (2019).[61] Other examples, stemming from the judiciary are the ruling in the *Urgenda* case (2019) in which the Dutch Supreme Court ruled that the Dutch state must ensure that greenhouse gas emissions will be reduced by 25% between 1990 and the end of 2020 and the subsequent *Shell* case (2021) in which the Hague District Court ruled that Royal Dutch Shell is required to reduce the CO2 emissions of the Shell group by 45% in 2030, compared to 2019 levels.[62]

Statistics published by Eurostat show that the Netherlands is doing relatively poorly in the field of renewable energy compared to other EU Member States.[63] Furthermore, because of the enormous effort that is still required in the Netherlands to achieve the agreed targets, sustainability agreements have become more important. For example, the Climate Agreement (2019) once again clearly shows that cooperation between local actors, including competing companies, is indispensable.[64]

ACM received comments on its draft Guidance from 27 stakeholders, including international undertakings, NGOs, trade associations, law firms, economists, and several other competition authorities.[65] On 26 January 2021, half a year after the first version, ACM published its revised Guidelines. While ACM adheres to the same principles, it made quite a few technical changes. The revised Guidelines will be discussed below.

2.2. The sustainability guidelines: what exactly do they say?

In its Guidelines the ACM notes the potential tension between sustainability initiatives and competition rules. It aims to use the Guidelines to clarify which sustainability agreements are allowed and how ACM deals with questions about sustainability agreements in practice. This goes further than its prioritization policy. In this way, ACM tries to

[61] Paris Agreement, United Nations 2015; Klimaatakkoord, Den Haag 2019 <https://www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/klimaatakkoord>; Klimaatwet, Wet van 2 juli 2019 <https://wetten.overheid.nl/BWBR0042394/2020-01-01>.

[62] Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2006; Rechtbank Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5339.

[63] For example, see <https://ec.europa.eu/eurostat/statistics-explained/index.php/Renewable_energy_statistics#:~:text=With%20more%20than%20half%20(54.6,and%20Austria%20(33.4%20%25)>.

[64] For the text of the Climate Accord, see <https://www.klimaatakkoord.nl/>.

[65] ACM, 'Accompanying memo to the second draft version of the Guidelines on Sustainability Agreements - opportunities within competition law' <https://www.acm.nl/sites/default/files/documents/memo-concerning-the-results-of-the-public-consultationof-the-guidelines-on-sustainability-agreements-.pdf>.

encourage market parties to conclude sustainability agreements. It proposes to adopt a more flexible approach than the EC and ACM itself have applied so far. To achieve climate targets, such as the reduction of CO2 emissions, companies are given more opportunities to conclude agreements. ACM creates a presumption of validity for certain agreements and indicates where that presumption does not apply. It also clarifies how benefits can be calculated. ACM commits, subject to conditions, not to impose fines for bona fide, publicly announced initiatives. ACM will ask the parties to amend the agreements which give rise to concerns.[66]

In its Guidance, ACM notes that sustainability agreements are permissible where: (i) they do not appreciably restrict competition; (ii) the benefits of the restrictive agreements outweigh the negative effects on competition and (iii) where legislation allows for these agreements.

2.2.1. Re (i) Agreements that do not appreciably restrict competition

In Chapter 4 of the Guidelines ("Sustainability Agreements without Restrictions of Competition"), ACM explains which sustainability agreements do not restrict competition and are therefore permitted. ACM distinguishes five concrete categories of sustainability agreements that are generally not anticompetitive and are therefore allowed:

- agreements that stimulate companies to make a positive contribution to a sustainability goal without being mandatory for individual companies;[67]
- codes for environmentally conscious, climate conscious or socially responsible market behaviour;[68]
- agreements aimed at improving the quality of products whereby certain less sustainably produced or offered products are no longer sold, subject to the condition that they have no noticeable effect on the price and/or variety of the product range;[69]

[66]This is also part of its prioritization policy from 2016, which is repeated on the website as "Principles for ACM's supervision of sustainability agreements".

[67]Marginal number 23. ACM mentions as an example a joint intention of a sector to reduce CO2 emissions, in which individual companies determine their own contribution and the way in which they want to realize it.

[68]Marginal number 24. The last group was only added in the revised Guidelines and expands this category beyond environmental sustainability. The codes are often accompanied by joint standards, labels, or hallmarks on the use of raw materials or production methods. ACM notes, in line with the guidelines on standardisation agreements (par. 280), that the conditions for participation must be transparent and access must be granted on reasonable and non-discriminatory terms. Equivalent alternative standards, labels or hallmarks should also remain possible, and participants should have the opportunity to sell products which fall outside the code.

[69]Marginal number 25. As an example, ACM mentions agreements to handle packaging more efficiently or to stop using a certain type of packaging.

- initiatives that create new products or markets and that require a joint initiative to have sufficient means of production, including know-how, or to achieve sufficient scale;[70]
- agreements whose sole purpose is to ensure that the companies involved, their suppliers and/or their distributors respect the national or international standards that apply to doing business in countries outside Europe, particularly in developing countries.[71]

ACM emphasizes that this chapter of the Guidelines is not an application of the doctrine of inherent restrictions. The Court of Justice of the European Union ("CJEU") has, in some instances, concluded that agreements do not fall within the scope of article 101 TFEU because they are necessary to achieve another legitimate objective. For example, in *Wouters*, the CJEU decided that the restrictive agreement was necessary to ensure the integrity of the legal profession.[72] In *Meca-Medina* and *Albany,* the legitimate objectives were respectively the integrity of sporting competitions and the objectives of social justice concerning collective bargaining by workers.[73] ACM acknowledges that this case-law may also be applied to sustainability agreements. However, ACM refrains from commenting on this option because it believes that the doctrine is insufficiently developed. ACM therefore considers that the exemption of Article 6, paragraph 3 is the best way forward.[74] We discuss how ACM interprets Article 6, paragraph 3 in the next section.

[70]Marginal number 26.

[71]Marginal number 27. ACM indicates that 'the standards in question often concern respecting labor laws and other fundamental social rights (for example, banning child labor, paying a minimum wage, the rights of indigenous peoples, and respecting the right to unionize), protecting natural resources (such restricting the logging of certain types of tropical wood), and respecting fair-trade rules (such as a ban on bribery). In some instances, the international standards are not sufficiently transposed in national legislation. In that case, corporate social responsibility covenants (CSR covenants) can fill this gap. ACM address two kinds of CSR covenants. On the one hand, CSR covenants that flesh out "sufficiently concrete and binding international standards fall outside the scope of the cartel prohibition". On the other hand, if the CSR covenants go beyond the international norm or if the legal value of the norm is unclear, the covenant will have to undergo an individual assessment (as further discussed below). Either way, it is important that the agreements do not unnecessarily restrict competition. Although there is room for the exchange of information in the context of sustainability initiatives is generally allowed, it is still advisable to tread carefully when disclosing potentially competitively sensitive information.

[72]Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (2006) ECLI:EU:C:2002:98.

[73]Case C- 519/04 P *Meca-Medina and Majcen v Commission* (2006) ECLI:EU:C:2006:492; Case C-67/96 *Albany International BV v Stichting Bedrijfpensioensfonds Textielindustrie* (1999) ECLI:EU:C:1999:430.

[74]Marginal number 18.

2.2.2. Re (ii) Agreements that restrict competition but the benefits of which outweigh the restrictive effects on competition

Where sustainability agreements or elements of such agreements constitute an appreciable restriction of competition, ACM considers whether there are benefits which offset the restrictions of competition (discussed in chapter 5 of the Guidelines).

