



Guidelines

Sustainability agreements

Opportunities within competition law

DRAFT

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1. Summary

Sustainability is one of the key priorities of the Netherlands Authority for Consumers and Markets (ACM). Agreements between undertakings can contribute in an effective manner to the realization of public sustainability objectives. Furthermore, such agreements can strengthen the support for the efforts that are needed for the realization of those objectives. These Guidelines therefore explain in greater detail how competition law is applied to sustainability agreements made between undertakings. These Guidelines give an idea of what opportunities market participants have for making sustainability agreements, but they also indicate what boundaries competition law sets. In individual cases, ACM will help find solutions to any bottlenecks. In ACM's experience, sustainability agreements, in many situations, can be made without any major problems. And in that context, if sustainability agreements have been discussed with ACM well in advance, and ACM has not identified any major concerns, but these agreements turn out to be incompatible with the Dutch Competition Act, ACM will not impose any fines. This also applies to sustainability agreements that have been published, and where these Guidelines have been followed in good faith. If, in those cases, the parties involved expeditiously adjust their agreements as requested by ACM, ACM will not impose any fines. At all times, undertakings have the opportunity to contact ACM and discuss the potential effects (if any) that the sustainability agreements that they wish to make (or already have made) with other undertakings may have on competition.

- Chapter 2 of these Guidelines is the introduction.
- Chapter 3 offers a brief explanation of the concept of sustainability agreements, and gives an overview of the opportunities that competition law offers for making sustainability agreements.
- Chapter 4 explains what sustainability agreements are not considered anticompetitive, and are thus allowed (opportunity 1). After all, many sustainability agreements have hardly any anticompetitive effects or even none at all, and are therefore perfectly allowed.
- Chapter 5 provides an explanation of the statutory exemption for efficiency gains (so-called paragraph-3 test), and, more specifically, if such gains are sustainability gains (opportunity 2). Four criteria need to be met in order to qualify for this exemption. This chapter discusses those criteria.
- Chapter 6 discusses the practical implications for ACM's oversight. ACM explains how, in practice, it will help undertakings assess their sustainability agreements. It is expected that, in the future, parties to sustainability agreements will also be able to take advantage of the opportunities offered by the Dutch Act on Room for Sustainability Initiatives as soon as it enters into force (opportunity 3).¹

2. Introduction

1. These Guidelines offer a practical explanation of the application of competition rules on sustainability agreements. The Guidelines explain what sustainability agreements are allowed, and how ACM in practice deals with questions about sustainability agreements. The Guidelines contain examples and practical advice for undertakings, enabling them to conduct self-assessments of their planned sustainability agreements.
2. Sustainability and competition often go hand in hand. Just as competition can stimulate innovation in the form of new or improved products and processes, so can it stimulate sustainability too. Consumers often see sustainability as a quality improvement of a product, and the availability of sustainable products increases their options. Investments and improved production processes that use raw materials more efficiently not only offer businesses competitive advantages but are also in the interest of sustainability. However, it is often pointed out that there is some sort of tension between sustainability and competition. National and European competition rules supposedly hamper sustainability agreements. ACM acknowledges that this tension may indeed exist in some cases. However, many sustainability initiatives that are submitted to ACM are compatible with competition law, and can thus go ahead, sometimes after minor adjustments. With these Guidelines, undertakings, trade associations, and their advisors are able to check what opportunities exist for making sustainability agreements within the boundaries of competition law. And with regard to situations that do not fall under any of the opportunities offered by competition law, the Dutch cabinet in 2019 submitted the Bill on Room for Sustainability Initiatives to create such additional opportunities.²
3. Over the past few years, attention for climate change and sustainable development has risen dramatically among policymakers and lawyers, as well as in society as a whole. For example, in 2015, the Paris Climate Agreement was signed³ and seventeen Sustainable Development Goals (SDGs) were set.⁴ The Netherlands and the rest of the European Union committed themselves to implementing this UN climate agreement, as well as the UN agenda with the SDGs. The Dutch government in 2019 adopted the Dutch Climate Act, which includes the following objectives: a 49%-reduction of greenhouse gas emissions by 2030, a 95%-reduction by 2050, and a 100% carbon-neutral energy production in the Netherlands by 2050⁵. In addition, the Supreme Court of the Netherlands in late-2019 ruled that the State of the Netherlands is obliged to make sure that greenhouse gas emissions will have been reduced with 25% by late-2020 compared with 1990.⁶
4. In that process, binding standards will be established that can be used for determining the merits of sustainability agreements in an objective manner. Furthermore, the importance of sustainability agreements has also increased because of the enormous effort that is needed to realize such objectives. The origins of sustainability agreements often lie in major agreements (the 2013 Energy Agreement, the 2017 Raw Materials Agreement, the 2018 National Prevention Agreement, and the 2019 Climate Agreement) as well as in various policy measures that have been announced.⁷ In that context, it goes without saying that, with the publication of these Guidelines, ACM would like to contribute to answering the question of how competition rules are applied to sustainability agreements.

3. Overview: opportunities for sustainability agreements

5. In this chapter, ACM first explains what it means by sustainability agreements. ACM then offers an overview of the opportunities for making sustainability agreements without violating the Dutch Competition Act, more specifically the cartel prohibition laid down in Section 6 thereof.

