



ACM Position Paper

Competition & Sustainability

Draft version

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Brief summary

In ACM's perspective, there is room for sustainability initiatives under the cartel prohibition (Section 6 of the Dutch Competition Act and Article 101 of the Treaty on the Functioning of the European Union). In some cases, the cartel prohibition does not apply to a sustainability initiative at all, for example because the initiative does not significantly affect the competitive process. However, in cases in which the competitive process *is* affected, also, ACM sees opportunities, because sustainable production benefits current and future consumers. Such opportunities can be found in particular in initiatives that leave sufficient options for consumers. But even if this is not the case because market-wide sustainability arrangements are concerned, there is a certain margin, in ACM's perspective, particularly if a negative external effect is eliminated in such a way that current and future consumers will benefit. The extent of this margin will have to be assessed on a case-by-case basis, considering the specific circumstances. In the first place, it is up to the parties involved in a sustainability initiative to check compliance of their arrangements with the cartel prohibition. Wherever possible and desirable, ACM will be able to offer guidance for the assessment in specific cases. This is also the objective of this Position Paper.

1 Introduction

1.1 Sustainability and competition

In this Position Paper, ACM explains its perspective on the collaboration between undertakings with respect to sustainability (hereafter: 'sustainability initiatives') and the cartel prohibition. ACM does so in order to offer businesses more clarity about the room for collaboration with regard to sustainability. Based on this Position Paper, it appears that the competition rules, i.e. the general competition rules that apply to collaborations between undertakings, do offer such room.

1.2 Clarification of the competition rules is desirable

ACM¹ received requests from various sides to provide a further explanation of collaboration options regarding sustainability. Uncertainty about the question what sustainability initiatives are and are not allowed could form an impediment to these types of initiatives. ACM wishes to avoid that sustainability initiatives that benefit society fail to be realized because of that uncertainty.²

¹ Wherever this document states 'ACM', it should also be understood to include the NMa, the legal predecessor of ACM.

² With this Position Paper, ACM aims to reduce the likelihood of unnecessarily blocking welfare-increasing arrangements (false positives) without unnecessarily raising the risk of allowing real cartels (false negatives). Such false positives (or over-enforcement) occur if the competition authority incorrectly deems an agreement as anticompetitive and as falling outside the scope of Section 6, paragraph 3, and therefore prevents a welfare-increasing market initiative.



Collaboration with respect to sustainability is currently also an issue in the political arena. In January 2013, the Dutch House of Representatives requested the Minister of Economic Affairs to adopt policy rules for ACM containing instructions on how to assess arrangements regarding animal welfare and the environment in the agricultural³ and nutrition sector.⁴

1.3 Private initiatives to realize sustainability objectives

In situations where sustainability interests are considered a public interest by the legislature, the government may choose to enshrine this in legislation. However, a trend can be observed that objectives related to sustainability are realized through the market. This trend is a reason for ACM to respond to the earlier mentioned requests for clarification. An increasing number of undertakings formulate their own sustainability objectives. Sometimes, this is done at the explicit request of the government, which leaves policy objectives with respect to sustainable development to the private sector. This can lead to self-regulation. Undertakings determine, more or less autonomously, the best way to achieve certain sustainability objectives, sometimes laying this down in formal arrangements⁵. If such arrangements touch upon factors that are normally considered competition elements (price, quality, quantity etc.), there may be a violation of the cartel prohibition of Section 6 of the Dutch Competition Act (Mw) and Article 101 of the Treaty on the Functioning of the European Union (TFEU).⁶ As a result of these trends, ACM often faces questions or complaints about sustainability initiatives.

1.4 ACM wishes to offer clarity

This Position Paper is the result of a process in which ACM has collected the opinions of the corporate sector and of experts on the interpretation of the cartel prohibition in connection with sustainability initiatives. During this process, ACM also engaged in discussions with various market participants reporting their initiatives to ACM. These reports were submitted partly as a result of a letter by former Minister of Agriculture Henk Bleker, dated 22 November 2011 to the Dutch House of Representatives.⁷ In these discussions, ACM provided the undertakings concerned guidance to assess the relevant sustainability initiatives in terms of competition law.

False negatives (or under-enforcement) are the reverse: the competition authority fails to intervene or intervenes insufficiently in case of anticompetitive behavior.