The third paragraph of Article 101 of the TFEU (which is reproduced almost verbatim in the third paragraph of Article 6 DCA) provides that it must be established that the agreement in question "*contributes to improving the production or distribution of products or to promoting technical or economic progress*". The third paragraph further stipulates that this only applies

> *provided that consumers receive a fair share of the resulting benefit and without (a) imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (b) affording one or more of the parties the possibility of eliminating competition in respect of a substantial part of the products in question.*

In its Guidelines, ACM deals with these cumulative conditions applied to sustainability agreements:

(a) *Advantages that may result from sustainability agreements*

First, ACM explains which benefits are relevant. It clarifies that these include benefits for society as a whole, including current users and future users, such as reducing negative externalities in production or consumption.[75] Other sustainability benefits may relate to stimulating innovation, reducing operating costs, or may ease the entry of new sustainable products on the market. Furthermore, benefits can be derived from informing consumers more thoroughly, introducing certificates to safeguard sustainable attributes, and preventing unfair competition through free riding.[76] ACM adds the nuance that sustainability agreements are not always necessary for undertakings to make their production more sustainable. An undertaking can be incentivised to do so because of regulation or because of the competitive advantages a more sustainable production brings.

(b) *Does a fair share of the benefits accrue to users?*

[75]Marginal number 35 and beyond.
[76]Marginal number 37.

2.2.2.1. What is a fair share?. To determine whether current or future users receive a "fair share" of the benefits, ACM distinguishes in the Guidelines between two categories of sustainability agreements: "environmental-damage agreements" and "other" sustainability agreements.

Environmental-damage agreements concern the reduction of negative environmental externalities, and, as a result thereof, a more efficient usage of natural resources. According to ACM, environmental damage is the damage to the environment resulting from the production and consumption of goods and services. This includes, for example, the emission of harmful air pollutants and greenhouse gases. These negative externalities imply the inefficient use of scarce natural resources. When undertakings work together to limit these negative externalities and use the scarce natural resources more efficiently, ACM qualifies this cooperation as an environmental-damage agreement.[77]

"Other sustainability agreements" may concern social or other forms of sustainability, such as imposing certain minimum standards on production processes. Examples include changing the recipes of food products for public-health reasons, and setting minimum requirements for animal welfare in the production of meat.

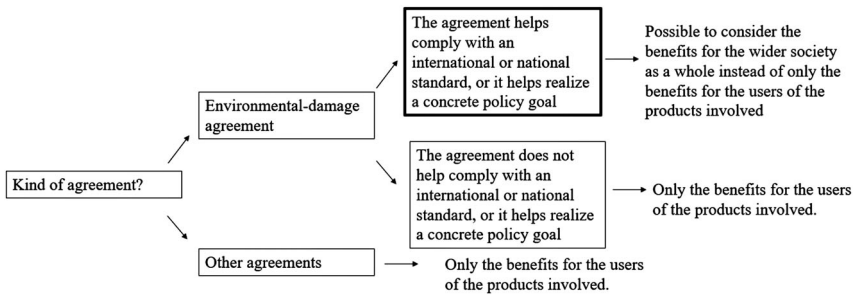
With regard to environmental damage agreements that contribute to the achievement of national or international standards by which the government is bound, it is sufficient if the users share in the benefits in the same way as the rest of society. In such cases, current and future users do not need to be fully compensated for the anticompetitive disadvantages, such as a price-increases.[78] ACM suggests that user demand is essentially what causes the problem. Thus, according to ACM, it is justified to allow agreements where direct users are not fully compensated for the negative impact (higher prices) of the agreement but the benefits to society outweigh such negative impact.[79]

For "other sustainability agreements", such as agreements in which companies impose requirements as concerns working conditions or animal welfare, ACM continues to take the view that users must be fully compensated by the benefits of the sustainability agreements for the disadvantages they suffer as a result of a restriction of competition.[80]

[77]Marginal number 8.
[78]In other cases, where the two conditions just mentioned are not met, users must be fully compensated for the disadvantages they suffer as a result of the restriction of competition. For example, product standards or environmental standards that are at a higher level of ambition than the binding standard in force.
[79]Marginal number 48.
[80]Marginal numbers 49–50.

In concrete terms, this means that if, for example, a sustainability agreement leads to a quality improvement in production but is also accompanied by a price increase, the users (viewed as a group) must value these quality improvements sufficiently (measured in terms of willingness to pay) to outweigh the price increase.[81]

If the initiative includes both the reduction of environmental damage and other sustainability aspects, ACM shall split the agreement along those lines. To the extent the initiative concerns the reduction of environmental damage, the benefits for society can be included in their entirety, while for other aspects, only the benefits for the users on the relevant market can be included.[82]



2.2.2.2. Weighing the pros and cons: to quantify or not to quantify?. A quantitative assessment usually imposes higher demands as concerns the required facts and the analysis. ACM considers that there are situations where it is not necessary to quantify the pros and cons of a sustainability agreement because it can be assumed that the agreement meets the criteria for an exemption:[83]

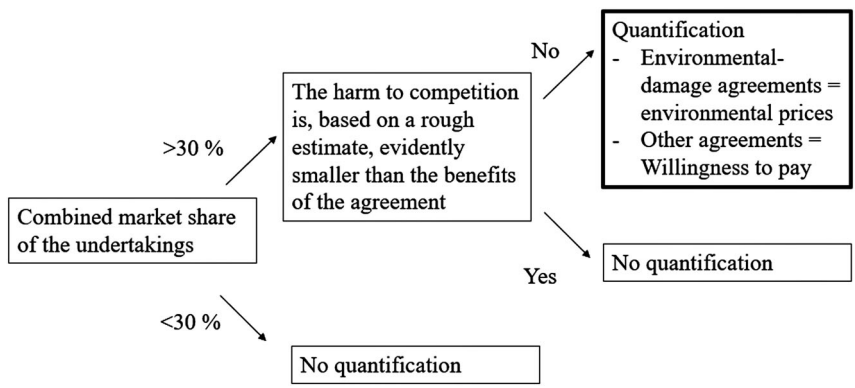
- if the combined market share of the parties does not exceed 30 percent and the parties can show that the initiative is aimed a sustainability objective and is likely to lead to real benefits.[84]
- if the benefits are clearly larger than the harm to competition that it causes[85] because the agreement will only lead to a limited price increase or a small limitation of the options, while users will reap benefits in return.[86]

[81]Marginal number 51.
[82]Marginal number 52.
[83]Marginal number 53.
[84]Marginal number 55.
[85]Marginal number 56.
[86]Marginal number 56.

If these exceptions do not apply, the main rules (quantitative assessment) apply. This means both the pros and cons of sustainability initiatives must be identified as accurately as possible and need to be expressed in monetary terms.

Benefits of "environmental-damage agreements" are expressed in monetary terms using so-called environmental prices.[87] These are key figures that express the price that society assigns to the harm caused by polluting emissions and greenhouse gases. When an environmental price is set for the purpose of achieving a concrete policy goal, it is based on prevention costs and is referred to as a "shadow price". When an environmental price is based on the damage that a certain production or consumption causes to humans and the environment, it is called an "environmental price based on damage costs".