Description of sustainability agreements

6. Sustainability or sustainable development is a broad concept, lacking a clear definition. The 2012 UN Resolution 66/288 describes sustainable development as the development towards “an economically, socially and environmentally sustainable future for our planet and for present and future generations”.⁸ This may include the protection of the environment, biodiversity, climate, public health, animal welfare, and fair trade. In these Guidelines, ACM does not use a comprehensive or precise definition of the term sustainability, but rather follows the UN description. ACM therefore means by sustainability agreements any agreements between undertakings, as well as any decisions of associations of 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.
7. If undertakings are unsure about whether or not their sustainability agreements fall under any of the opportunities that are described in these Guidelines, they are more than welcome to submit their questions to ACM.

Overview: three opportunities

8. Section 6, paragraph 1 of the Dutch Competition Act and Article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU), respectively, contain the cartel prohibition. It applies, first of all, to agreements between undertakings and those of associations of undertakings that compete with each other (so-called ‘horizontal restraints’). The *Guidelines regarding agreements between competitors* explains in greater detail the assessment of such agreements.⁹ The cartel prohibition also applies to agreements between undertakings from different levels in the distribution chain or value chain (so-called ‘vertical restraints’). The cartel prohibition applies differently to these kinds of agreements, which is explained by ACM in the *Guidelines regarding agreements between suppliers and buyers*.¹⁰ Sustainability agreements may contain both horizontal and vertical agreements.
9. The cartel prohibition does not necessarily stand in the way of sustainability agreements. When testing sustainability agreements against competition law, ACM distinguishes three opportunities:

Opportunity 1

10. Certain types of agreements such as price-fixing agreements, customer-sharing agreements, distribution agreements, collective distribution or production restraints, and collective refusals to buy or supply, are, in principle, assumed to fall under the cartel prohibition. However, this does not hold for other types of agreements, which, for example, concern less important competition parameters and the impact of which on competition is negligible. ACM explains this in more detail in **chapter 4**.

Opportunity 2

11. Section 6, paragraph 3 of the Dutch Competition Act and Article 101, paragraph 3 of the TFEU provide for a statutory exemption from the cartel prohibition. This exemption has four criteria. ACM explains these in greater detail in **chapter 5**.¹¹

Opportunity 3

12. If a sustainability agreement does not qualify for an exemption under Section 6, paragraph 3 of the Dutch Competition Act, market participants will still have various other options for going ahead with their sustainability initiative. See **chapter 6** for these options.
13. ACM's enforcement policy in relation to sustainability agreements is aimed at finding solutions that will make it possible to be able to reap the sustainability benefits of initiatives, and is not aimed at enforcement based on fines. ACM's enforcement policy in relation to sustainability agreements will be discussed in **chapter 6**.

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4. Sustainability agreements without restrictions of competition

14. In this chapter, ACM explains what sustainability agreements do not fall under the cartel prohibition, and are therefore perfectly allowed.

General remarks

15. Sustainability agreements are mostly aimed at a more economical (a more efficient) use of raw materials, at a reduction of pollutant emissions and waste streams, or at a reduction, in any other way, of the negative effects of production on humans, animals, the earth's climate, the environment, or nature. The mere fact that a sustainability agreement seeks to realize these objectives does not rule out that the agreement *can* be anticompetitive, and can thus fall under the cartel prohibition.
16. However, sustainability agreements will usually not be anticompetitive if they do not or not appreciably affect competition on the basis of key competition parameters such as price, quality, diversity, service, and distribution method.
17. Furthermore, sustainability agreements that are solely aimed at promoting product quality, product diversity, innovation or market introductions of new products will, in most cases, actually promote competition. That is why such agreements are usually not anticompetitive. However, such agreements cannot exclude other market participants and products.
18. Below is an overview of several categories of sustainability agreements that, generally speaking, are not anticompetitive, and that are therefore allowed.

Categories of allowed sustainability agreements

19. One category of agreements that, generally speaking, are allowed, are **agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding** on the individual undertakings. Think of collective intentions, ambitions or targets of sectors with regard to sustainability objectives such as a reduction of CO₂ emissions, where individual undertakings determine their own contributions and the way in which they wish to realize them.
20. A second category concerns **codes of conduct promoting environmentally-conscious or climate-conscious practices**. These often involve joint standards and certification labels about the use of raw materials, production methods, etc.¹² With regard to such codes, the participation criteria must be transparent, and access must be granted on the basis of reasonable and non-discriminatory criteria. In addition, it should remain possible to have alternative standards or certification labels of equal standing, and also to sell products that fall outside of such codes.¹³
21. A third category concerns **agreements that are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold**. These agreements may fall outside the scope of the cartel prohibition if they do not

appreciably affect price and/or product diversity. One example is agreements that are aimed at a more efficient use of packaging materials or at no longer using a certain type of packaging.

22. A fourth category concerns **initiatives where new products or markets are created, and where a joint initiative is needed for acquiring sufficient production resources, including know-how, or for achieving sufficient scale**. Sometimes, joint actions are strictly necessary in the start-up phase only. In that case, lengthier collaborations should still be tested against paragraph 3 of the cartel prohibition.

