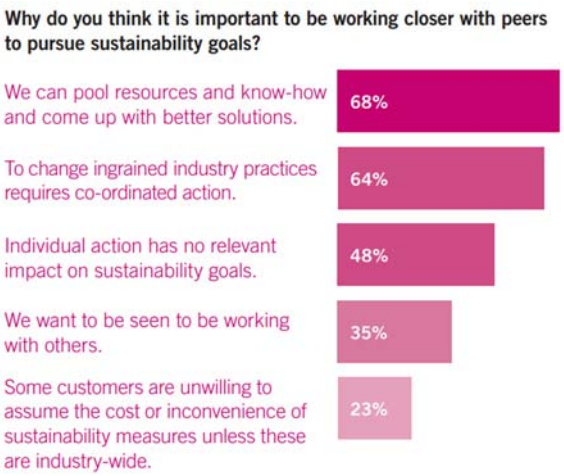
Linklaters

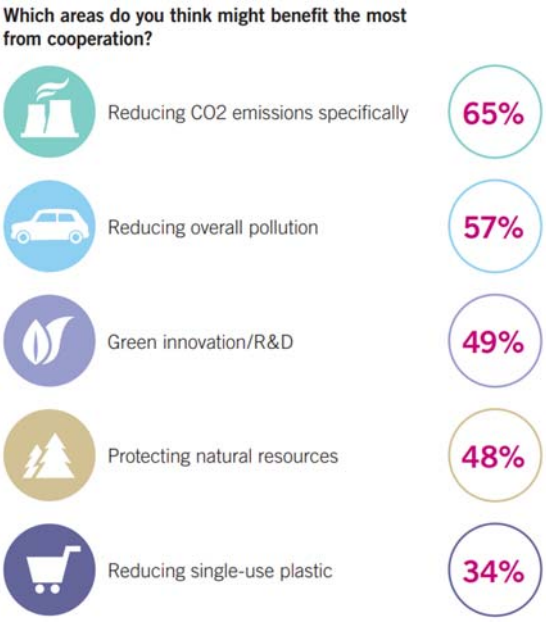
Response by Linklaters to the ACM's consultation on the draft guidelines on sustainability agreements

Linklaters LLP strongly supports the initiative of the Authority for Consumers & Markets (the "**ACM**") to lead the way in the debate about the role of competition law in facilitating (or hampering) sustainability projects.

Competition policy has an important role to play in striking the right balance between encouraging or disincentivising collective action by industry to achieve sustainability objectives. Indeed, achieving such objectives will require close co-ordinated action, often between competing firms, to overcome a potential "first-mover disadvantage" and deliver initiatives of sufficient scale to have a meaningful impact. At the same time, while the European Commission (the "**Commission**") is asking businesses for bold action to meet the challenges of climate change, the absence of clear competition law guidance has been hampering industry-led sustainability initiatives throughout the EU.

A survey we recently conducted among business leaders found that nine out of ten businesses consider collaboration key to achieve progress on sustainability issues.[1] At the same time, 57% of business leaders that participated in the survey indicated that there are concrete examples of sustainability projects that they did not pursue because the legal risk was too high. The figures below provide a more detailed insight into the outcomes of our survey.





[1] Available here. The survey was conducted in March 2020 and involved a poll (conducted by Censuswide on behalf of Linklaters) among 200 sustainability leaders at large corporates in the France, Germany, the Netherlands, the UK and USA.

Also the European Parliament has asserted that a restricted approach to competition law has "*increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards*".[2] As advisors, we have seen cases where companies have forgone genuinely beneficial projects because of perceived competition law risks which they considered could not be appropriately mitigated despite our advice. Guidance on the scope and parameters of sustainability collaborations from a competition law perspective will encourage positive behaviour in the private markets and help the development of a (more) sustainable society.

The ACM taking the lead with its proposed guidelines on sustainability agreements (the "**Guidelines**") is a brave, welcome and positive development. To support this initiative further, we set out a number of observations in this paper that could help to make the Guidelines more effective and give companies (and their advisors) the tools to conduct a self-assessment with confidence. We have indicated in the title of each section to which part of the Guidelines our observations relate.