For "other sustainability agreements", environmental prices cannot be used. ACM thus proposes a more direct way to determine the value of the agreement's improvements: a study of the willingness of consumers to pay. Both current and future consumers can be considered. The study of willingness to pay can either be based on the revealed preference of consumers or on the stated preference. In the former, revealed choice behaviour is used to determine what consumers are willing to pay for certain products. In the latter, that willingness to pay is determined by asking consumers about the choices they would make in certain hypothetical situations. For the latter method, various techniques are available, such as the Contingent Valuation method and the Conjoint Analysis method.[88]



[87] Marginal number 58.

[88] In the first method, respondents are asked what valuation they have for certain real, existing products. In the second method, the valuation of various product features is identified separately. ACM used the Conjoint Analysis method in the Chicken of Tomorrow case.

Last two conditions for an exemption: (c) Is the agreement necessary and does it not go beyond what is necessary to achieve the benefits, and (d) is there still sufficient competition left?

With regard to these last two conditions, the Guidelines do not modify existing law and policy. The necessity requirement still means that the sustainability agreement (and all its parts) is required to be reasonably necessary for the realization of the goal and the resulting benefits.[89] As a practical advice, ACM states that it is often effective to assess a sustainability initiative based on this necessity test first.[90] ACM also clarifies that (i) an agreement is only necessary if and insofar it solves a market failure,[91] and (ii) the costs of environmental-damage agreements cannot be higher for consumers than the costs of a government measure that generates the same sustainability gain.[92] Finally, regarding the condition that the sustainability agreement may not eliminate competition for a substantial part of the products in question, the first question is which share of the market participates in the agreement. In addition, it is important to assess the impact of the sustainability agreement on the main parameters of competition in the relevant product market.[93]

2.2.3. Re (iii) recourse to minister

If ACM does not see room for a certain initiative under the competition rules, the parties can turn to the legislator. If the legislator adopts the initiative as a "general rule that serves the public interest" there is either no need for companies to cooperate to achieve the goal sought as it is imposed by law, or the cooperation does not fall under the DCA anymore as it merely implements the law.[94] In the Netherlands the legislator has been reluctant to adopt rules in relation to sustainability initiatives. In the future, parties may be able to turn to the Minister of Economic Affairs[95] to request him or her to adopt a general order in council, whereby an initiative originating in society becomes binding and in principle is not governed by the competition rules (unless there is a conflict with the Union principle of loyalty). As already stated above, it is not yet certain whether the draft law provided for this option will be enacted.

[89]Marginal number 64.
[90]Marginal number 33.
[91]Marginal number 36, 37 and 66.
[92]Marginal number 67.
[93]Marginal number 69.
[94]Marginal number 74.
[95]Marginal number 75.

2.2.4. Enforcement

The Guidelines differ from ACM's Vision Paper 2014 as concerns enforcement. Entrepreneurs who, when entering into sustainability agreements in good faith, follow the Guidelines and make their initiatives publicly known, do not have to fear a fine, even if their agreements are subsequently held to be inadmissible.[96] In such a case, ACM will first consult with the parties involved to see whether the agreement can be amended. This reflects the revised vision of ACM in its prioritization policy in 2016.

3. Analysis

3.1. Introductory remarks

The ACM's Guidelines are contentious as the relationship between sustainability agreements and antitrust is the subject of ongoing debate. In particular there is an ongoing debate on the issue of what is meant by a "fair share" for consumers in article 101(3) TFEU in a sustainability context.

We respectfully submit that where producers can pass on the full costs of sustainability initiatives because consumers are willing to pay for sustainable products or services, sustainability is a relevant competition parameter. Full undistorted competition can in such circumstances generate sustainable outcomes. It can be competitively and commercially advantageous to adopt sustainability measures unilaterally, despite the costs involved. ACM points out in its introduction to the Guidelines that consumers often regard sustainability as an improvement in the quality of a product and that the availability of sustainable products increases their options.[97] ACM emphasizes that it is important that consumers are not misled about the sustainability of the products they buy. It has therefore recently published Guidelines on how to apply the rules regarding unfair trading practices to sustainability claims.[98]

To the extent that sustainability goals can be achieved by unilateral action, articles 6 DCA and 101 TFEU safeguard sustainability interests by prohibiting restrictive agreements and requiring parties to compete, also as concerns the sustainability of their products. To endorse this, ACM has published on its website the results of a study it carried out

[96]Marginal number 72.
[97]Marginal number 2.
[98]Marginal number 2.

into the diversity and price of chicken meat on offer in supermarkets.[99] The conclusion of the study is that the living conditions of chickens in the current assortment in Dutch supermarkets far exceeds the minimum requirements which the Chicken of Tomorrow agreement sought to achieve. It is practically impossible to find fast-grown chicken ("*plofkip*") in Dutch supermarkets now.[100] Supermarkets offer chicken where differentiated levels of animal welfare have been adhered to. Consumers pay more for higher levels of animal welfare. This development suggests, according to ACM, that the Chicken of Tomorrow initiative was not necessary to achieve the improvement in animal welfare envisaged in 2013.[101] That conclusion is dubious. Firstly, the question arises whether the improvement in animal welfare which the 2013 initiative sought to achieve has been realized sufficiently quickly. Secondly it is unclear what the market would have looked like if the Chicken of Tomorrow initiative had gone ahead.

We further submit that where consumers have limited or no willingness to pay, firms would normally be concerned about a first mover disadvantage. The fear of free riding by competitors which do not change their products or production methods limits sustainability incentives. Market players will continue production methods which have negative externalities if this gives them a competitive advantage. This is not new and could be seen in the over-farming of common ground in mediaeval Europe. This was known as the "tragedy of the commons".[102] The Dutch energy, chicken and textile initiatives discussed in paragraph 2.1 aimed to reduce negative externalities: the burden that the production and consumption of products place on the living environment and conditions of humans or animals. Cooperation in dealing with negative externalities reduces the threat of free riders. In line with this, the Guidelines reflect the assumption that in certain instances sustainable goals may only be achieved or may be achieved more quickly through cooperative agreements. By clarifying its vision on what agreements are possible, ACM seeks to encourage sustainability initiatives. We see this as a positive development in cases where there is a clear market failure.

[99]See ACM news report of 1 September 2020 ''More sustainable chicken meat on the shelves even without anti-competitive agreements', see <https://www.acm.nl/nl/publicaties/duurzamer-kippenvlees-ook-zonder-concurrentiebeperkende-afspraken-volop-de-schappen>.

[100]See ACM note 'Welfare chicken of today and "Chicken of tomorrow"' <https://www.acm.nl/sites/default/files/documents/2020-08/welzijn-kip-van-nu-en-kip-van-morgen.pdf>.

[101]See ACM note (n 101).

[102]P Jansen and S Beeston, 'De Concept Leidraad Duurzaamheidsafspraken van de ACM: de 'tragedy of the commons' voorbij?' (2020)4–5 Markt & Mededinging 136.

Before we assess whether the Guidelines could serve as a source of inspiration for a modernized EU approach to sustainability and competition policy, we first analyse which parts of the Guidelines may be beneficial to transpose.