Example 1

Several housing corporations and installation companies agree on giving a boost to zero-energy housing through a joint initiative. They wish to launch a pilot project in which the installation companies combine their expertise in order to make 1,000 homes energy-neutral within a short amount of time.

ACM's assessment

This initiative will not restrict competition because it has turned out that the installation companies involved each lack the expertise required to undertake this kind of project individually within the amount of time that was set. Also, by combining the corporations' demand, the project attains such a mass that it has a chance of success. If they take this collaboration further, and a restriction of competition does arise, the companies involved will be able to invoke Section 6, paragraph 3 of the Dutch Competition Act. If the housing corporations decided to make even more homes more sustainable, it would be reasonable to give all building contractors a chance to take part in the project. The corporations will then have to make sure that these contractors will have access to the experience that was gained during the pilot phase.

23. Finally, agreements will fall outside the scope of the cartel prohibition if their sole purpose is to make the undertakings involved, their suppliers and/or their distributors respect the laws of the countries in which they do business. Such agreements are particularly important for undertakings that have difficulties checking for themselves whether their business partners comply with the rules. By concluding covenants, they are able to make the necessary agreements, allowing them to perform such checks. The rules and regulations in question often concern respecting labor laws (for example, banning child labor, paying a minimum wage, respecting the right to unionize), protecting the environment (such a ban on illegal logging), and respecting fair-trade rules (such as a ban on bribery). What is important though is that such agreements do not unnecessarily restrict competition. Undertakings should, in particular, be cautious about publishing information that could be competition-sensitive.

Example 2

A group of wood processors agree to procure responsibly in accordance with a covenant signed by the Dutch government and the sector. The objective of the agreement is to prevent environmental damage and human-rights violations in the production chain in certain countries in Asia, Latin America, and Africa. In that context, they will follow the standards that have been laid down in the national laws of those countries. The processors have a combined market share of 90% in the Netherlands.

It has been agreed that the processors:

- 1) only procure wood from pre-approved regions. These regions are on a so-called 'green list' that is managed by the undertakings that take part in the initiative;
- 2) publish from where and from whom they procure wood;
- 3) invest 1.5% of their turnovers, through a collective fund, in the enforcement of compliance with the agreements;
- 4) mark the sustainable products in a uniform manner using a label;
- 5) include a fixed surcharge in the selling price to compensate for the additional costs.

Assessment

In this case, the agreements that are necessary for realizing the objective do not fall within the scope of the cartel prohibition, because this objective does not go beyond ensuring that national rules and regulations are respected.

Compiling the 'green list' is reasonably necessary for realizing the planned objective. The creation of a collective fund is also necessary since it covers the costs for enforcement of compliance with the agreements, as well as other operational costs of the initiative. However, publication of the names of the sellers from whom wood is purchased does not meet the necessity criterion, and one objection against it is that it may result in the processors gaining insight into each other's competition-sensitive information. On the other hand, it is allowed to forward the names of the sellers to the central organization so that it can ensure compliance with the agreements. Agreement (5), too, goes beyond what is necessary for realizing the objective. After all, the undertakings involved can also make their own decisions with regard to passing on the costs or not. At the same time, agreement (4), too, may fall outside the scope of the cartel prohibition because it increases transparency for buyers, thereby improving the competitive process.

5. Sustainability agreements with benefits that offset restrictions of competition

24. The statutory exemption from the cartel prohibition has been laid down in Section 6, paragraph 3 of the Dutch Competition Act and in Article 101, paragraph 3 of the TFEU, respectively. It applies to agreements that restrict competition but also offers benefits that offset the disadvantages of those agreements.¹⁴ The assessment must be made using the following four criteria (cumulative):
 - a. The agreements offer efficiency gains, including sustainability benefits;
 - b. The users of the products in question are allowed a fair share of those benefits;
 - c. The restriction of competition is necessary for reaping the benefits, and does not go beyond what is necessary;
 - d. Competition is not eliminated in respect of a substantial part of the products in question.
25. When testing agreements against paragraph 3, ACM uses the European Commission's guidelines as well as national and European case law as its starting point.¹⁵ And, insofar it falls within competition-law boundaries, ACM also follows the 2016 Policy Rule regarding Competition and Sustainability of the Dutch Minister of Economic Affairs.¹⁶
26. If undertakings make agreements that restrict competition to an appreciable extent, it is up to them, if so needed, to demonstrate that those agreements are actually allowed because they meet the exemption criteria.¹⁷
27. In this chapter, the four criteria for the exemption are explained in further detail. As a matter of practicality, it can be expedient to test a sustainability agreement against criterion c) first. If an agreement contains any restrictions of competition that are not necessary for realizing the planned objective, those restrictions are not eligible for the exemption. Only those benefits that are clearly related to the agreements in question and for which those agreements are necessary will be included in the assessment.

a) Benefits that may result from sustainability agreements

28. As already mentioned, sustainability agreements may be aimed at a wide range of sustainability aspects. When testing agreements against the exemption under paragraph 3, it is important, first of all, to identify the sustainability initiative's benefits as much as possible in each individual case.