1 Cooperation not restrictive of competition (para. 14 onwards)

It is helpful that the Guidelines specify five categories of agreements that fall outside the scope of Article 6(1) of the Dutch Competition Act ("**DCA**"). However, it would be helpful to practitioners if the ACM could expand on the legal basis underpinning the exclusion of certain categories of agreements from the application of Article 6(1) DCA; more specifically, whether these agreements are excluded because the ACM does not consider them to result in anticompetitive effects or whether this is instead an application of the Wouters doctrine as developed by the European Court of Justice under Article 101(1) TFEU.[3]

2 The scope of the benefits to be considered (para. 28 onwards)

The Guidelines helpfully highlight that a broad range of potential benefits are taken into consideration in the assessment under Article 6(3) DCA. Reference is made to 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.

We encourage the ACM to consider a broad range of (non-price related) qualitative efficiencies, such as technical or economic progress, green supply chains and lower CO2 emissions, within the framework of Article 6(3) DCA. From the perspective of society as a whole, a more sustainable product is often a better product so that product sustainability itself is a qualitative benefit.[4] The Guidelines provide the right framework by placing the emphasis on benefits that are useful not only to the direct consumers, but, also to society (or parts thereof) in a broader sense.

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[2] See in this regard A. Gerbrandy, G. Piscitelli, "The sustainability dilemma in competition law", *ECDPM Great Insights magazine*, Winter 2018/2019, Volume 8, issue 1; and S. Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement*, Volume 8, Issue 2, July 2020, p. 354–405.

[3] In *Wouters* (Case C-309/99 - Wouters and others, Judgment of 19 February 2002), the European Court of Justice held that Article 101(1) TFEU does not apply to certain restrictive practices between competitors if they serve a legitimate public interest, such as: ensuring the integrity and proper practice of the legal/pharmaceutical profession, protecting the fairness of sports against doping practices, or upholding the quality of accountancy services.

[4] As we explain in more detail below, it is not (yet) a given that this is also the case from a consumer's perspective.

3 A qualitative assessment of the benefits (para. 31 onwards)

The Guidelines note that the parties to an agreement can substantiate the benefits either qualitatively or quantitatively. Which substantiation is the most appropriate will be determined on a case-by-case basis.

In light of the difficulties associated with demonstrating long-term objective benefits, we appreciate the approach set out in the Guidelines. Since certain benefits cannot (easily) be quantified, there must also be scope for a qualitative analysis. In the past, quantification has been the preferred method. For example in the Dutch coal plan closure case[5], the ACM has compared higher electricity prices associated with closure of coal plants against the benefits of lower emissions, which were calculated based on a combination of shadow prices (which track emission costs) and prevention cost method (which tracks the savings in not needing to take emission reducing measures). In the Dutch Chicken of Tomorrow case[6], the ACM relied on the other hand on the "willingness to pay" test, thereby comparing higher prices of sustainably produced chickens against consumers' willingness to pay for animal welfare and environmental improvements.

Rather than being the exception to the rule, the qualitative assessment should in our view be on an equal footing with the quantitative assessment. The choice of substantiation requires a fact-specific approach. Indeed, too strong a focus on quantifying benefits risks blocking sustainability initiatives which, when assessed qualitatively, would be beneficial. This is in particular the case when non-price effects need to be measured (e.g., quality, choice and innovation).

This broader approach requires an adjustment of the traditional analytical tools to measure the full economic effects of an agreement, including its impact on sustainability. Against this background, it would be helpful if the Guidelines explained in more detail what is required in relation to qualitative substantiation. The Guidelines now note that "*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*."

4 True costs and true prices (para. 35)

In paragraph 35 of the Guidelines, the ACM suggests that companies engaging in sustainability initiatives can recoup their increased costs through marketing activities and promoting their sustainable products. This assumption is, at the very least, questionable.

Investing in more sustainable production processes and products increases a company's development and production costs. As a result, sustainable products are in general more expensive than non-sustainable ones. At the same time, consumers in the EU tend to be price sensitive. Companies need to address this challenge to become more sustainable while remaining competitive. It is often not (yet) a given that consumers across the board are prepared to pay more for sustainable products. This has to be assessed on a case-by-case basis, as is also reflected in ACM's precedents (in particular the Chicken of Tomorrow case[7]). More generally, the Guidelines would benefit from a more detailed consideration of the passing-on of increased sustainability costs

[5] ACM Memo of 29 September 2013, ACM analysis of closing down 5 coal power plants as part of SER Energieakkoord (available here).

[6] ACM Memo of 26 January 2015, ACM analysis of the sustainability arrangements concerning the Chicken of Tomorrow (available here).

[7] *Ibid.*

to consumers (or the lack thereof). As already mentioned in the introduction, there is a general "first-mover disadvantage" inherent in sustainability initiatives.

