



## **Guidelines**

# **Sustainability agreements**

**Opportunities within competition law**

**DRAFT**

# Contents

- 1. Summary ..... 3
- 2. Introduction..... 4
- 3. Overview: opportunities for sustainability agreements ..... 6
- 4. Sustainability agreements without restrictions of competition..... 8
- 5. Sustainability agreements with benefits that offset restrictions of competition ..... 12
- 6. ACM's policy on the assessment of sustainability agreements ..... 22
- Endnotes of the Guidelines regarding Sustainability Agreements ..... 24

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# 1. Summary

Sustainability is one of the key priorities of the Netherlands Authority for Consumers and Markets (ACM) as part of its mission to ensure that markets work well for people and businesses, now and in the future. 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 show what opportunities market participants have for making sustainability agreements, but they also indicate what boundaries competition law sets. Undertakings can contact ACM at all times to discuss their questions. 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.

- 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).<sup>1</sup>

## 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 stimulates innovation in the form of new or improved products and processes, so can it also stimulate innovations with regard to sustainability<sup>2</sup>. Consumers often see sustainability as a quality improvement of a product, and the availability of sustainable products increases their options. In that context, it is important that consumers are well informed about the sustainability attributes of products. In order to protect consumers better and to combat misleading practices and unfair competition, ACM has drawn up the Guidelines regarding sustainability claims. Those guidelines explain how the consumer protection rules regarding unfair commercial practices apply to sustainability claims made by businesses.<sup>3</sup>
3. However, it is often pointed out that there is some sort of tension between sustainability and competition. National and European competition rules supposedly hamper innovations with regard to sustainability, because they supposedly prohibit the agreements that businesses, in their view, believe are necessary. 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.<sup>4</sup>
4. Over the past few years, the societal, political and legal attention for climate change, biodiversity, and sustainable development has risen dramatically. In 1992, the Convention on Biological Diversity, held in Rio de Janeiro, was signed. After that, and particularly in recent years, attention for sustainability has taken off. For example, in 2015, the Paris Climate Agreement was signed<sup>5</sup> and seventeen Sustainable Development Goals (SDGs) were set.<sup>6</sup> 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 2050.<sup>7</sup> 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.<sup>8</sup>
5. With such developments, concrete policy goals and 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 overarching 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.<sup>9</sup> 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.

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### 3. Overview: opportunities for sustainability agreements

6. 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*

7. 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”.<sup>10</sup> This may include the protection of the environment, biodiversity, climate, public health, animal welfare, fair trade, working conditions (such as child labor, livable wages, the right to unionize), and human rights. 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. ACM does however use a specific and very precise definition of environmental-damage agreements, because, for such agreements, a different interpretation is used of the requirement that users are allowed a fair share of the benefits of the agreement.

#### *Environmental-damage agreements*

8. Environmental damage can be described as damage to the environment in the production and consumption of goods or services. Environmental damage results, for example, from the emission of harmful air pollutants and greenhouse gases, and from the waste of raw materials. We call the resulting damage for society, which is not included in the price of production, negative externalities. This damage manifests itself as atmospheric heating, a reduced biodiversity, and/or less healthy livelihoods. Environmental damage implies the inefficient usage of scarce natural resources. If undertakings, by working together, reduce environmental damage, they thus generate an efficiency gain. That gain will not only be reaped by the users of the products in question, but also by society as a whole. ACM believes that, with regard to such collaborations, a different interpretation than usual can be used for the requirement that the users are allowed a fair share of the benefits of an agreement (see marginals 36 and 46-48).
9. 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*

10. 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 to decisions of associations of undertakings that compete with each other (so-called ‘horizontal restraints’). The *Guidelines regarding agreements*

*between competitors* explain in greater detail the assessment of such agreements.<sup>11</sup> 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*.<sup>12</sup> With regard to certain agreements (including horizontal ones), such as price-fixing agreements and the sharing of customers or sales areas, it is assumed, in principle, that they fall under the cartel prohibition, and have the object of restricting competition. Sustainability agreements may contain both horizontal and vertical agreements<sup>13</sup>.