³ The agricultural and nutrition chain is defined as the chain of production, distribution and consumption of foodstuffs. An NMa report on pricing in this chain ("Pricing in the agricultural and food sector2", [*Prijsvorming in de agri-food sector2*] of 2 December 2009) can be found at: http://www.tweedekamer.nl/images/NMa_Rapportage_Prijsvorming_118-200762.pdf (in Dutch).

⁴ Dijkgraaf/Geurts motion of 24 January 2013, *Parliamentary Documents II*, 2012/2013, 33 400 XIII, nr. 99.

⁵ Wherever this document mentions 'arrangements', it should also be understood to include concerted efforts by undertakings and decisions by trade organizations, as referred to in Section 6 paragraph 1 Mw.

⁶ The text of both provisions is set out in Appendix 1. In the following text, these provisions will be referred to as Section 6 Mw/101 TFEU, or jointly referred to as 'cartel prohibition'.

⁷ See <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/11/22/kamerbrief-over-de-belemmeringen-in-regelgeving-bij-de-verduurzaming-van-de-voedselketen.html> (in Dutch).



Additionally, ACM organized a round-table discussion with representatives from the corporate sector in November 2011, and an expert meeting on sustainability and competition in January 2013. In March 2013, NMa launched the Sustainability Knowledge Database [*Kennisbank Duurzaamheid*] on its website.⁸ This [Knowledge Database](https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/kennisbank-duurzaamheid/) offers guidance for assessing sustainability initiatives based on decisions in actual cases in which sustainability was an issue. Furthermore, this Position Paper provides an overall picture of the way in which sustainability initiatives could be assessed in both legal and economic terms according to ACM. This Position Paper will be included in the Sustainability Knowledge Database after the consultation round.

2 Key principles

ACM works on the basis of the following principles.

2.1 Interpretation of the cartel prohibition when applied to sustainability initiatives

This Position Paper limits itself to the cartel prohibition as referred to in Section 6 Mw / Article 101 TFEU. This cartel prohibition is laid down in paragraph 1 of both articles. Paragraph 3 of both provisions sets out in what circumstances arrangements between companies that, in principle, fall within the scope of the cartel prohibition can be exempted. For the convenience of the reader, this document will refer to ‘paragraph 1’ and ‘paragraph 3’. Sustainability issues have so far not played a major role in the application of the prohibition on abuse of a dominant position as set out in Section 24 Mw and Article 102 TFEU and concentration control based on the Mw and the European Merger Regulation. For this reason, these other competition law provisions are not discussed in this Position Paper.

2.2 Companies perform self-assessments to check whether their collaboration arrangement is permitted

Section 6 Mw/Article 101 TFEU is based on a system in which undertakings perform a self-assessment to check whether or not the arrangements they intend to engage in would restrict competition and, as such, be in conflict with the cartel prohibition. If they decide to invoke the exception set out in paragraph 3, undertakings are required to prove compliance with the criteria

⁸ See <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/kennisbank-duurzaamheid/> (in Dutch).



applicable to this exemption. This document does not change anything to this burden of proof⁹, however, it aims to assist undertakings in their self-assessment.

2.3 The term Sustainability

Sustainability is a very broad term that does not have a single definition¹⁰. It encompasses topics such as environmental protection, public health, fair trade production, animal welfare, etc. The activities and products that currently exist in sustainable versions include organic food, sustainable wood, sustainable fishery, fair-trade coffee, and renewable energy. As competition authority, ACM must be alert to the fact that not all anticompetitive collaborations with the title 'sustainable' are actually sustainable. Similarly, not everything that is arranged collectively under the banner of sustainability actually benefits, on balance, consumer welfare. The mere fact of invoking sustainability will in itself not be enough for ACM to clear collaborations between competitors. The fact that the term sustainability cannot be properly defined is, in itself, not a problem, because each case is to be assessed on its own merits. For a competition law assessment, it is not a deciding factor whether or not an arrangement is made under the banner of sustainability. Instead, what *is* the deciding factor is the question what interest is served with the arrangement, how this interest can be defined in terms of economic and technological progress, and to what extent it relates to the associated restriction to competition.

2.4 Sustainability initiatives are not granted a special status

All arrangements between undertakings and all behavior of undertakings are assessed in accordance with the same analytical framework. Sustainability arrangements are therefore not a 'special category' according to current policies and case law.

⁹ This follows from Article 2 of Regulation 1/2003 of the Council of 16 December 2002, Official Journal of the European Union L1/1, 4 January 2003: "In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article [101] (1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article [101] (3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."