5 Determining the fair share (para. 36 onwards)

We welcome the ACM's position that strict adherence to the principle of full compensation of consumers is not appropriate to achieve sustainability goals. That said, the distinction between environmental-damage agreements and other sustainability agreements is not entirely clear and obvious to us. More specifically, the Guidelines would benefit from more detailed guidance on the definition of an environmental-damage agreement. In addition, the distinction made seems to suggest that there are more and less important sustainability objectives (e.g., environment versus animal welfare or fair trade). We do not consider such a distinction necessary and it is also not an area where the ACM would be best placed to do so (as it is in essence a political choice). Finally, in relation to environmental-damage agreements specifically, the rationale and merit of the limitation of the exception included in paragraph 41 of the Guidelines (i.e., the requirement that 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) is unclear to us.

6 The "safe harbor" (para. 46 onwards)

We welcome the ACM's proposal to create specific sustainability "safe harbors" for which it is not necessary to quantify the benefits of the cooperation. Indeed, the need to quantify the pros and cons of sustainability agreements stems from the fact that the Commission's horizontal cooperation guidelines and case law at EU level has applied the consumer-welfare test in a narrow manner. In our view, against the background of today's need for a more sustainable society and economy, competition law enforcement as we have known it over the past decades needs to be re-adjusted and applied in a more flexible way so as to allow companies to achieve sustainability goals and be a pillar of the green economy.

We do note however that the ACM's proposal introduces a safe harbor threshold of 30%, above which agreements between competitors may not need to be evaluated on a quantitative basis. Such a threshold may be a difficult hurdle to overcome in practice. To have a meaningful impact in mitigating the effects of, for example, climate change, sustainability agreements will typically need to be industry-wide and span several levels of the value chain. Indeed, what matters when it comes to putting in place a new and effective sustainability cooperation is that either the entire industry abides by it or at least a very significant part of the relevant players adopts the agreements/standards. Such initiatives would therefore often require more than a 30% coverage of the relevant market. It is therefore important for the ACM to consider the legality of these agreements, despite the involvement of all/most market participants.

7 The limits of a quantitative assessment of the benefits (para. 49 onwards)

The Guidelines note that, when a quantitative assessment of the pros and cons of a sustainability measure is required (above the safe harbor thresholds), both sides need to be expressed in monetary terms (i.e., price effects).

As a matter of principle, reducing fundamentally non-economic effects (e.g., environmental effects) to economic values is a clear-cut way of conducting a balancing exercise. However, while in general a short-term analysis of the costs and benefits will be a good proxy for longer-term costs and benefits, such an approach disregards the dynamics that may change the relative weighting of costs and benefits over time.

In relation to environmental benefits specifically, emission-reducing technology and processes may be very expensive and lead to significantly higher pricing. How the benefits resulting from the sustainability objectives will outweigh the competitive harm is therefore of crucial importance. In order to ensure that the benefits can be clearly quantified, it is important to evaluate the elements of environmental benefits based on objective methodologies and criteria (i.e., objective economic models) instead of complex *ad hoc* estimates of savings and costs. The Guidelines make use of proxies for the net benefits assessments of environmental-damage agreements by using the concepts of "environmental prices" and "shadow prices" (which tell us about the cost of emissions and their long-term effects). We encourage the ACM to provide more detailed guidance on how to make use of these benchmarks, so as to maximise legal certainty for businesses.

Outside the realm of environmental benefits, the Guidelines provide that: "*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*." As is the case for environmental-damage benefits, the Guidelines would benefit from more specific guidance on the methodology to calculate broader sustainability benefits. Indeed, outside the Guidelines, the precedents are old and scarce and the methodologies used are rather limited. Competition authorities have tended to focus on the more easily quantified direct cost savings or survey-based 'willingness to pay' amounts. To allow competition law to play a positive role in encouraging sustainability cooperation, the quantification exercise needs to move away from the more easily quantified but relatively narrow direct short-term price effects, and start to quantify the wider benefits. Increased consideration of non-price benefits is an area that the authorities already emphasise in relation to, for example, the effects on innovation competition of mergers. The methodology will not necessarily be straightforward, as it will require experience not just in competition, but also in wider fields such as the environment and cost-benefit analysis. But such methodologies are not outside the realm of courts and competition authorities. A similar approach is already well established in the context of private damages claims, where courts must assess the "remoteness" (i.e., causal link) of an event to decide where to draw the line. The Guidelines provide a welcome opportunity for the ACM to provide more clarity on these issues.