11. However, 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*

12. Not all agreements between undertakings fall under the cartel prohibition. Agreements, which, for example, concern less important competition parameters and the impact of which on competition is negligible, may fall outside the scope of the cartel prohibition. ACM explains this in more detail in **chapter 4**.

*Opportunity 2*

13. 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**.<sup>14</sup>

*Opportunity 3*

14. 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.
15. 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**.

## 4. Sustainability agreements without restrictions of competition

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

### *General remarks*

17. Sustainability agreements are mostly aimed (through innovation or not) 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.
18. In a number of rulings, the Court of Justice of the European Union has come to the conclusion that agreements fall outside the scope of Article 101 TFEU if the anticompetitive restrictions in question are inherent in or necessary for the pursuit of a legitimate objective. ACM does not rule out that this case law also applies to sustainability agreements, but finds the doctrine regarding this point still insufficiently clear for it to give its interpretation in these Guidelines<sup>15</sup>. On the other hand, ACM believes that the framework for exemptions from the cartel prohibition under Section 6, paragraph 3 of the Dutch Competition Act is particularly suitable for weighing the benefits of sustainability agreements in a well-structured manner against the anticompetitive effects.
19. 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.
20. 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.
21. Also, the exchange of information in preparation of or as part of sustainability agreements is allowed, provided that the competition-law boundaries are respected in those processes. Guidance for what is and what is not allowed can be found in the Guidelines regarding arrangements between competitors, and can also be deduced from the practice that has emerged as a result of the establishment of concentrations<sup>16</sup>.
22. Below is an overview of several categories of sustainability agreements that, generally speaking, are not anticompetitive, and that are therefore allowed<sup>17</sup>.



## Categories of allowed sustainability agreements

23. 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.
24. A second category concerns **codes of conduct promoting environmentally-conscious, climate-conscious or socially-responsible practices**. These often involve joint standards and certification labels about the use of raw materials, production methods, etc.<sup>18</sup> 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.<sup>19</sup>
25. 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 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.
26. A fourth category concerns **initiatives where new products or markets are created through innovation, and where a joint initiative is needed for acquiring sufficient production resources, including know-how, or for achieving sufficient scale**. Sometimes, joint actions (possibly on an exclusive basis) 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, so that they are able to make available that knowledge to contractors other than those that were involved in the pilot.

27. The fifth and last category concerns agreements whose sole purpose is to make the **undertakings involved, their suppliers and/or their distributors respect the national or international standards that apply to doing business in countries outside Europe, particularly in developing countries**. 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 arrangements, allowing them to perform such checks. The standards in question often concern respecting labor laws and other fundamental social rights (for example, banning child labor, paying a minimum wage, the rights of indigenous peoples, and respecting the right to unionize), protecting natural resources (such as restricting the logging of certain types of tropical wood), and respecting fair-trade rules (such as a ban on bribery). These standards usually follow from international conventions or treaties. They are subsequently laid down in local legislation or in legislation of the country where the importer or processor is officially registered. However, it is also possible that these international standards have not or not sufficiently been laid down in national legislation.
28. In the Netherlands, such gaps have, for some time now, also been addressed by international corporate social responsibility covenants (CSR covenants)<sup>1</sup>. As part of such CSR covenants, undertakings make arrangements with regard to compliance with international standards with regard to child labor, livable wages, and the right to unionize. Such standards may follow from international treaties, and, within the Dutch legal system, can be binding on both the government and the corporate world. If CSR covenants involve the fleshing out of sufficiently concrete and binding international standards, they will fall outside the scope of the cartel prohibition. In that context, it is important that such agreements do not unnecessarily restrict competition. Undertakings should, in particular, be cautious about publishing information that could be competition-sensitive.
29. In cases where CSR covenants concern (in part or fully) the compliance with standards that go beyond the international standard and/or of which the degree of legal binding within the Dutch legal system is unclear, individual assessments of the agreements must be made. With regard to situations with an appreciable restriction of competition, the benefits of the agreements may offset their anticompetitive effects. These Guidelines offer guidance for making the latter assessments. ACM is also ready to discuss in what ways the objectives of CSR covenants can be best kept (or can be made) compatible with competition law (for more information about how to contact ACM, go to chapter 6).