[Articles renumbered in accordance with the current numbering in the TFEU].

¹⁰ An often used definition of sustainability comes from the Brundtland Report (*World Commission on Environment and Development (WCED), Our common future*, Oxford: Oxford University Press, 1987 p. 43). Both CBS (Statistics Netherlands) and CPB (Netherlands Bureau for Economic Policy Analysis) apply this definition in their joint 'Monitor Sustainable Netherlands' (2009 and 2011). Please refer to: <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2012/01/10/monitor-duurzaam-nederland-2011.html> (in Dutch).

"Sustainable development is development responding to the needs of the current generation without risking the needs of future generations, both here and in other parts of the world".

According to the Brundtland report, sustainable development can be achieved by, among other things, environmental policy, meetings essential human needs, energy-efficient production, and conservation of flora and fauna. Economic and ecological drivers are not necessarily irreconcilable.



2.5 Not all collaborations with regard to sustainability are anticompetitive

Not all collaboration initiatives with regard to sustainability fall within the scope of the cartel prohibition. This is demonstrated with examples in the [Sustainability Knowledge Database](#). There are types of collaborations that are harmless from a competition perspective, based on the fact that they relate to an aspect of business that will not easily affect consumers. This includes, for example, joint use of sustainability certificates.¹¹

Additionally, it is possible that sustainability initiatives are anticompetitive, yet also comply with the exemption criteria of the cartel prohibition. This will be discussed later in this Position Paper.

2.6 Behavior negatively affecting consumers under the banner of sustainability

In some cases, undertakings make arrangements under the banner of sustainability that are anticompetitive and which do not benefit consumers. This is why it is important that undertakings provide a thorough and substantiated description of their sustainability arrangement in relation to the expected benefits that the arrangement yields for consumers. Competition authorities obviously take action against any cartels made under the banner of 'sustainability'. An example is the detergent cartel penalized by the European Commission in 2011.¹² It started as an initiative of a trade association to introduce improved environmental performance of detergents. This environmental objective, however, was also the ground for unnecessary collusion on price and other items between the companies involved.

3 Assessment of sustainability initiatives

3.1 Introduction

The next paragraphs first look back on the decisions of the ACM and the European Commission in competition cases in which sustainability initiatives played a role. Subsequently, various elements of the economic and legal interpretation of sustainability initiatives are discussed separately.

¹¹ More examples are set out in the memorandum 'The assessment of anticompetitive practices as a result of sustainability initiatives in practice'. This memorandum is available on ACM's website.

¹² Please refer to: Elina Laurinen, *The Consumer detergents cartel* in *Competition Policy Newsletter*, nr 2, 2011 and the European Commission's press release of 13 April 2011 (IP/11/473) at: http://europa.eu/rapid/press-release_IP-11-473_nl.htm.



3.2 How have sustainability arrangements to date been assessed in practice?

Arrangements between competitors on key competition parameters such as price and quantity restrict competition in a market. In principle, such arrangements are not permitted under the cartel prohibition. Exceptions to this prohibition are possible under paragraph 3 of the cartel prohibition if the arrangement fulfills all of the following criteria:

1. The arrangement contributes to improving the production or distribution of goods or to promoting technical or economic progress;
2. Consumers get a fair share of the resulting benefit;
3. The arrangement is necessary to achieve these benefits and does not go beyond what is necessary (also: proportionality test);
4. The arrangement does not lead to competition being eliminated in a substantial part of the market. The arrangement must leave enough room for competition (also: residual competition requirement).

The memorandum issued by ACM in March 2013 with the title [The assessment of anticompetitive practices as a result of sustainability initiatives in practice](#) illustrates to what extent the most prevalent forms of competition restrictions in sustainability initiatives can pass the test of Section 6 Mw/Article 101 TFEU. The following general conclusions can be drawn from the overview in said memorandum:

- a) Arrangements relating to the resale price generally fall under the cartel prohibition. Only very few exceptions fall within the exemption criteria of paragraph 3.¹³
- b) Collective action plans regarding an ancillary service (such as collective waste removal systems), if such systems are anticompetitive, can meet the exemption criteria in paragraph 3 subject to certain basic requirements.¹⁴
- c) Standardization for the purpose of logistics, distribution or packaging does not easily fall within the scope of the cartel prohibition, and, if it does, will relatively easily meet the exemption criteria of paragraph 3.¹⁵
- d) The cartel prohibition also offers room for arrangements that involve a qualitative restriction of supply. This may concern arrangements to only bring to market products that are sustainable (in a certain respect). Such arrangements are more likely to be anticompetitive, and also to a higher degree, if they:
 - concern a key competitive parameter, as a result of which they may cause prices to rise, or to cause certain products with existing consumer demand to no longer be supplied; and

¹³ An example of an exception is the VOTOB case: see the 1992 Competition Report of the European Commission and 'Melkdubbeltje' (Milk Tuppence) NMa case 2432 (2001).