8 The requirement that sufficient competition remains on the market (para. 59)

As mentioned above, to be impactful, sustainability agreements will typically need to be industry-wide and span several levels of the value chain, also to avoid the "first-mover disadvantage". Even if all undertakings in a relevant market are part of the agreement, as the Guidelines correctly propose, sufficient competition will still remain on the market if market participants continue to compete on the key parameters of competition, such as price, quality or innovation depending on the specific circumstances of the market. In order to unlock the potential of sustainability cooperation, a flexible approach on the part of the ACM would be welcome to ensure that this requirement does not act as a blocking condition.

9 The ACM's policy on the assessment of sustainability agreements (para. 60 onwards)

The Guidelines recognise a need for flexibility in the application of competition rules for sustainability agreements. The proposal not to impose fines on companies that published their sustainability agreements and followed the Guidelines in good faith is very welcome and will encourage companies to pursue their sustainability objectives. As has become apparent during the Covid-19 crisis, *ad hoc* comfort letters for certain types of cooperation may lead to efficient and effective

solutions. The ACM's proposal to engage with companies to ensure the necessary adaptations to their agreements can therefore only be applauded.

The litmus test for the Guidelines will be whether the ACM's decisional practice reflects the more liberal approach advocated in the Guidelines and thus effectively provides for a flexible framework for companies to ensure sustainable cooperation. To create legal certainty and a uniform approach towards sustainability agreements, we encourage the ACM to publish each (informal) advice or decision to companies in the framework of the Guidelines, including "non-infringement" decisions clearly identifying those agreements where the environmental benefits outweigh any restrictions of competition. The publication of the ACM's reasoning will be vital to provide sufficient legal certainty and encouragement and make meaningful progress on sustainability.

In the same vein, to ensure that the Guidelines have their intended effect, it will be important to have a dialogue about these policies at European level. Indeed, the Guidelines may be of limited value in practice if other European competition authorities do not follow suit. Companies could still be faced with an enforcement risk in other jurisdictions.[8] In the past, competition authorities in the EU have repeatedly said that competition law is not the solution or even the most important policy instrument in relation to sustainability issues. We agree. However, competition law can be part of the problem.

Although the ACM is the first national competition authority in the EU to take a progressive and yet formal stance, the UK, French and Greek competition authorities have also designated sustainability as a priority, whereas the German competition authority has monitored various sustainability initiatives set up by companies. This development is fuelled by increased pressure to achieve the ambitious sustainability goals set by the EU (and in addition, those required by consumers, NGOs and investors). In reaction to the ACM's initiative, the Commission has also stressed the importance of an EU-wide approach.

It is noteworthy in this context that the European Commission previously seemed to take a more conservative approach, putting the emphasis on legislation: "*if, as a society, we want to make our world more sustainable, in ways that competition alone doesn't guarantee, the answer is not to change the rules of competition. It's to put the regulations in place that will produce the sort of outcomes we want to see*." This conservative approach was also present in the letter of J. Laitenberger to the Secretary General of the Ministry of Economic Affairs, where the Commission advocated a definition of welfare limited to the individual consumer rather than to the society as a whole.[9]

In our view, a uniform and flexible approach towards sustainability cooperation under existing competition rules is key. Although regulation creates a level playing field for all market participants, it will take significant time to adopt and implement, with more limited flexibility in practice. Put simply, it would be too time-consuming and rigid: if one were to wait for regulation in each and every case where competition law prevents a sustainability initiative from moving forward, achieving the EU's sustainability goals is put at risk.

The president of the ACM Martijn Snoep during the conference hosted by the Greek Competition Authority on Monday 28 September 2020 confirmed this point of view by stating:

[8] The Guidelines are also not binding on the courts, which could rule that an agreement is incompatible with EU or national cartel rules. Concretely, a claimant could bring a damages claim in a civil court in response to a sustainability initiative and there would be no guarantee that the court would apply the ACM's reasoning.

[9] Letter to Secretary-General, Ministry of Economic Affairs, 26 February 2016, COMP/A4/ D*011157.

> "*The ACM's mission is to make markets work well for people and businesses now and in the future". That means that competition is not a goal in itself but an "important instrument" to achieve a broader set of goals beyond "short-term consumer welfare*".[10]

We welcome this position and invite the ACL to pursue this further when finalising the draft Guidelines in the light of the observations it has received.

Linklaters LLP, 1 October 2020

[redacted]

[10] C. Connor, "EU enforcers dispute the role of antitrust in achieving green goals", GCR, 28 September 2020, p. 3. Available here.