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<sup>1</sup> See also: [www.imvoconvenanten.nl](http://www.imvoconvenanten.nl)

### *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) *can* 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

30. 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 drawbacks of those agreements.<sup>20</sup> 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.
31. 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.<sup>21</sup> 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.<sup>22</sup>
32. 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.<sup>23</sup>
33. 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

34. 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*

35. 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, for example, using existing studies conducted by knowledge institutions, government agencies, international organizations (or the research divisions thereof), influential NGOs, or studies of their own.
36. Benefits can follow from sustainability agreements for both the users as well as for society, in the broader sense of the word. Such benefits can relate, first of all, to the reduction of negative externalities in production or consumption. As a result thereof, scarce natural resources (common

resources) are used in a more efficient manner. To that end, regulations or collaborations are often needed. In that context, sustainability agreements can play a role. In these Guidelines, we refer to those as environmental-damage agreements.

37. In addition, sustainability agreements can, like other collaborations in other areas, generate various other efficiency gains. They can stimulate innovation, as a result of which sustainable products are produced at lower costs or they can make it easier for sustainable products to be introduced into or distributed on the market<sup>24</sup>. Also, sustainability agreements may result in consumers being better informed about the sustainable attributes of products. Finally, efforts can be made, for example certification, to ensure that such attributes are better safeguarded, and to prevent unfair competition as a result of free riding<sup>25</sup>.
38. The above does not take away the fact that undertakings are often also themselves able to make their production processes more sustainable, either because various types of regulation offer sufficient incentives to do so, because they are able to gain a competitive advantage with such a move, or because they aim to make their production processes more sustainable anyway. Undertakings more and more often realize that the social costs (*true costs*) of their products may differ from the actual operational costs. Undertakings may seek to minimize that discrepancy or to offer more transparency about those costs. For example, they can pay a 'livable wage' or compensate for the emissions of greenhouse gases. In their marketing efforts, they can use those elements for extolling the virtues of their products among consumers.

#### *Description of the benefits*

39. A first, logical step when testing agreements against the first criterion of paragraph 3 is to identify and describe the sustainability benefits in question as concretely as possible, for example, by indicating *what* harmful emissions are reduced.
40. It is subsequently important to know *to what extent* sustainability benefits can be expected. For example, it can be explained to what extent certain harmful emissions will be reduced, and over what period of time. ACM will also take into account long-term benefits, since such are typical of many sustainability agreements.
41. Sometimes, a description of the benefits will have to remain qualitative. Benefits with regard to innovation or animal welfare are more difficult to quantify, for example. The description of such benefits will therefore 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.
42. The extent to which the benefits of a sustainability agreement must be analyzed (in terms of the level of detail, degree of quantification, and likelihood) depends in part on the way in which the benefits and the restrictions of competition must be assessed (see under criterion b), particularly whether that assessment can remain qualitative or must have a more quantitative character.

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

43. According to the second criterion of paragraph 3, users (buyers) 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.<sup>26</sup> In addition, these can be direct users as well as indirect ones, lower in the production chain, and (finally) the end-user.
44. 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.<sup>27</sup>

#### **What is a fair share?**

45. 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 is an environmental-damage agreement, *and* (ii) the agreement helps, in an efficient manner, comply with an international or national standard, or it helps realize a concrete policy goal (to prevent such damage). Only if both criteria are met, then ACM believes that users do not need to be compensated in full.
46. Therefore, ACM makes in these Guidelines a distinction between *environmental-damage agreements* and *other sustainability agreements*. As already noted in marginal 8, environmental-damage agreements concern the reduction of negative externalities, and, as a result thereof, a more efficient usage of natural resources.
47. Other sustainability agreements may concern social or other forms of sustainability, such as imposing certain minimum standards on production processes. Examples include changing the recipes of food products for public-health reasons, and setting minimum requirements for animal welfare in the production of meat.
48. ACM believes that, with regard to environmental-damage agreements, it should be possible, also in a paragraph 3-assessment, to take into account benefits for others than merely those of the users. 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. Moreover, they enjoy the same benefits as the rest of society. In that context, the agreement must contribute (efficiently) to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective. One example of a concrete policy objective is the government's policy aimed at reducing CO<sub>2</sub> emissions on Dutch soil by year X by Y%.
49. With regard to other sustainability agreements, users still need to be fully compensated for the harm they suffer caused by the restriction of competition. First, this concerns agreements that are not related to the reduction of environmental damage, but that do fall under the broader definition of sustainability agreements. Second, it can concern agreements that do relate to the reduction of environmental damage but that are not necessary for achieving a standard or concrete policy objective. Think of product standards or environmental standards that are more ambitious than the