Objective benefits

29. Only *objective* sustainability benefits will be taken into consideration, not any benefits that are solely based on the subjective opinions of the parties involved. Parties involved can substantiate objective benefits using existing studies conducted by knowledge institutions, government agencies or studies of their own.
30. Objective sustainability benefits are benefits that are useful not only to the consumers, but, in general, also to society (or parts thereof) in a broader sense. Sustainability benefits are often associated with a reduction of so-called negative externalities, meaning factors that are not included in the costs for the firms but that do represent costs for society. Reducing externalities means that, in

the production of consumption of products, everyone takes more into account the impact that those externalities have on the environment and on the living conditions of humans. This can produce benefits for society as a whole, including today's users and those in the future. Other sustainability benefits may involve reducing operational costs, increased innovation, quality improvements, or a greater diversity of products on offer, including the introduction of, for example, animal-friendly products or products that guarantee a fair income.¹⁸

Substantiation of the benefits

31. The parties involved can substantiate the benefits of sustainability initiatives either qualitatively or quantitatively. Which substantiation is the most appropriate will vary in each individual case.
32. If quantitative data are available or can be collected relatively easily, it will be logical to include that data in the substantiation.¹⁹ Environmental benefits can often be quantified, for example, by indicating the extent to which certain harmful emissions will be reduced, and over what period.
33. In the absence of any quantitative data, substantiation will sometimes have to remain qualitative (descriptive). Benefits with regard to innovation or animal welfare are more difficult to quantify. Substantiation of such benefits will therefore inevitably focus on identifying the nature of the benefits as much as possible. In any case, it is also important to shed light on the likelihood of those benefits actually being reaped.
34. The extent to which the benefits of a sustainability agreement must be substantiated (in terms of the level of detail, degree of quantification, and likelihood) depends in part on the thoroughness of the assessment of the benefits and the restrictions of competition that is required (see under criterion b). If a light test suffices in that assessment, it may not always be useful to identify the benefits quantitatively or in a very detailed manner.

True costs and true prices

35. These days, there is much discussion about true costs and true prices. Undertakings often want to know the social costs of their products, and to what extent these differ from the actual costs for businesses. These costs can sometimes be lower because certain externalities are not taken into account. The undertakings are subsequently able to set up their production process in such a way that the difference between operational costs and social costs is eliminated as much as possible. Undertakings can do this in different ways. For example, they can pay a 'living wage' or compensate for greenhouse gas emissions. In their marketing activities, they can use these elements to promote their product to consumers. Such improvements in the offerings of undertakings can, within the framework as explained in these Guidelines, also be considered benefits within the meaning of paragraph 3 of the cartel prohibition.

b) Are users allowed a fair share of the benefits?

36. According to the second criterion of paragraph 3, users of the products that are the object of an agreement must be allowed a fair share of the benefits. These can be current users as well as future ones.²⁰ In addition, these can be direct users as well as indirect ones, lower in the production chain, and (finally) the end-user.

37. Determining the exact time period in which users feel the effects of the agreement will depend on the time period in which the agreement has an effect. Therefore, it may also concern long-term effects.²¹

What is a fair share?

38. With regard to sustainability agreements in particular, it is important to know what is meant by the notion of 'fair share'. The basic principle used by the European Commission is that users should be compensated at least for the harm caused by the restriction of competition to them. In that context, users should, for each relevant market, be seen as a group. ACM believes there is good reason to deviate from this basic principle if two criteria are met: (i) the agreement aims to prevent or limit any obvious environmental damage, and (ii) the agreement helps, in an efficient manner, comply with an international or national standard to prevent environmental damage to which the government is bound. These criteria are cumulative.
39. Therefore, ACM makes in these Guidelines a distinction between *environmental-damage agreements* and *other sustainability agreements*. Environmental-damage agreements are agreements that aim to improve production processes that cause harm to humans, the environment, and nature. In that context, think of agreements aimed at reducing emissions of pollutants, and at preventing the use of pollutive raw materials in products. Undertakings also make sustainability agreements that concern social sustainability or other forms of sustainability. One example of such 'other' sustainability agreements are agreements where undertakings set requirements for labor conditions or animal welfare. Such an agreement could concern paying a fair wage in developing countries that do not have a minimum wage. Other examples are minimum requirements for animal welfare in the production of meat or changing the recipes of food products for public-health reasons.

Environmental-damage agreements

40. ACM believes that, with regard to environmental-damage agreements, it should be possible to take into account benefits for others than merely the users. For example, if undertakings in a certain sector jointly decide to use carbon-neutral energy only, greenhouse gas emissions will decrease as a result thereof. This is a benefit that both customers of the producers involved as well as the rest of Dutch society can reap. As a consequence, the agreement will also help realize the government's policy objective of reducing CO2 emissions.
41. In such situations, it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions. However, in that context, the agreement must contribute to a policy objective that has been laid down in an international or national standard to which the Dutch government is bound. Moreover, that contribution must be efficient (see section 50). In such cases, users will, as a rule, reap the benefits in the same way as the rest of society does.
42. In other cases, where the two abovementioned criteria are not met, users still need to be fully compensated for the harm they suffer caused by the restriction of competition. Think of product standards or environmental standards that are more ambitious than the existing, binding standard for the government.

Other sustainability agreements

43. With regard to other sustainability agreements, too, ACM follows the basic principle that users must be fully compensated by the benefits of the sustainability agreements for the harm that they suffer caused by a restriction of competition.
44. This means that, for example, if a sustainability agreement leads to a quality improvement in production, but also leads to a price increase, the users (as a group) will have to attach sufficient value to those quality improvements to offset the price increase.