¹⁴ For example: *Stichting Papier Recycling Nederland*, NMa case 3007 (2003).

¹⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal of the European Union C11/1, 14 January 2011, paragraph 331.



- concern a larger share of supply on the relevant market (so-called market-wide arrangements).

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If a sustainability initiative benefits a certain interest that is deemed valuable by consumers and society, while no key competitive parameters are restricted, then market-wide arrangements may be reconcilable with the cartel prohibition.¹⁶ In the case of qualitative supply restriction, if a key competitive parameter is affected - for instance when shifting to offering only sustainable, but therefore also more expensive products - the paragraph 3 test still offers sufficient room. This test can be met relatively easily if buyers still have enough options for choosing a non-sustainable product. If the latter is not the case because the arrangement is more or less market-wide, a paragraph 3 test will be relatively difficult. In such a case, an assessment must be made of the benefits and disadvantages for consumers.¹⁷ In the case of market-wide arrangements, more attention must be paid to the requirement of having sufficient residual competition, even though this requirement does offer some leeway. Undertakings will generally know themselves whether or not the initiative they take affects a key competitive parameter. If the initiative concerns a key element of the competitive process, the companies involved in the initiative can check, based on their joint market position, if consumers still have the option between both the more expensive, sustainable product and other products. If an arrangement is market-wide, companies must review whether there is enough residual competition, for example because new players can enter the market that offer sustainable products cheaper in an innovative way.

3.3 Appreciability

The first question in the assessment of a possibly anticompetitive sustainability initiative is if it *appreciably* restricts competition. Some arrangements fall outside the scope of the cartel prohibition due to low appreciability, for example, because of the low combined market share of the undertakings involved in the sustainability initiative.¹⁸

3.4 Inherent restrictions

In a few cases, the European Court of Justice accepted that a competition restriction was acceptable in view of the legitimate public interest served.¹⁹ The competition restriction was considered to be

¹⁶ NMa case 6456 (2008), short-form opinion on anaesthetized castration of piglets.

¹⁷ Case IV 36.718, decision of the European Commission of 19 January 1999.

¹⁸ Also, agreements can fall within the 'bagatelle' or De Minimis provisions of Section 7 Mw due to the low combined market share of the undertakings involved, which keeps them outside the scope of application of the cartel prohibition set out in Section 6. In respect of Article 101 (1) TFEU, the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) is relevant (Official Journal of the European Union, C 368/13, 22 December 2001).

¹⁹ For general details on 'ancillary restraints', reference is made to the Court's decisions in *Remia* (11 July 1985, Case 42/84) and *Métropole* (18 September 2001, Case T-112/99). The following court decisions are especially relevant to the



‘inherent’ to the public interest served, and, for that reason, the cartel prohibition did not apply. In the literature on this European case law, it has been suggested that this principle of inherent restrictions may also be applied to sustainability initiatives. In principle, ACM does not rule this out. However, ACM believes this question has been insufficiently explored yet in order to be able to make statements on its application in this Position Paper.

3.5 Application paragraph 3: arrangements must promote welfare

3.5.1 Introduction

As soon as a sustainability initiative is appreciably anticompetitive, the question arises of whether it meets the exception criteria of paragraph 3. The relevant arrangement is then tested against the four exception criteria of these provisions. These criteria are cumulatively applicable and must be applied in relationship to each other.

Before discussing each of the four exception criteria separately, the economic background is first explained of the competition law assessment of collaborations with regard to sustainability. It must be noted that ACM intends to apply these four exception criteria on sustainability initiatives against this economic background.

3.5.2 Broad definition of welfare

From an economic point of view, a broader definition of economic welfare is applied than the one used in daily conversation. First, consumer preferences play a key role in this definition of economic welfare. For this Position Paper, it is important to note that consumers may also find product features that are related to sustainability important, and may thus attach value to products that have been created in an environmentally and/or animal-friendly manner. It is also important from an economic perspective to use scarce resources as efficiently as possible. Doing so promotes economic welfare. This may also concern depletable resources and how the environment is treated.