The Guidelines describe to what extent competition law allows companies to make agreements to create a more sustainable economy and society. But they do more than that. ACM also explains how it interprets Article 6 paragraph 3 of the DCA and Article 101 paragraph 3 TFEU and where it shall (not) exercise its authority to impose a fine. Specifically:

- in the assessment of environmental damage agreements which contribute to the achievement of concrete climate targets to which the government is bound, the benefits for society may be considered, also in relation to what comprises a fair share of the benefits for the users;[103]
- in some cases, there is a presumption of validity and a qualitative substantiation of the advantages and disadvantages of the sustainability agreements suffices;[104]
- ACM will not impose a fine if a sustainability agreement has been discussed with ACM in advance and ACM sees no major risks or if the parties have made their cooperation publicly known and have complied with the Guidelines in good faith.[105]

3.2. Sustainability agreements which do not restrict competition

Chapter 4 of the Guidelines[106] largely explains "what we already knew": namely that not all (elements of) sustainability agreements constitute a noticeable restriction of competition. Furthermore, there are borderline cases that may have little noticeable effect on competition, especially when the companies involved retain their freedom on important competition parameters – such as price, quality, and innovation.[107] As far as we are concerned, the added value of the Guidelines is that ACM distinguishes five concrete categories of sustainability agreements that are generally not

[103]Until now, the advantages for the users had to outweigh the disadvantages for the users.
[104]This applies if companies that make the agreements together have a market share of less than 30% or if it is evident that the advantages outweigh the disadvantages. Until now, the pros and cons often had to be calculated.
[105]ACM does expect that if the agreements do not comply with the competition rules, they will be adjusted.
[106]'Sustainability agreements without competition restrictions'.
[107]In a similar sense, see the explanatory notes to Policy Rule 2016.

restrictive of competition and are therefore allowed. This practical solution gives companies real points of reference on what is deemed acceptable.

Several of the categories mentioned are either already clear from the Horizontal Guidelines or obviously not a restriction of competition. The third category, which includes *"agreements aimed at improving the quality of products whereby certain less sustainably produced or offered products are no longer sold"* is at first sight surprising. An agreement to cease the sale of specific products may reduce the choice of consumers and is in such circumstances often considered a hardcore restriction.[108] The Guidelines clarify that such agreements only fall outside the scope of the cartel prohibition if they have no noticeable effect on the price and/or variety of the product range.[109] As an example, ACM refers to agreements to handle packaging more efficiently or to stop using a certain type of packaging. The fourth category ("*initiatives that create new products or markets and that require a joint initiative to have sufficient means of production, including know-how, or to achieve sufficient scale*") simply repeats provisions of the EC's Horizontal Guidelines.[110] The list is, according to Martijn Snoep, nevertheless useful if it takes the wind out of the sails of companies that argue that they cannot take sustainability initiatives because of the competition rules.[111]

Subsequently, ACM gives two reasons why it does not flesh out the doctrine of the inherent restriction in the Guidelines. ACM considers the case law to be insufficiently clear and argues that Article 6, paragraph 3 is better suited. Although it is not fully crystallized,[112] the doctrine of the inherent restriction could, in our view, be an appropriate framework for assessing sustainability initiatives. On several occasions the CJEU has considered that a restriction of competition was acceptable because of the legitimate public interest it served.[113] The restriction of competition was considered "inherent" to that public interest. As a result, the cartel prohibition did not apply. It has been suggested in the literature that the doctrine of the inherent restriction can also be applied to sustainability

[108]Jan Blockx, 'Duurzaamheidsafspraken en mededinging: stand van zaken aan de hand van de Concept Leidraad van de ACM' (2021) 2 SEW 49, 53.
[109]Marginal number 25. As an example, ACM mentions agreements to handle packaging more efficiently or to stop using a certain type of packaging.
[110]2011 Horizontal Guidelines, para 130; 163, 237; Jan Blockx, 'Duurzaamheidsafsrpaken en mededinging: stand van zaken aan de hand van de Concept Leidraad van de ACM' (2021) 2 SEW 49, 53.
[111]Martijn Snoep, 'Keynote' (IBA 2020 – 24th Annual Competition Virtual Conference, 9 September 2020) <https://www.acm.nl/nl/publicaties/keynote-speech-martijn-snoep-voor-iba-annual-competition-conference>.
[112]And not unimportantly: the Commission could therefore have even more difficulty with it.
[113]See, for example, references to relevant judgments in footnote 22 of the Vision Document 2014.

initiatives.[114] Certain agreements could, for example, be argued to be subsidiary to the Energy Agreement and the Paris Climate Change Agreement. Such agreements could contribute to the energy transition to which the Netherlands is committed.

A broader interpretation of the third paragraph with respect to what qualifies as an improvement in technical or economic progress and what is a fair share for users is in applying the inherent restrictions doctrine, not necessary. This is the main advantage of an assessment under the first paragraph of article 6 DCA and 101 TFEU. It avoids the core of the problem – the discrepancy between sustainability and (the competition law approach to the concept of) (consumer) welfare. In our opinion, the application of the doctrine of the inherent restriction would not lead to "disguised" cartel agreements under the "cover" of sustainability, because in addition to a legitimate interest, parties relying on the inherent restrictions doctrine also need to demonstrate the necessity and proportionality of the limitation. However, we do see a danger in this option. Unless the application of the doctrine would be limited to legitimate goals to which the Netherlands is bound because of (inter)national obligations ACM would have to make choices that are part of the policy of democratically elected representatives of the people.[115]

3.3. The test of paragraph 3

Below, we consider how to interpret paragraph 3 (of article 6 DCA and article 101 TFEU) within the current state of competition law and policy.

First a preliminary remark. In its discussion of the paragraph 3 criteria, ACM notes that it follows the Policy Rule 2016 of the Dutch Minister "*insofar it falls within competition law boundaries*".[116] Given that the

[114]This is how Gerbrandy considers:

> The notion of ancillary restraints arises in circumstances where there is a subsidiary anti-competitive clause, which is necessary and proportional to a broader agreement that is (in itself) not anti-competitive, and as a result the subsidiary clause is not caught by Article 101 (1) TFEU. The case law is not without difficulties, but the following general notion seems uncontested: this doctrine will apply when taking into account the overall legal and economic context of the agreement under scrutiny if the counterfactual (i.e. the situation without the agreement) would lead to less competition. In relation to sustainability agreements, the applicability of the concept is, as far as I am aware, untried; though it has been pointed towards recently in literature.

A Gerbrandy, 'Solving a Sustainability Deficit in European Competition Law' (2017) 40(4) World Competition 2017, 554–55.

[115]As noted with regard to the Guidelines, this need not be limited to environment-related obligations as far as we are concerned.

[116]Marginal number 31.

subject of Policy Rule 2016 is the application of the competition rules, we interpret this nuance as a confirmation that ACM still believes that there is no room under the paragraph 3 test to take account of the benefits of all parts of agreements as a whole. Whereas the doctrine of the inherent restriction seems to offer room for a holistic approach in the interpretation of paragraph 1, paragraph 3 does not offer such room, according to ACM.

3.3.1. Differentiation between environmental damage agreements and other sustainability agreements

Firstly, we have conceptual difficulties with the distinction made in the Guidelines between environmental damage agreements and other sustainability agreements.

ACM indicates that the reason for this distinction lies in the obvious externalities in environmental damage agreements, the fact that users contribute to the damage to the rest of society through their consumption and the presence of a standard by which the government is bound to protect society against these externalities.

Although we appreciate that "environment" is interpreted very broadly (and includes people, the environment and nature), we cannot follow this reasoning. Other sustainability agreements can, in principle, also make an efficient contribution to compliance with an (inter)national standard to prevent damage to which the government is bound. Perhaps the government is currently not bound by standards that concern sustainability objectives other than those that relate to the environment. However, it would have been possible to formulate the Guidelines in such a way that initiatives that make an efficient contribution to future binding standards would be assessed in the same way as environment-related initiatives.