Weighing the pros and cons: to quantify or not to quantify?

45. When weighing the pros and cons of a sustainability agreement, it is not always necessary to quantify them. In any real-life quantitative assessment, the pros and cons of an agreement can only be compared if the same measurement unit is used, which is done by expressing them in monetary terms. A quantitative assessment usually imposes higher demands on the analysis as well as the required facts. That is why ACM will first discuss situations in which an answer can often be given to the question of whether or not an agreement meets the criteria laid down in paragraph 3 without having quantified the effects of that agreement.

No quantification needed

46. ACM believes that, in the following types of cases, it is usually possible to conclude that an agreement meets paragraph 3 without quantifying the effects of an agreement.
- i. The undertakings involved have a limited, combined market share;
 - ii. The harm to competition is obviously smaller than the benefits of the agreement.

(i) Sustainability initiatives with a limited market share

47. If sustainability initiatives are launched by undertakings with a combined market share of no more than 30%, a qualitative assessment will suffice, according to ACM. In that case, the undertakings involved will have to be able to demonstrate that their initiative is specifically aimed at certain sustainability objectives, and that, in that respect, real benefits can be reasonably expected. With a considerable degree of competition remaining in the market, it can be assumed that the initiative will have to prove its value to buyers or suppliers in order to be successful. It can also be expected that users will consequently get a fair share of the benefits.

Example 3

Three waste collection companies agree to collect business waste in a certain urban area in a more sustainable manner. The waste collectors have a combined market share of 30%. These undertakings put forward various benefits that will result from a more efficient utilization of waste collection vehicles, including cost savings. An early estimate suggests that the collaboration will lead to a 20% reduction in vehicle-kilometers because of route optimization. The information exchange between the undertakings will be limited to the operational information that is needed for said route optimization.

ACM's assessment

This agreement restricts competition because, in this particular area, the waste collectors involved no longer compete freely for the favor of the customer. However, the agreement is expected to produce also demonstrable, objective benefits in the form of cost savings, reduced emissions of pollutants, and reduced traffic congestion. The benefits for the residents in the urban area in question are: increased traffic safety and cleaner neighborhoods. The agreement does not go beyond what is necessary for realizing the planned objective. Furthermore, considering the limited combined market share, it is plausible that sufficient competition will remain in the market. It is therefore also plausible that the pressure exerted by those competitors will ensure that the users will also get a fair share of the cost-saving benefits. ACM therefore believes it is likely that the criteria laid down in Section 6, paragraph 3 of the Dutch Competition Act have been met.

(ii) The benefits of the agreement are larger than the harm to competition that it causes

48. A second category of agreements that lend themselves for a quantitative assessment are the cases in which, at first glance, it is already sufficiently clear that the benefits offset (or more than offset) the harm. For example, think of agreements that will only lead to a limited price increase or a limited reduction in choices for buyers, while, at the same time, it is obvious that users will reap enormous benefits in return. Furthermore, it can be safely assumed, without any further assessment, that users are allowed a fair share of the benefits.

Example 4

Several soda companies and suppliers of packaging materials agree on promoting re-using paper and cardboard packaging. The agreement is about using a certain weight percentage of recycled materials in the production of beverage packaging. In order to prevent raw-material waste, it is also agreed to organize the production process in such a way that a limited number of cardboard layers is used. The transition to this new technology will, for some time, produce an increase (albeit a modest one) in production costs. The packaging manufacturers agree with the beverage companies only to produce packaging that meets the agreed upon standards. The beverage companies agree among each other only to use such packaging from now on.

Assessment

ACM recognizes that this collaboration produces benefits for the environment, and that it helps promote a more responsible use of raw materials. As packaging materials are a relatively small cost component for soda companies, the collaboration therefore concerns a relatively less important input. The expected price increase for buyers resulting from the agreement is relatively modest, and, moreover, only temporary. However, it is plausible that the suppliers suffer from a first-mover disadvantage preventing each of them from switching to the new production method. It is plausible that the agreement's benefits more than offset that increase. Furthermore, sufficient competition on other parameters than the method of packaging will remain. Also, research has shown that, generally speaking, consumers sympathize with reducing packaging waste. That is why, among other reasons, it can be assumed that the users are allowed a fair share of the benefits of the agreement. It can therefore be assumed that the agreement meets the criteria of paragraph 3 without requiring a quantitative assessment.

Quantitative assessments

49. For quantitative assessments under paragraph 3, both the pros and cons of sustainability initiatives must be identified as accurately as possible, and need to be expressed in monetary terms. Sustainability agreements can lead to higher costs in different ways. Production costs can increase because of the use of more expensive raw materials or production methods. This can lead to higher prices. In addition, an agreement can limit the choices for buyers, for example, because pollutive yet cheaper product varieties are no longer offered. In quantitative assessments, such disadvantages are expressed as price effects as accurately as possible.
50. Benefits of *environmental-damage agreements* are expressed in monetary terms using so-called environmental prices.²² These environmental prices are values that indicate the harm of, among other things, pollutive emissions and greenhouse gas emissions. They are also called 'shadow prices,' because they are not market prices. When choosing the environmental prices that will be used, the guidelines that apply to governmental agencies when making social cost-benefit analyses (SCBAs)²³ should, in principle, be used as the starting point. If an environmental price is set with an eye to the realization of a concrete policy objective, it is called a shadow price based on prevention costs. By using such environmental prices, it can be determined whether or not a sustainability initiative helps, in an efficient manner, realize social policy objectives. If the cost increase resulting from the

restriction of competition is lower than the expected sustainability benefits, valued using a shadow price based on prevention costs, then this is an indication that the initiative's contribution can be qualified as efficient.