3.5.3 The market often works as it should - but not always

In most situations, the market mechanism is an excellent way to ensure an efficient use of scarce resources. However, market failures can occur. This is the case, for example, when the value of the

category referred to in literature as ‘public ancillary restraint’:

1) ECJ ruling of 19 February 2002 in Case C-309/99 (*Wouters/Nederlands Orde van Advocaten*), 2002 ECR I-01577. In this case, the Court deemed a self-regulatory measure of the Dutch Bar Association that was, in principle, restricting competition, inherent to proper performance of the profession of attorneys of law, and therefore ruled that this measure fell outside the application of Article 101 (1) TFEU.

2) ECJ judgment of 18 July 2006 in Case C-519/04 (*Meca Medina*), 2006 ECR I-06991. In this case, based on a similar reasoning as in the *Wouters* case, the Court ruled that the anti-doping rules of FINA (the international swimming association) were inextricably related to the organization and proper progress of the sports competition, and therefore did not fall within the scope of Article 101 (1) TFEU.



environment or that of scarce resources is not sufficiently reflected in the price and/or the quality of the products for which they were used. This causes inefficiencies in the market process, which in turn lead to a sub-optimal welfare level. Welfare increases are thus, in principle, possible. This is a factor that relatively often plays a role in issues related to sustainable development.

Some of the inefficiencies may concern future generations, for example, if the current generation uses scarce resources in such a way that is inefficient from a long-term perspective. An example is over-fishing leading to extinction of certain species of fish. If current and future generations are taken into consideration in the decision-making on fishing, it may lead to less fishing in order to ensure fishing is still possible in the future. Future generations thus benefit from conservative fishing now, but, at the same time, fish as a consumption product may become scarcer for the current generation and, therefore, possibly more expensive.

3.5.4 Collaboration may lead to a more sustainable supply

Anticompetitive arrangements may play a role in undertakings' sustainability initiatives for various reasons. For example, some undertakings may develop or bring to market a sustainable product more efficiently or more effectively by collaborating with others. This may also be the case when introducing certificates that are related to sustainability, leading to consumers being able to rely on products actually being manufactured in a sustainable manner. For such initiatives, it is often enough when only a limited number of suppliers join forces. If their collaboration requires arrangements that restrict mutual competition (more or less appreciably), such arrangements must be tested against compliance with paragraph 3. If there are enough other providers in the market that do not participate in these arrangements, this test can be met relatively easily.

3.5.5 Arrangements may be required to solve a coordination problem

A coordination problem may arise if a sustainable product brings with it higher production costs. Undertakings are then confronted with a 'first mover disadvantage': if prices rise, customers may switch to suppliers that have not shifted to a more sustainable production. In such cases, the market may be unable to create sufficient incentives to help implement sustainable production. A joint approach may be successful in such cases.

This can be demonstrated using the above example of overfishing. An individual fisherman who, on his own, adopts a fishing quota cannot solve the bigger problem, and may price himself out of the market. This means that individual fishermen do not have any incentive for conservative fishing, unless other fishermen do the same. Only by shifting to conservative fishing together are the fishermen able to solve the problem.

Therefore, making arrangements may offer a solution in order to correct market failures. The welfare increase, in such cases, is the avoided welfare costs resulting from the market failure. The solutions,



however, may be imperfect and/or involve additional costs themselves (such as transaction costs). In addition, the assessment and weighing of the interests involved will not always be straightforward in practice. A cost/benefit analysis is required. This does not alter the fact that the starting point should be that competition law serves to promote consumer welfare, and for that reason, it can be argued to take the solution of the market failure into consideration in the assessment.

3.5.6 Economic approach implies careful assessment

From the above, it is clear that certain sustainability questions require a coordinated approach. Solving a sustainability problem may result in welfare increases. As long as the costs of resolving the problem are less than the welfare increases, welfare will increase on balance. If several solutions are possible to resolve the market failure, the solution with the lowest costs is preferred.

In exceptional circumstances, the solution to a sustainability question may consist of undertakings in a certain sector making market-wide arrangements to realize a sustainability objective. In particular, if the arrangement results in higher prices of the relevant products, or reduced quality or variety of the products involved, such disadvantages must be assessed against possible other consumer benefits of this arrangement.