As a result of the focus on environmental objectives, the assessment of the Chicken of Tomorrow initiative would not have been any different, even though, arguably, the benefits to society would have been sufficient to compensate the negative impact on users. This would have been the case even if there had been an international chicken welfare standard to which the Netherlands was bound. After all, research has shown that although consumers appreciated the aim of the Chicken of Tomorrow initiative, they are (or were) not prepared to pay for it.

We wonder whether the prioritization of environmental objectives is a choice motivated by the desire to maintain a healthy relationship with the

EC and a recognition of the limited room for manoeuvre of the ACM without attracting criticism from Brussels.

3.3.2. Relevant benefits and the interpretation by ACM of what is a fair share of the benefits for users

In the Guidelines, ACM notes that only objective sustainability benefits will be taken into consideration. These are not only benefits for users, but also benefits for society in a broader sense.[117]

In a letter dated 2016[118] (still about the 2016 Policy Rule), the EC indicated that the assessment under Article 101(3) TFEU, which also provides guidance for the assessment under Article 6(3) DCA, does not provide scope for an assessment in which the benefits to society as a whole are taken into account.

> *EU competition law […] allows us to take into account sustainability concerns when and to the extent that these also are perceived as benefits in the eyes of the actual consumers in the relevant market (as compared to society as a whole). […]*
>
> *The draft text expressly wants ACM to take into account the effects on Dutch citizens who do not buy/use the product in question. This is in clear contradiction with EU case law and the Commission Guidelines on the application of Article 81(3) (now 101(3)), as previously set out in our letter of November 2013 on this matter.*

In this letter, the EC seems to ignore its own *CECED* decision.[119] In *CECED*, the EC considered not only individual economic benefits, but also collective environmental benefits. In this case, these were efficiency gains (lower energy costs) in a market other than the one affected by the anticompetitive agreements (supply in the market for washing machines was reduced).

The fact that it is also allowed to consider benefits in a market other than the one affected by the agreements is also confirmed by the EC's Horizontal Guidelines.[120] In the EC's view, this is only the case if the markets in which the restrictive effects on competition and the efficiencies occur are related and if the group of consumers affected by the restriction and the efficiencies is essentially the same.

[117]Marginal numbers 35–36.
[118]Letter from Laitenberger, see footnote 33.
[119]*CECED* (Case IV.F.1/36.718), Commission Decision 2000/475/EC [1999] OJ L 187/47.
[120]Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (Text with EEA relevance) OJ C 11, 14.1.2011, p. 1.

ACM has so far endorsed the EC's view. In its Vision Paper of 2014, it considered the following:

> *Agreements can also benefit users other than those directly involved, but the Commission's minimum requirement is that the benefits must sufficiently benefit the group of users who bear the disadvantages of the agreement to compensate them for those disadvantages. As a minimum, therefore, these consumers must not be allowed to lose out as a result of the agreement.*[121]

ACM Guidelines create more room to take account of benefits to society when determining whether the advantages of an agreement outweigh the disadvantages. The "fair share" criterion does not in all cases require total compensation for users.

It follows from the Guidelines that in the case of a restrictive agreement that makes an efficient contribution to a concrete climate objective to which the State is bound, the users receive a fair share of the environmental benefits if their benefit is equal to the benefits that the rest of society derives from the measures.[122] ACM gives as a concrete example CO2 reduction agreements.[123] For example, if companies in a certain sector jointly decide to use only CO2-neutral energy, this will reduce greenhouse gas emissions. This is an advantage that benefits both the users of the products concerned and the rest of Dutch society. In this way, the agreement can also contribute to the government's policy goal of reducing CO2 emissions. In such cases, therefore, users do not have to be fully compensated for the anti-competitive disadvantages, such as an increase in price.[124]

ACM notes that it takes the EC's Guidelines as a starting point.[125] However, it sees reason to deviate on this point from the position of the EC (and its own position) to date.

Indeed, in its Guidelines on 101(3),[126] the EC considers that the net effect of an agreement should at least be neutral from the point of view of those consumers directly or indirectly affected by the agreement.[127] Similarly, in its Horizontal Guidelines the EC notes that consumers "*must at least be compensated for the restrictive effects of the*

[121]Vision Document, p. 14.
[122]Marginal number 48.
[123]Marginal number 48.
[124]However, this is subject to the condition that the agreement contributes to the achievement of a policy objective laid down in an international or national standard to which the Dutch government is bound. Moreover, that contribution must be efficient.
[125]Marginal number 31.
[126]Horizontal Guidelines, marginal number 85–88.
[127]Horizontal Guidelines, marginal number 85.

agreement".[128] The presumption that the benefits must at least compensate consumers for the negative effects which they suffer as a result of an agreement does not apply to each individual user, but to the whole group of users in the relevant market.[129]

We believe that such a narrow interpretation of the condition that a "fair share" of the benefits must be passed on to the user follows neither from the TFEU nor from the case law of the CJEU.

The use of this vague wording in the TFEU and the DCA gives the EC and ACM a certain freedom of action. By interpreting "fair share" in such a way that, under circumstances, this already exists if the benefit for users is equal to the benefits that the rest of society has from the measures, ACM does not seem to exceed the grammatical limits of its discretion. In a recent legal memo, ACM correctly points out that:

> "*[t]he second condition [of Article 101(3) TFEU, authors] speaks of a fair share for consumers, and not of full compensation. It does not specify that this fair share regards a specific group of consumers in a particular market. To the contrary, what is fair is by nature context specific and cannot be defined by a hard and fast rule applicable in all circumstances. Observed in isolation, this Treaty provision therefore does not suggest that full compensation of consumers, let alone in-market, is required*".[130]

In addition, it has never been established in the case law of the CJEU that users must always and regardless of the circumstances be fully compensated for the disadvantages of the anti-competitive agreement.[131] Nor does this follow from the *Consten and Grundig*[132] and *Metro (I)*[133] cases to which the EC refers[134] in its Guidelines on 101(3).

Finally, an argument in favour of the way in which ACM interprets "fair share" can be found in the TFEU. The EC's Guidelines on 101(3) note:

> *objectives pursued by other Treaty provisions are taken into account to the extent that they can be understood under the four conditions of [the third paragraph].*[135]

[128]Horizontal Guidelines, marginal number 49.
[129]Horizontal Guidelines, marginal number 86–87.
[130]ACM Legal Memo, 27 September 2021, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context? see <https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>.
[131]See e.g. ACM Legal Memo (n 131).
[132]CJEU 13 July 1966, Consten and Grundig, joined cases 56 and 58–64, ECLI:EU:C:1966:41, 522.
[133]CJEU 25 October 1977, Metro, case 26–76, ECLI:EU:C:1977:167, marginal number 48.
[134]See footnotes 80, 81, 82 and 54 of the Commission Notice – Guidelines on the application of Article 81 (3) of the Treaty, PC C 101, 27.4.2004, pp. 97–118.
[135]Horizontal Guidelines, marginal number 42.