Example 5

Five producers of a semi-finished product that is predominantly sold in the Netherlands wish to make an agreement that basically says that they will make their manufacturing processes completely carbon-neutral within five years. These undertakings do not fall under the European Trading System (ETS) for CO₂. The producers have developed binding standards for themselves in consultation with the associations of undertakings that buy their products. In consultation with ACM, an estimate for the next 10 years has been made of the expected price increase of the semi-finished product as well as an estimate of the environmental benefits that are associated with reduced CO₂ emissions. After that 10-year period, there is too much uncertainty surrounding the costs and benefits of the agreement as a result of the developments in government regulation aimed at reducing CO₂ emissions.

Assessment

As a result of the agreement, it is estimated that the prices of the semi-finished product are expected to increase by 7%. On the other hand, the agreement could be a welcome addition to the measures that the Dutch government has already introduced that are aimed at reducing CO₂ emissions, such as subsidies, revocations of licenses, and a partial CO₂ tax. It is unlikely that the government will be able to achieve its policy objective (that follows from the 2015 Paris Climate Agreement) with these measures alone.

Considering the projected price increase, ACM finds it necessary to make a quantitative assessment in this case. The reduction in CO₂ emissions is valued using environmental prices based on prevention costs. These environmental prices are based on said national policy objective. The calculation reveals that the environmental benefits offset the expected price increase. Therefore, the agreement helps, in an efficient manner, realize the policy objective. However, the buyers of the end product in question represent merely 30% of the Dutch population. The 30% of the environmental benefits that can be directly allocated to them are not large enough to offset the price increase of the end product. If the second criterion of paragraph 3 were strictly applied, the agreement would not qualify for exemption. However, in this case, under the principles set out in these Guidelines, the total benefits for Dutch society as a whole are used in the calculation. As such, it can be considered that the agreement meets the second criterion of paragraph 3.

51. Example 5 shows what happens if the exemption from the principle of fully compensating the users is applied to an agreement that is aimed at, among other objectives, preventing obvious environmental damage. By using shadow prices, it could be determined what value should be placed on the contribution that the initiative would make towards the sustainability objective for which a binding standard exists. Every member of society will benefit from these sustainability gains, regardless of whether they are a consumer of that particular product. These benefits are used in the paragraph-3 assessment of the costs and benefits.
52. It is important to note that the consumers in this example are part of the wider group (society at large) that benefits from the agreement. These consumers therefore enjoy these benefits, in principle, as

much as the rest of society does. In a direct sense, these benefits mean that a binding policy objective that applies to the society in question can be realized through a less extensive use of other instruments. However, more indirectly speaking, it is about reducing the risks of global warming, because the policy objective has been set with an eye to that particular interest. Since the sustainability benefits of this agreement consist of the reduction of externalities of the production in question, it is justified to take these into account when testing the agreement against the second clause of paragraph 3, and particularly in the assessment of the question of what is meant by a fair share of the benefits for users.

53. Environmental prices usually cannot be used in the case of *'other sustainability agreements.'* One option would be to determine more directly what value can be assigned to the improvements that are the result of the agreement in question. Such an exercise can reveal, for example, what the consumers' willingness to pay is for a certain product or product feature such as an improvement in terms of human friendliness, animal friendliness or environmental friendliness.

Example 6

Five pig slaughterhouses want to make a market-wide agreement (covering the Netherlands) in which they only offer pork that has certain 'green' features. That is why, when procuring pigs, they will use several standards that seek to improve the living conditions of the pigs. The five slaughterhouses have a combined market share of 80% in terms of pork sales in the Netherlands. The agreed upon standards have been determined after consultation with the most important organizations in the pig farming industry and in the retail industry in the Netherlands. In consultation with ACM, an estimate has been made of the expected cost increase of pork. In addition, a study has been conducted into the consumer valuation of pork that comes from pigs that have lived in better conditions. As it is expected that the agreed upon standards will be superseded in the longer term by statutory standards at a European level, it has been agreed with ACM that the assessment of the costs and benefits of the agreements will be limited to the next ten years.

Assessment

The analysis reveals that, as a result of the agreement, pork will become more expensive for consumers, at first 10% more expensive, and subsequently, as a result of economies of scale, slightly less than 5% more expensive at the end of the ten-year period. It is not plausible that a similar improvement in the living conditions for the pigs could also be achieved in a way that is less anticompetitive, because the economies of scale can only be achieved with an agreement that is more or less market-wide. Considering the combined market share of the participating slaughterhouses and the projected price increase, ACM finds it necessary to make a quantitative assessment in this particular case.