3.6 Applying the economic approach to the four exemption criteria

What does the above economic approach mean for the application of the four exception criteria on sustainability initiatives? The following discussion is based on the principle that the sustainability initiative is anticompetitive, and therefore falls under the cartel prohibition.²⁰

The four paragraph 3 criteria are discussed in succession. In its discussion, ACM uses as starting point the decisional practice and Notices of the Commission on the interpretation and application of Article 101 TFEU and the European court rulings.

3.6.1 Criterion 1: Economic and technical progress

The first criterion for the exception under Section 6 MW/Article 101 TFEU paragraph 3 is that the arrangement must lead to improved production or distribution, or to a promotion of technical or economic progress. In short, it means that the arrangement must have a positive welfare effect.

In its Guidelines regarding Article 101 (3), the European Commission states that the benefits that can be included in the Article 101 (3) assessment may include cost reductions or qualitative

²⁰ However, it should be noted that this is not the case with all sustainability initiatives.



improvements in the form of new or improved products, a wider product range etc.²¹ In the first place, this concerns benefits that will be enjoyed by consumers of those products. Additionally, the European Commission also recognizes that society as a whole may benefit from collaboration arrangements, because “[...] fewer resources [are] being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources”²²

Sustainability arrangements aim to have products created that have certain sustainable qualities. Products may be environmentally friendly or animal-friendly, or they can be produced in a way that uses scarce natural resource more efficiently. This can increase welfare in different ways. First, current consumers may attach value to such products, which are thus considered to be more valuable than non-sustainable products. Many consumers are willing to pay more for sustainable products because they value the realization of the ideas behind such products. When determining the benefits, qualitative improvements that create value through the introduction of new or improved products may thus be taken into consideration. When arrangements simultaneously lead to a reduction of supply – for example, by taking animal-unfriendly products off the market – it is necessary that it can be demonstrated that the (new) supply really is an improvement in terms of quality, or that it is at least perceived as such by consumers. The latter may be demonstrated by the willingness of a substantial share of consumers to possibly pay more for these products.

In addition, sustainable production and consumption may also be in the interest of future consumers, because a more efficient utilization of scarce resources results in certain products also being available (or more available) in the future. Sustainable production may promote welfare both statically and dynamically.

3.6.2 Criterion 2: Fair share of the benefits to consumers

The second exception criterion requires a fair share of the benefits resulting from the improvements as referred to in the previous section be given to users. This requirement aims to ensure that any benefits resulting from an arrangement are not only enjoyed by the producers involved, but are also sufficiently passed on to consumers.

The definition of ‘consumers’

The Guidelines on the application of Article 81 (3) of the European Commission clarify that the term ‘consumer’ must be defined as follows: ‘all direct or indirect users of the products covered by the agreement’. In other words, the consumers within the meaning of Article 101 (3) are the customers of

²¹ Guidelines on the application of Article 81(3) of the Treaty, Official Journal of the European Union, C 101/97, 27 April 2004, paragraph 59.

²² Idem par. 85.



the parties in the arrangement, but, in some cases, also the next level of buyers.²³ Arrangements may benefit others than the users that are directly involved in the arrangement, but the European Commission uses a minimum requirement that the benefits must sufficiently benefit the group of users that incur the costs in order to compensate them for those drawbacks. *At the very least*, it means that these consumers cannot be disadvantaged as a result of the arrangement.

Effects on different markets

Negative effects on consumers in a geographical or product market generally cannot be compensated by positive effects elsewhere.²⁴ However, if two markets are related, both markets can be taken into consideration if they involve largely the same group of consumers. This is the case, for example, with arrangements between laundry machine manufacturers to no longer produce any machines not complying with certain environmental standards on power consumption efficiency. This arrangement leads to more environmentally friendly products, but also to more expensive products. At the same time, such new products offer qualitative efficiencies in the form of more wash cycles that can be used by consumers. Buyers of these laundry machines may also achieve savings thanks to reduced consumption of water, power and detergent. These savings are realized in other markets than the relevant market of the arrangement. Nevertheless, these efficiency improvements may be taken into consideration, since the markets where the anticompetitive effects and the efficiencies occur are related, and the groups of consumers affected by the restriction and the efficiencies are essentially the same.²⁵

The principle of compensation

The benefits must at least compensate the consumers for the negative effects of the arrangement. This basic principle applies to the group of users as a whole in the relevant market, rather than to each individual consumer.²⁶ If the restriction of competition leads to rising prices, these consumers must be compensated together, for example with better quality of the new or existing products involved.²⁷

Long-term benefits

In the above sections, it has been explained why collaboration may sometimes be necessary for solving a coordination problem and taking away a negative external effect. If production or consumption of a certain product involves negative external effects to other consumers, a sustainability initiative that reduces these negative external affects will also have a favorable effect on the welfare of other consumers. This may be the case in the short run, but also in the long run.