Article 191(2) TFEU prescribes that EU policy, including competition policy, "shall be based on the […] principles […] that environmental damage should as a priority be rectified at source and that the polluter should pay". As the ACM has pointed out, this principle of the "polluter pays" means that the costs of negative externalities should rest with direct beneficiaries of the pollution, and conversely, the benefits of addressing these externalities need not be limited to these direct beneficiaries. Applying this principle in the context of article 101(3) TFEU would justify a fair share for direct consumers that amounts to appreciable objective benefits but does not equate with their full compensation.[136] This would also be in line with the obligation to apply the competition rules in a manner that is consistent with the other objectives of the Treaties such as sustainable development based on balanced economic growth, and a high level of protection and improvement of the quality of the environment, and with the requirement of a consistent interpretation of the Treaties overall.[137] In that respect reference can be made to Articles 7, 9 and 11 TFEU. According to Article 11 TFEU on environmental protection and sustainability,[138] environmental protection requirements must be integrated into the implementation of the Union's policies and activities in order to promote sustainable development. Furthermore, Article 7 TFEU requires the Commission to "ensure consistency between its policies and activities". Finally, Article 9 TFEU warrants a broader application of the flexible interpretation of "fair share". According to Article 9 TFEU, when exercising its competences, the Union must take account of them:

> *requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*

ACM must obviously consider carefully before taking account of benefits to non-users, that is, the rest of society. It will want to avoid being accused of redistributing wealth, which is a pre-eminent task of the government. ACM has therefore made it clear that it is not its task to decide when a certain social and/or sustainability goal should be given more weight than the goal of protecting a competitive market (and consumers). However, when the Netherlands has committed itself to certain

[136]ACM Legal Memo (n 131).
[137]Ibid.
[138]That provision states that "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*".

sustainability goals, ACM can argue that this choice has already been made by a democratically legitimized legislator – as it intends to do for environmental initiatives.

It is clear that ACM in the Guidelines explicitly limits the exception to the principle that users must be compensated for their disadvantage to agreements that make an efficient contribution to compliance with an (inter)national standard to which the Netherlands has committed itself.[139] As a result, ACM maintains its position that democratically elected representatives of the people must determine the sustainability policy. ACM can then apply the competition rules in a way that supports political policy. It will not apply the competition rules in a way that requires it to determine policy itself.

All things considered, we conclude that ACM has found an intelligent way to remain outside the political spectrum and still create extra room under Article 6(3) DCA. The (political) principle that users should have more benefits than disadvantages is maintained unless the agreement helps to comply with an (inter)national (political) standard or helps realize a concrete policy goal to prevent environmental damage.

3.3.3. Calculation of the benefit

We support the fact that the Guidelines provide – in line with Policy Rule 2016 and the policy of the EC[140] – that future effects may also be considered. As far as we are concerned, this, too, fits perfectly with the discretionary power afforded by Article 6(3) of the DCA and Article 101(3) of the TFEU.[141] However, the question remains as to what weight should be given to future benefits, also in view of the smaller degree of probability that those benefits will materialize. The EC's Guidelines contain provisions for the calculation of benefits to users, whereby future benefits are given a lower value:

> *In making this assessment, it should be considered that the value of a future benefit to users is not the same as current benefit to users. The value of 100 EUR saved today is much greater than if the same amount were saved the following year. Thus, profit for users in the future is not full compensation for a current loss of equal nominal size. In order to allow a proper comparison between the current loss for users and the future profit for users, the value of future profits for users should be discounted. The discount rate applied should*

[139]Marginal number 45.
[140]Horizontal Guidelines, in particular marginal number 43 and 85.
[141]Marginal number 30.

> *reflect the inflation rate (if any) and the interest lost, as an indication of the lower value of future profits.*[142]

As far as we are concerned, it is unfortunate that ACM did not address the question of how future benefits for the user or society as a whole can be taken into account when the benefits are not quantifiable. In this respect, the new presumption of validity may offer a solution in some cases.

3.3.4. Presumption of validity: qualitative substantiation

One of the challenges of parties considering a sustainability initiative is how to make the benefits transparent. Some benefits can be quantified. Other benefits, such as animal welfare, are less easy to quantify. Furthermore, an analysis of the quantitative benefits is often very time-consuming and costly.

We applaud the fact that ACM sees room for a presumption of validity with regard to certain sustainability initiatives. In those cases, according to ACM, a qualitative substantiation of the advantages and disadvantages of the sustainability agreements will be sufficient instead of the previously required quantitative substantiation. This applies, for example, when the harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement.[143]

A valid question, however, is when it is "evident" that harm to competition is smaller than the benefits. ACM mentions examples of agreements of which the costs are low and the advantages large. However, there is significant room for discussion as to when this is the case, certainly where there is no quantitative substantiation. We are of the opinion that parties who want to make use of this presumption should consult ACM. Fortunately, ACM has indicated in the Guidelines that there is room for this.

3.4. No enforcement if in good faith

Furthermore, we applaud the policy intention of ACM in the Guidelines not to impose a fine where the companies have followed the Guidelines in good faith, but in the end do not meet all the conditions for an exemption from the prohibition.[144] ACM will in such circumstances ask the parties to amend the agreements.

In the Dutch newspaper *Volkskrant* Martijn Snoep also said the following about ACM's enforcement policy in the context of sustainability.

[142]Horizontal Guidelines, marginal number 88.
[143]Marginal number 48.
[144]Marginal number 62.

> *We have noticed that many companies think they can achieve environmental benefits by working together, but do not dare to cooperate because they are afraid of fines. Entrepreneurs do not want to invest in a complicated plan if they think it might be shot down. We now say: if you follow this new Guideline in good faith, and it turns out that you do not comply with all the rules, we will not impose a fine. In such cases we will say: you must change the plan on this and this point. In this way we think we can remove the fear of fines. Fines are meant to punish collusive, hidden agreements which take us for a ride. When you act in good faith, you will not be fined* (translation by authors).[145]

In this context, ACM seems to want to apply the same enforcement policy as it applies with respect to its supervision of specific cooperation in the health care sector.[146] We assume that ACM has positive experiences with this approach in health care.

It is difficult to predict whether the enforcement policy set out in the Guidelines will lead to more (permissible) sustainability initiatives. We see little difference in this respect compared to the current priority policy of ACM[147] in which ACM indicated that it would not impose fines if parties cooperated in solving competition problems related to sustainability initiatives. However, the fact that this is brought back into the limelight by the Guidelines could have the desired effect: incentivise companies to cooperate to realize sustainability objectives.[148] To date such effect is minimal. This may be due to the fact that the Guidelines do not take account of nor rule out potential sanctions in other countries.

4. Could the sustainability guidelines serve as a source of inspiration for a modernized EU approach to sustainability and competition policy?

4.1. Preference for an EU-wide harmonized competition policy

> *For a European level playing field, it is necessary that the European Commission, too, as well as other countries will start enforcing the rules uniformly.*[149]

[145] Volkskrant 8 July 2020.

[146] See <https://www.acm.nl/nl/onderwerpen/zorg/samenwerking-in-de-zorg/samenwerking-tussen-eerstelijns-zorgaanbieders> and <https://www.acm.nl/sites/default/files/documents/beleidsregel-acm-juiste-zorg-op-de-juiste-plek-nw.pdf>.

[147] Principles for ACM's supervision of sustainability agreements, 2016.

[148] Although we have no information as to whether the enforcement policy in the healthcare sector has led to increased cooperation, we no longer notice many initiatives such as "t roer moet om" whereby general practitioners called on politicians to exempt primary care from competition rules. This could be an indication that primary care feels less hampered by competition rules.

[149] ACM, 'Guidelines on sustainability agreements are ready for further European coordination' <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination>.