standard or the policy objective. These are assessed similarly as the 'other sustainability agreements'.

50. As previously mentioned, the other sustainability agreements, which ACM thus distinguishes from the environmental-damage agreements for the purpose of the application of the 'fair-share' criterion, concern, among other aspects, working conditions, animal welfare, social sustainability, and human rights. With regard to these other sustainability agreements, 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. Even if a concrete policy objective did exist, the element of the negative externalities would be lacking, and, by extension, the inefficient usage of common resources, such as mentioned in marginal 36.
51. This means that, for example, if such other sustainability agreements lead to a quality improvement in production, but also lead to a price increase, the users (as a group) will have to attach sufficient value to those quality improvements to offset the price increase.
52. It is possible that a sustainability initiative concerns both the reduction of environmental damage as well as other sustainability aspects. In that case, the assessment under the second criterion of paragraph 3 will have a mixed character. Insofar the initiative concerns the reduction of environmental damage, the benefits for society can be included in their entirety, while for the other aspects, only the benefits for the users on the relevant market can be included.

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

53. 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***

54. ACM believes that, in the following types of cases, it is usually possible to conclude that an agreement meets the second criterion of 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, based on a rough estimate, evidently smaller than the benefits of the agreement.

***(i) Sustainability agreements with limited market shares***

55. If sustainability agreements are made by undertakings with a combined market share of no more than 30%, a qualitative assessment will suffice. 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, it is plausible that real benefits can be achieved. 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*

The joint performance of the waste collection could restrict competition among the collectors involved. 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) Based on a rough estimate, the benefits are larger than the harm to competition that it causes*
56. A second category of agreements that lend themselves for a quantitative assessment are the cases in which, at first glance, it is already evident 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 large benefits in return. It can be safely assumed, without any further assessment, that users are allowed a fair share of the benefits. Whether a price increase or a reduction of the options is 'limited' cannot be captured by a fixed formula. Such factors need to be assessed in relationship to the importance of the agreement's 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. The suppliers have subsequently made a plausible case that each of them will not individually switch to the new production method, as that would lead to a loss of customers. Furthermore, it is plausible that the agreement's benefits more than offset the drawbacks. 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*

57. 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 cheaper yet pollutive product varieties are no longer offered. In quantitative assessments, such drawbacks are expressed as price effects as accurately as possible.
58. Benefits of *environmental-damage agreements* are expressed in monetary terms using so-called environmental prices.<sup>28</sup> These environmental prices are values that express the price that society assigns to 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)<sup>29</sup> can be used as a starting point. If an environmental price is set with an eye to the realization of a concrete policy objective, it is called an environmental price based on prevention costs. If an environmental price is more directly based on the damage that

a certain production or consumption causes to humans and the environment, it is then called an environmental price based on damage costs.

#### *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 CO<sub>2</sub>. 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 CO<sub>2</sub> 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 CO<sub>2</sub> emissions. The participating undertakings have a combined market share of over 30%.

#### *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 CO<sub>2</sub> emissions, such as subsidies, revocations of licenses, and a partial CO<sub>2</sub> tax. It is unlikely that the government will be able to achieve the concrete 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 CO<sub>2</sub> 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 calculated environmental benefits offset the expected price increase. Furthermore, it appears that the used environmental prices are a suitable benchmark for assessing the efficiency of a sustainability agreement. It can therefore be assumed that the agreement helps, in an efficient manner, realize the policy objective, thereby also meeting the third criterion of paragraph 3 (see marginal 67). The buyers of the end product in question represent merely 30% of the Dutch population. 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.