Research has shown that consumers value the new meat product's animal-friendliness. That is why the animal-friendliness can be considered a qualitative improvement of the product. Consumers are willing to pay, on average, 3% more for this meat. That in itself is not enough to compensate them for the financial harm that they will suffer caused by the agreement. The agreement therefore does not meet the second criterion of paragraph 3.

54. Example 6 illustrates a situation to which the basic principle still applies: consumers on the relevant market must, on average, at least be fully compensated for the harm they suffer caused by the agreement.

c) Is the agreement necessary, and does it not go beyond what is necessary for realizing the benefits?

55. The necessity criterion means that the sustainability agreement (all of its elements) is reasonably necessary for realizing the objective as well as the resulting benefits.
56. It can be expected from the parties to the sustainability agreement to make a plausible case that, realistically speaking, no other, less anticompetitive alternative is available for realizing the same objective. They can do so, for example, by demonstrating that a collective agreement is necessary because no undertaking can afford to be the first to change its behavior. In addition, a sustainability agreement can be indispensable if one or more undertakings are only able to realize the objective to a demonstrably less efficient degree, for example, because of a lack of expertise or scale. In that case, sustainable products can be introduced sooner or more effectively as a result of the sustainability agreement.
57. Furthermore, a sustainability agreement cannot contain any unnecessary restrictions of competition. If an objective can be realized in a less anticompetitive manner without taking anything away from the effectiveness of the collaboration, then that route should be taken. In some sectors, market participants make agreements, for example, about quality standards with regard to sustainability aspects of products and services. Such agreements are clearly less anticompetitive than an agreement about no longer producing or selling certain products and services.
58. Only the benefits of a sustainability initiative for which the restrictions of competition are necessary will be part of an assessment under paragraph 3. The previous examples have already shown in different ways how the necessity criterion is applied.

d) Will sufficient competition remain on the market?

59. With regard to the criterion that a sustainability agreement cannot eliminate competition in respect of a substantial part of the products in question, it is, first of all, about the question of which part of the undertakings participate in the agreement. After all, not all undertakings that are active in a certain market necessarily participate in an initiative. Furthermore, it is important to assess what the influence of the sustainability agreement is on the key competition parameters in the product market in question. So long as the market participants involved are able to continue to compete with one another on key parameters, there may still be sufficient room for competition, even in the case of market-wide sustainability agreements.

6. ACM's policy on the assessment of sustainability agreements

60. Undertakings are to conduct a self-assessment first in order to find out whether or not their agreement restricts competition, and falls under the scope of Section 6, paragraph 1 of the Dutch Competition Act and, if such is the case, whether it meets Section 6, paragraph 3 of the Dutch Competition Act. For these self-assessments, ACM applies the standards as discussed in chapters 4 and 5.
61. If undertakings are unsure about the reliability of their self-assessments, they are invited to contact ACM and to discuss their agreements, preferably at an early stage. ACM will then indicate what concerns it may have, and it will help find possible solutions.
62. With regard to sustainability agreements that have been published, and where these Guidelines have been followed in good faith as much as possible, but which later turn out not to be compatible with the Dutch Competition Act, adjustments to such agreements may be agreed on in consultation with ACM, or following an ACM intervention. In those cases, ACM will not impose any fines. This also applies to agreements that have been discussed with ACM well in advance, and where ACM, at that point, did not identify any major risks.

Dutch Act on Room for Sustainability Initiatives

63. If ACM comes to the conclusion that a sustainability initiative cannot be made compatible with the Dutch Competition Act, the undertakings involved will have various options to go ahead with their initiative still.
64. First, the undertakings may choose to submit their initiative to the legislature. That is because general rules that serve the public interest do not fall under the scope of the Dutch Competition Act. If an initiative is converted into regulations, the sustainability objective that the initiative aims to realize may yet be realized after all.
65. In the future, undertakings may, in some cases, also have the opportunity to contact the Minister of Economic Affairs and Climate Policy (minister of EZK). Under the Bill on Room for Sustainability Initiatives, the minister may decide to set an order in council in the interest of sustainable development, if requested to do so (by anyone, but with a reasoned explanation, and a description of the support for the initiative among those who will have to comply with the rules or those who will otherwise be affected by them).
66. Within the framework of this bill, undertakings may request the minister of EZK to issue an order declaring a sustainability initiative statutorily binding on the entire sector. In their assessment, the minister may seek advice from ACM regarding the market effects of the upcoming rules. When handling such requests, the minister will take into account, among other aspects, the relationship between the effects of the upcoming rules and the intended sustainable development.

67. These may include initiatives the benefits of which are predominantly reaped by those outside the circle of users on the relevant market(s) that are affected by the initiative. Undertakings and associations of undertakings will have to decide for themselves whether or not they wish to go to the minister of EZK. At this point, it is still uncertain whether the bill will be passed.

Future-ready competition policy

68. Finally, ACM re-emphasizes that sustainability considerations play a fundamental role in the public debate and thinking about future-ready competition policy. These Guidelines are a reflection of the current state-of-play of that thinking. New insights may, in the future, result in changes to these Guidelines.

69. These Guidelines supersede the 2014 Vision Document on Competition and Sustainability²⁴ as well as the 2016 Basic Principles for ACM's oversight of sustainability agreements.²⁵

DRAFT

Endnotes of the Guidelines regarding Sustainability Agreements

¹ At this point, the Act on Room for Sustainability Initiatives has not yet been adopted. The bill and the latest news surrounding that bill can be found on the site of the [Dutch House of Representatives](#) (in Dutch).