²³ Idem par. 84.

²⁴ Idem par. 43.

²⁵ Example 5 (Environmental standards), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 329.

²⁶ Idem par. 87.

²⁷ Guidelines on the application of Article 81(3) of the Treaty, paragraph 86.



The benefits of a sustainability initiative often become visible in the long run, whereas users often already pay more for the product in question in the short run. In ACM's opinion, the earlier mentioned principle of compensation can also be applied in such a way that, within the scope of paragraph 3, it can be argued that current consumers, on balance, are disadvantaged by an arrangement if that arrangement is beneficial to future consumers.

As previously stated, from an economic point of view, there is no reason to only take into consideration the benefits to current consumers in the relevant market if those benefits will manifest themselves over a longer period of time. Sustainable development generally involves interests that cover an extended period of time. If these were not taken into account, factors such as depletion of natural resources and environmental pollution would often not be addressed through self-regulation.

ACM therefore sees room to take into consideration benefits in some cases within the context of a paragraph 3-test if such benefits cover an extended period of time, and if they occur within a larger group than the current users of the relevant product. This is also in line with the dynamic perspective that is often relevant in competition law, in which effects are considered that go beyond the here and now. On this basis, ACM considers it justified to apply a long-term perspective on 'benefits to consumers' in certain cases.

Requirements attached to the demonstration of benefits to users

The extent of taking into consideration such benefits in individual cases mainly depends on the objective substantiation of the benefits (which, when, to whom) that are associated with the sustainability initiative. Regarding benefits that will occur in the future, stricter requirements apply with regard to the substantiation i.e. the 'robustness' of such benefits, and the likelihood that they will occur. In ACM's perspective, government policy that is clearly known and sufficiently specified, which states that it is desirable to take into consideration the interests of future generations with regard to the relevant field, can play a role therein.

If the substantiation of the benefits associated with the sustainability initiative is missing or insufficient, or the boundaries of the scope of Section 6, paragraph 3 are exceeded based on the abovementioned approach, such sustainability initiatives cannot be deemed to be exempted from the cartel prohibition. In such cases, however, the relevant sustainability objective can be served through legislation and regulation.

3.6.3 Criterion 3: Necessity requirement

The third criterion of paragraph 3 concerns the necessity of the restrictions. This criterion means that the arrangement cannot impose any restrictions that are not vital for the realization of the efficiency



improvements. The Guidelines explain that the relevant question is whether more efficiency improvements could be realized than if the arrangement were not in place.²⁸ Furthermore, there should be no alternatives that are feasible and have a reduced anticompetitive effect to realize the efficiency improvements. The Guidelines also note that restrictions can be essential to harmonize the incentives to parties, and to ensure that their efforts are aimed at the implementation of the arrangement.²⁹

Decisional practice of the Commission and the NMa

The necessity criterion is generally not applied too strictly in practice. The key factor is if the restriction to competition can be reasonably considered necessary to achieve the planned benefits. This means that the Commission and the NMa generally did not actively seek less far-reaching alternatives. Only if clear realistic and feasible alternatives are available, parties can be asked to indicate why these alternatives to the arrangement would be significantly less efficient.

Ultimately, the criteria of paragraph 3 will always be considered in relationship to each other. In particular, the more competition is restricted, the more reason there is to pay more attention to the necessity requirement. In the case of a non-market-wide, qualitative arrangement such as a Fair Trade initiative, the necessity requirement is more easily met because the fact that there is residual competition will ensure there are enough options for consumers.³⁰

In addition, if a sustainability initiative resolves or reduces a negative external effect, the necessity requirement is not automatically met, because there are often more solutions to the sustainability problem, some of which are less anticompetitive than others. In the assessment of the necessity of the arrangement, it must be examined whether the negative effects of the arrangement might entail a 'premium' for the undertakings that is not related to the cost increase as a result of increased sustainability.