Martijn Snoep always made it clear that ACM Guidelines are intended to act as an impulse towards a European approach to sustainability agreements. Other NCAs joined in the call for such harmonized approach in their submissions in the context of the Green Deal consultation of DG Competition. For example, the Bulgarian Commission on Protection of Competition has indicated that it "*firmly believes that additional explanation is required concerning the characteristics of the agreements that support the objectives of the Green Deal without restricting competition*".[150] The French NCA welcomes "*clarifications of the characteristics of agreements that serve the objectives of the Green Deal without restraining competition*".[151] The Finnish Competition Council states that "*the lack of clarity of the EC Guidelines may have had the effect of restraining cooperation between companies also in cases where this might be desirable*".[152] The answers from the Member States and NCAs differ on many subjects but they all agree that clarification and guidance on how to interpret Article 101 TFEU is needed.[153]

Practically speaking, this makes sense. A lack of consensus regarding the application of competition rules to sustainability initiatives could result in the abandonment of sustainability initiatives that are considered unproblematic or exempted in some EU member states.

But also from a legal perspective this is necessary. ACM cannot reinterpret Article 101(3) TFEU and Article 6(3) DCA without the other competition authorities interpreting these provisions in the same way. This is obvious as concerns Article 101 TFEU. For Article 6 DCA it is also obvious to the extent that there is an effect on trade between the Member States as a result of which Article 101 TFEU also applies. It then follows from Article 3(2) of Regulation (EC) No 1/2003[154] that the application of Article 6 DCA may not lead to derogations from Article 101 TFEU. However, even in a situation in which only Article 6 DCA applies, it follows from the Explanatory Memorandum to the DCA that the DCA is neither stricter nor more lenient than the EU

[150]Bulgarian Commission on Protection of Competition, 'Submission - Competition Policy contribution to the Green Deal', 1.
[151]Autorité de la concurrence, 'Response to the European Commission's consultation within the "European Green Deal"', 2.
[152]Finnish Competition and Consumer Authority, 'Competition Policy supporting the Green Deal / Call for contributions'.
[153]Liesbet Van Acker, 'Antitrust Policy and the Green Deal: National Competition Authorities Calling for Action?' (*CCM Blog*, 25 April 2021) <https://law.kuleuven.be/ccm/blog/?p=66>.
[154]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p. 1–25.

competition rules.[155] This principle also seems to apply if there is no effect on trade between the Member States.

It is therefore of great importance that ACM (and other NCAs) receive guidance from the EC. Given the current juncture in which the EC, too, is pursuing a clear sustainability course, the likelihood of this is greater than ever before.

4.2. Transposition of the guidelines to the EU level

The final question that remains is whether the Guidelines could be transposed to the EU level. We look at three different aspects: the possibility to stay outside the scope of article 101(1) TFEU; the interpretation of Article 101(3) TFEU; and the possibility to issue comfort letters and prioritize.

4.2.1. Outside the scope of 101(1) TFEU

ACM provided a list of five kinds of cooperation that fall outside the scope of Article 101(1) TFEU: (i) non-binding agreements, (ii) codes of conduct, (iii) agreements aimed at improving product quality while less sustainable products are no longer sold, (iv) agreements that create new products or markets, and (v) agreements to adhere to national and international standards.

In the literature, it is widely accepted that such a list could also be drawn up and used by the EU. Most authors suggest a similar list, but some also add to it.[156] For example, some include agreements which may have an actual or potential impact on price or choice when, overall, this negative impact on competitive variables is negligible,[157] and agreements to grant open-source access to intellectual property.[158] Although such a list could almost be endless,[159] even a short list would greatly improve legal certainty if included in the EC Horizontal or Vertical Guidelines – as was the case in the 2001 Horizontal Guidelines.[160]

[155] *Kamerstukken II* 1995/1996, 24707, nr. 3 MvT, p. 10.

[156] Simon Holmes, 'Practical examples of cooperation between businesses to work on a more sustainable basis which may be caught by competition law but which should usually be ok (either because they should not be caught at all or because they should be exempt - Contribution to the consultation Competition Law Contributing to the Green Deal'; Ginevra Bruzzone and Sara Capozzi, 'Response to the DG Comp Call for Contributions on "Competition Policy and the Green Deal"', 5–7.

[157] Ginevra Bruzzone and Sara Capozzi, 'Response to the DG Comp Call for Contributions on "Competition Policy and the Green Deal"', 5.

[158] David Wouters, 'Which Sustainability Agreements Are Not Caught by Article 101 (1) TFEU?' (2021) 12 (3) JECLAP 257, 263.

[159] Wouters (n 159), 261–62.

[160] European Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation Agreements (Hereafter '2001 Horizontal Guidelines'), para 184–87; European Commission,

4.2.2. Transposition of the Guidelines to the EU level: interpretation of Article 101(3) TFEU

The interpretation of the conditions of Article 101(3) TFEU in the ACM Guidelines' falls within the grammatical possibilities for interpreting Article 101(3) TFEU. However, it contradicts the current 2004 Guidelines. Thus, ACM's interpretation of Article 101(3) can only be transposed to the EU level, if the Horizontal Guidelines are amended. The Horizontal Guidelines are currently under review. The EC expects the new Horizontal Guidelines to be adopted in the fourth quarter of 2022.[161] In particular the areas of information exchange, joint purchasing and standard setting is where clarification is to be expected.

The evaluation phase has been completed and the review is currently in the middle of the impact assessment phase. The evaluation study highlighted that the scope of sustainability agreements and the definition of efficiency gains linked to the assessment of economic benefit for consumers is one of the aspects which commentators have found to be unclear.[162] Moreover, most commentators indicated that the interpretation of the "fair share for consumers" test is not broad enough and that the definition of efficiency gains needs to go beyond purely monetary terms.[163]

The question, of course, remains whether ACM's interpretation of paragraph 3 is the best way forward for the EC. There is quite some criticism of the progressiveness of ACM approach. For example, like us, Schinkel and Treuren call "*the distinction between externalities related to the environment and other sustainability factors conceptually weak*".[164] Moreover, they question whether the flexibility of the benefits criterion will lead to more sustainability agreements and investments and argue that the proposed changes will lead to political decisions on redistribution by ACM.[165] Peeperkorn promotes "*adopting the*

'Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulation' SWD (2021) 103 final, 57.

[161]European Commission, 'Antitrust: Commission publishes Findings of the Evaluation of Rules on Horizontal Agreements between Companies' (*Press release*, 6 May 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2094>.

[162]European Commission, 'Evaluation support study on applicable to horizontal the EU competition rules cooperation agreements in the HBERs and the Guidelines' <https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers_en>, 144.

[163]European Commission (n 163) 145.

[164]Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: Friendly Fire in the Fight Against Climate Change' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 85.

[165]Schinkel and Treuren (n 165).

missing legislation and other implementing measures" as a solution instead of changing the test currently applied by the EU.[166] Furthermore, he argues that ACM is underestimating the difficulties of quantifying the damage to society. The solution proposed by ACM in the form of abatement costs is, in his opinion, "*not consistent with the way benefits are assessed and quantified under Article 101(3) TFEU*".[167]

Still, we believe that the Guidelines are not hugely innovative. Two of the changes that ACM introduces (i.e. (i) the fact that for some agreements no quantification of the benefits is necessary and (ii) in some instances no full compensation for the consumer is required) only apply to a very limited number of agreements. Many agreements and initiatives will not benefit from the more flexible approach. Considering the relatively moderate approach of ACM, the Guidelines could be the perfect compromise when the EC seeks inspiration during the Horizontal Guidelines review process.