² Dutch House of Representatives, parliamentary year 2018 – 2019, 35 247, no 2, Bill. See also Dutch House of Representatives, parliamentary year 2018 – 2019, 35 247, no 3, Explanatory Memorandum, pages 1/2 and 5. It follows from the bill that the scope of the Act on Room for Sustainability Initiatives is limited to requests that concern a) (1) electricity, (2) built environment, (3) industry, (4) agriculture and land use and 5) mobility; b) sustainable energy production or energy saving and c) animal health and animal welfare. In addition, an order in council can also identify other topics to which such requests may relate (Section 2, Bill on Room for Sustainability Initiatives).

³ Paris Climate Agreement, 12 December 2015, Treaty Series 2016, no 162 (to combat man-made climate change).

⁴ *The 2030 Agenda for Sustainable Development*, A/RES/70/01, United Nations. See also *Towards a safe operating space for the Netherlands*, 12 July 2018, *Van mondiale SDG-ambities naar nationale beleidsdoelen*, 13 March 2019, PBL Netherlands Environmental Assessment Agency and the Dutch SDG Reports, *Nederland ontwikkelt duurzaam*, 2017, 2018 and 2019.

⁵ Act of 2 July 2019, establishing a framework for the development of policy aimed at reducing irreversibly and progressively the Dutch greenhouse gas emissions in order to limit global warming and climate change, Bulletin of Acts and Decrees 2019, 253. Entry into effect on 1 September 2019, Bulletin of Acts and Decrees 2019, 254.

⁶ ECLI:NL:2019:2006 Supreme Court of the Netherlands 19/00135 dated 20-12-2019, State of the Netherlands v. Urgenda Foundation.

⁷ Among other publications: *A circular economy in the Netherlands by 2050*, Ministries IenM and EZ, September 2016, *Circular Economy Implementation Programme 2019-2023*, Ministries IenW and EZK, February 2019, *Final Report on Raw Materials or Waste*, Ministry IenW, October 2019, *Agriculture, Nature and Food: valuable and connected*, Ministry of Agriculture, Nature and Food Quality, September 2018, *Restructuring Plan for LNV, Towards a new perspective*, June 2019 and the letter to the Dutch House of Representatives, *Sustainable Cattle-farming*, Ministry of Agriculture, Nature and Food Quality, September 2019. See also the National Energy and Climate Action Plan 2021-2030, Ministry EZK, November 2019.

⁸ UN General Assembly, Resolution A/Res/66/288 of 27 July 2012, RIO + 20. See also Dutch House of Representatives, 2018-2019 session, 35 247, No 3, Explanatory Memorandum to the Bill on Room for Sustainability Initiatives, p. 11

⁹ <https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten> (in Dutch)

¹⁰ <https://www.acm.nl/nl/publicaties/leidraad-afspraken-tussen-leveranciers-en-afnemers> (in Dutch)

¹¹ There are also other statutory exemptions from the prohibition of cartels. Sections 12 and 13 of the Dutch Competition Act provide for agreements that fall under a European block exemption. Another example is Section 7 of the Dutch Competition Act, which exempts agreements of minor importance from the prohibition of cartels (so-called block exemption).

¹² With regard to such sustainability agreements, the following are also relevant: the Commission Communication (2011/C 11/01), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ 2011 C 11/1), marginals 257, 259, 263 and beyond (hereinafter: Guidelines for Horizontal Guidelines on the Functioning of the European Union).

¹³ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, marginal 280.

¹⁴ Court of First Instance, judgment of 26 September 2018, EAEPC, T-574/14, marginals 130, 133 and 134.

¹⁵ Commission Notice (2004/C 101/08), Guidelines on the application of Article 81 (3) of the Treaty (OJ C 2004, 101, p. 97-118) (hereinafter: Guidelines on the Application of 101 (3) TFEU).

¹⁶ Policy Rule of the Minister of Economic Affairs of 30 September 2016, No WJZ/16145098, containing policy rules for the application by the Netherlands Authority for Consumers and Markets of Section 6 (3) of the Dutch Competition Act in the case of anti-competitive agreements made for the purpose of sustainability, Dutch Government Gazette 2016, No 52945, 5 October 2016.

¹⁷ See Section 6 (4) of the Dutch Competition Act.

¹⁸ Guidelines on the Application of 101 (3) TFEU), marginals 59 through 72.

¹⁹ Court of First Instance, judgment of 11 July 1996 in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision*, marginals 119 and 120.

²⁰ Guidelines on the Application of 101 (3) TFEU), particularly marginals 43 and 85.

²¹ Guidelines on the Application of 101 (3) TFEU), particularly marginals 87 – 89.

²² See: CE Guide on environmental prices (CE Delft 2017)

²³ General Guidance for Cost-Benefit Analysis (CPB and PBL 2013).

²⁴ ACM, Vision Document on Competition & Sustainability, May 2014.

²⁵ <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/duurzaamheid-en-concurrentie/uitgangspunten-toezicht-acm-op-duurzaamheidsafspraken> (in Dutch).