In ACM's perspective, when applying the necessity requirement, it must be possible to take into consideration the potential existence of the earlier mentioned first-mover disadvantage³¹. Undertakings are sometimes unable on their own to make a product more sustainable because that would lead to customers switching to a non-sustainable alternative. However, if nonetheless the arrangement would actually yield users benefits on balance, the existence of a first-mover disadvantage could be an argument, in ACM's view, to consider a market-wide arrangement justified. This does not take away the fact that the application of paragraph 3 continues to be an integral

²⁸ Guidelines on the application of Article 81(3) of the Treaty, paragraph 74.

²⁹ Idem par. 80.

³⁰ Please also see the ACM memorandum [‘The assessment of competition restrictions due to sustainability initiative in practice’ pages 5-6.](#)

³¹ See section 3.5.5.



assessment on the basis of the four criteria.

If the government instructed market participants to serve a certain interest through self-regulation that may be taken as a confirmation that apparently there is a sustainability objective, but this does not imply that the necessity of the specific arrangement has also been confirmed therewith.

The conclusion is that ACM will more often apply the necessity criterion as '*reasonably necessary*,' but this will also depend on the circumstances of the specific sustainability initiative.

An undertaking must therefore check if a restriction to competition is the least restrictive way of resolving the negative external effect. In the example of overfishing, the undertakings must demonstrate with sufficiently solid and verifiable data that a fishing quota is necessary and that less far-reaching and price-affecting measures do not suffice. In addition, the extent to which the arrangement covers the market can be tested against the necessity requirement, according to ACM.

3.6.4 Criterion 4: Sufficient residual competition

The fourth criterion for exception of an arrangement from the cartel prohibition is that the arrangement may not give the relevant undertakings the opportunity to eliminate competition with regard to a substantial part of the relevant products. This is the requirement of 'residual competition.' Will enough competition remain after the arrangement has come into effect? The residual-competition criterion can be seen as an additional safeguard that the dynamic efficiency, which normally ensues from effective competition, is not disrupted.

Dynamic efficiency and residual qualitative competition

The application of the residual-competition criterion first checks what the combined market share is of the undertakings involved in an arrangement, and what the degree of residual competition on that market is. Additionally, this requirement can be met if competition is restricted, for example, for a single competitive parameter, but remains unrestricted for all other parameters. Another factor that can play a role in the assessment is whether there continue to be enough market entry opportunities for the undertakings that do not participate in the arrangement.

Relation with other requirements

The factor 'residual competition' cannot be seen separately from the other requirements. As soon as the efficiency benefits that an arrangement yields are very high, this may, in the overall assessment, compensate for the negative effects of an anticompetitive arrangement that covers a large part of the market or that is a market-wide arrangement.



An interesting example in this regard is the case *Stichting Papier Recycling Nederland*.³² With regard to a waste management arrangement that had been submitted for exemption, the NMa's opinion was that the minor surcharges to be added to the price of waste paper and cardboard recycling would support a closed-loop product lifecycle (economic and technical progress) that benefits consumers (they can dispose of waste paper free of charge, and it is good for the environment). With regard to residual competition, the NMa noted the following:

82. As is evident from the Commission's Guidelines regarding horizontal arrangements, the fact that virtually all of the undertakings active in the relevant product markets are party to these environmental arrangements does not preclude that compliance with this application criterion of Article 81, paragraph 3, EC, and Section 17 Mw is possible. Competition parameters other than (the remaining portion of) price, that could play a role in this context include product or process differentiation and technological innovation.

83. In this case, it can be noted that competition on the markets for new paper and cardboard is not eliminated for a substantial part as a result of the financing system for the processing system instigated by PRN. The system does not affect aspects other than (the remaining portion of) price on which market parties generally compete, such as quality, sustainability and service."

Checking room for residual competition

From the above, it can be concluded that undertakings involved in a sustainability initiative can comply with the 'residual competition' requirement in various ways. In the example of countering overfishing, the undertakings can check whether consumers have enough alternatives, and whether producers that are able to realize the objective of countering overfishing more efficiently have the opportunity to do so.

³² Case 3007, decision dated 31 December 2003.



Appendix 1

Texts Section 6 Mw (Dutch Competition Act) and Article 101 TFEU

Section 6 Dutch Competition Act (Mw)

1. Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.
2. Agreements and decisions that are prohibited under subsection (1) are legally null and void.
3. Subsection (1) shall not apply to agreements, decisions and concerted practices which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not:
 - a. impose any restrictions on the undertakings concerned that are not indispensable to the attainment of these objectives, or
 - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.

(...).

Article 101 Treaty on the Functioning of the European Union

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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