4.2.3. Comfort letters and enforcement

ACM has repeatedly stated that undertakings can ask questions or submit agreements to identify and discuss risks with ACM. In Europe, undertakings are, since 2003, obliged to self-assess the legality of their practices and agreements, without help from the EC through so-called "comfort letters".[168] However, because of the unprecedented nature of the climate crisis, we would recommend reintroducing comfort letters for sustainability cooperation. For agreements during the corona crisis, the EC also reintroduced ad hoc comfort letters, albeit exceptionally and at its sole discretion.[169] For instance, the EC issued a comfort letter to "Medicines for Europe", a trade association of generic pharmaceuticals producers.[170] Besides the formal letters of comfort, the EC also set up an email address and webspace for questions in relation to Covid-19. This could also be done for sustainability cooperation.[171] At first sight, comfort letters appear to provide legal certainty for companies, but old

[166]Luc Peeperkorn, 'European Union' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021), 411.
[167]Peeperkorn (n 167) 412.
[168]Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1.
[169]Temporary Antitrust Framework, para 18.
[170]Medicines for Europe, 'Medicines for Europe Welcomes EC Decision to Enable Secure Supply of Hospital Medicines' (*Press release*, 8 April 2020) <https://www.medicinesforeurope.com/wp-content/uploads/2020/04/Medicines-for-Europe-Press-release-European-antitrust-guidance-08042020.pdf>.
[171]Ginevra Bruzzone and Sara Capozzi, 'Response to the DG Comp Call for Contributions on "Competition Policy and the Green Deal"', 8.

criticisms – such as the impact on third-party rights, their legal value, and their reviewability – would probably resurface.[172] Still, these criticisms do not outweigh the potential benefit of a stimulant of sustainable cooperation and increased legal certainty for undertakings. The EC can also go one step further and establish a voluntary notification system, like the complemented system in Australia.[173] Finally, sustainability cooperation could be encouraged if the EC would announce that it would not impose fines but would instead give the parties the opportunity to amend clauses in the agreements if the EC finds them incompatible with Article 101 TFEU.

4.3. EU inspiration

Finally, we would like to point out that EU's approach to sustainability and competition policy could also benefit from past and current EU initiatives. Although not as extensive as that of ACM, the EC also has some history of dealing with the tension between competition law and sustainability. In this article, we have already briefly discussed the CECED case,[174] but the 2001 Horizontal Guidelines gave extensive guidance on how to assess environmental agreements under Article 101 TFEU. This included a list of agreements that did not fall under Article 101(1) TFEU, how to apply Article 101(3) TFEU, and examples to clarify the rules. This entire chapter was left out of the 2010 Horizontal Guidelines when the EC decided to take a "more economic approach". The EC argued that the environmental agreements mainly concerned standard setting which should be dealt with under the standardization chapter.[175]

The 2001 Horizontal Guidelines defined "environmental agreements" as "*those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty*".[176] The removal of this definition from the Horizontal Guidelines left a void that is not filled until today. Nowadays, several authors use a broad definition where sustainability agreements are agreements that have a link with the UN Sustainable

[172]Borys Wodz, 'Comfort Letters and Other Informal Letters in E.C. Competition Proceedings – why is the Story Not Over?' (2000) 21 European Competition Law Review 159.
[173]Georgina Foster, Grant Murray, Wendy Thian, 'Australia' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 399.
[174]*CECED* (Case IV.F.1/36.718), Commission Decision 2000/475/EC [1999] OJ L 187/47.
[175]Horizontal Guidelines, 7, footnote 1
[176]2001 Horizontal Guidelines, para 179.

Development Goals, thus including gender equality, the elimination of poverty, and income inequality.[177] ACM seems to use a similar definition stating that "*sustainability agreements are agreements between undertakings […] that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature*".[178] This definition is very broad but is tempered by the concept of "environmental damage agreements". The flexibility that ACM provides is largely only for environmental damage agreements.

Recently, the EU did define "sustainable economic activity" in the Taxonomy Regulation. In this regulation, an economic activity is sustainable when it "*contributes substantially to one or more of the environmental objectives; (b) does not significantly harm any of the environmental objectives; (c) is carried out in compliance with the minimum safeguards, and (d) complies with technical screening criteria*". The environmental objectives include climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, the protection and restoration of biodiversity and ecosystems. The EC could be inspired by this approach when defining sustainability agreements.[179] Whether the EC chooses for a narrow definition or a broad definition with a carve-out like ACM, an EU definition would be preferable to different definitions by various NCAs.[180] By providing a definition, the EC would be able to provide specific guidance for environmental agreements in its next Horizontal Guidelines.

On 10 September, the EC published a Competition Policy Brief entitled "Competition Policy in Support of Europe's Green Ambition". With this document, the EC provided a first glimpse of its views on sustainability and competition policy. Contrary to the ACM, the EC does not seem to be inclined to shake up the current framework. With regards to the "fair share" criterion, the EC firmly stands behind the principle of full compensation. The EC states that:

[177]Holmes (n 7) 368; Wouters (n 159) 258.
[178]Marginal number 4.
[179]David Wouters, 'Sustainability Agreements vs Greenwashing under Article 101 TFEU' (*Kluwer Competition Law Blog*, 3 June 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/06/03/sustainability-agreements-vs-greenwashing-under-article-101-tfeu/>.
[180]European Commission, 'Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulation' SWD(2021) 103 final, 68 and 75; Ginevra Bruzzone and Sara Capozzi, 'Response to the DG Comp Call for Contributions on "Competition Policy and the Green Deal"', 8.

> *benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. This ensures that consumers are **fully compensated** for the harm suffered"* and "*if an agreement leads to a reduction in pollution to the benefit of society, and assuming the benefits are significant, a fair share of them can be apportioned to the harmed consumers – the latter being part of society – and **fully compensate** them for the harm.*[181]

While this is only a preliminary statement, it does not bode well for the proponents of the ACM approach.

5. Concluding remarks

In this paper, we have explored the extent to which ACM's Guidelines could serve as a source of inspiration for a modernized EU approach to sustainability and competition policy.

The Guidelines clearly constitute a compromise. ACM has created an intelligent modus operandi allowing it to approve sustainability initiatives under the third paragraph of Articles 6 DCA and 101 TFEU without itself having to take political decisions. We believe ACM's approach could function as a practicable starting point for other national competition authorities and the EC to devise a coherent and legally resilient approach throughout the EU. As Simon Holmes states

> *Even if many would like to go further than ACM Guidelines, they may well prove to be the necessary compromise if we are to move forward constructively in the fight against climate change. Let us not let the perfect be the enemy of the good.*[182]

A coherent approach is important; different interpretations across Europe form a barrier for companies contemplating sustainability initiatives and magnify first-mover disadvantages. This could mean that sustainability initiatives that are considered unproblematic or exempted in some EU member states are abandoned. That is not in line with the Green Deal.

It is encouraging that the EC also has sustainability on its agenda in connection with its reassessment of the Horizontal Guidelines.[183] The ACM will be keen to get the EC on the same line. That will be a challenge. Although the EC has indicated that it is willing to enter discussions with

[181]EC, 'Competition policy brief Competition Policy in Support of Europe's Green Ambition' (2021), 6.
[182]Simon Holmes, 'Preface: How Sustainability Can be Taken Into Account in Every Area of Competition Law' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Law* (Concurrences 2021) 6.
[183]See <https://ec.europa.eu/competition/antitrust/news.html>.

companies about sustainability initiatives, it has also indicated that in these times there is no reason to soften the rules.[184]

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No potential conflict of interest was reported by the authors.

[184]See Olivier Guersent's statement at <https://app.parr-lobal.com/intelligence/view/intelcms-v372tj>.