59. 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 preventing environmental damage. By using environmental 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 concrete policy objective exists. Every member of society will benefit from these sustainability gains, regardless of whether they are a consumer of that particular product. These total benefits for Dutch society are used in the paragraph-3 assessment of the costs and benefits.

60. It is important to note that the consumers (the buyers of the product) in this example are also 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 concrete 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 negative externalities of the production in question, it is justified to take the sustainability gain for society as a whole into account when testing the agreement against the second criterion of paragraph 3, and particularly in the assessment of the question of what is meant by a fair share of the benefits for users.
61. Environmental prices often 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 the valuation of users for a certain product or product feature such as an improvement in terms of human friendliness, animal friendliness or environmental friendliness. Various methods can be used for determining the valuation (interpreted as willingness to pay) of users<sup>30</sup>. In that context, the valuation of future users can also be taken into account<sup>31</sup>.
62. The valuation of users of sustainable (or more sustainable) products can be determined using a willing-to-pay study. In that context, a distinction can be made between willingness-to-pay studies on the basis of *revealed* preferences or on the basis of *stated* preferences. In the former, revealed choice behavior is used to determine what consumers are willing to pay for certain products. In the latter, that willingness-to-pay is determined by asking consumers about the choices they would make in certain hypothetical situations. For the latter method, various techniques are available, such as the Contingent Valuation method and the Conjoint Analysis method<sup>32</sup>. In the first method, respondents are asked what valuation they have for certain real, existing products. In the second method, the valuation of various product features is identified separately. ACM used the Conjoint Analysis method in the Chicken of Tomorrow case. These methods are discussed in detail in the Technical Report on Sustainability and Competition of Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, which was commissioned by ACM and the Greek competition authority HCC. This report is published together with these Guidelines. ACM understands that a willingness-to-pay study is not easy. ACM is ready to answer any questions in concrete cases.

#### *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.

63. 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?***

64. The necessity criterion means that it is plausible that the sustainability agreement (all of its elements) is necessary for realizing the objective as well as the resulting benefits. In that context, (i) the agreement in itself must be necessary for the realization of the benefits, *and* (ii) each of the individual restrictions of competition that follow from the agreement are necessary.
65. It can be demanded from the parties to the sustainability agreement to make a plausible case that (i) no alternative measure is possible that is less anticompetitive than the agreement, and (ii) that all anticompetitive elements of the agreements are essential to the realization of the objective. They can do so by demonstrating that one of the situations described in marginals 36-37 applies. An agreement can be necessary, for example, because no individual market participant is able, for economic reasons, to realize changes to its production or distribution that result in a more efficient usage of resources. Another example is a situation where one or more undertakings are only able to realize the objective to a demonstrably less efficient degree, because of a lack of expertise or scale. In that case, the sustainability agreement promotes innovation, and allows sustainable products to be introduced sooner or more effectively<sup>33</sup>.
66. 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 magnitude of the potential efficiency gains as well as the likelihood that these are indeed realized,

then that route should be taken<sup>34</sup>. In some sectors, market participants only make agreements, for example, about quality standards with regard to sustainability aspects of products and services, without agreeing that market participants will not manufacture or sell products and services that do not meet those standards. Such agreements are clearly less anticompetitive than an agreement about no longer producing or selling certain products and services.

67. The necessity criterion offers a safeguard that efficiency gains are not realized at unnecessarily high costs. The more restrictive the agreements are to competition, the more precise the assessment on the basis of this criterion must be<sup>35</sup>. From this criterion, it follows that the undertakings involved make agreements that restrict competition as little as possible. This means, among other things, that the agreements must be cost-efficient. In this regard, there is no difference between the types of sustainability agreements identified in these Guidelines. In addition, specifically with regard to environmental-damage agreements, the measures may not lead to higher costs for users than the costs of any upcoming government measures with a similar objective as the sustainability agreement.
68. 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?***

69. 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 relevant market. 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<sup>36</sup>.

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

70. 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.
71. If undertakings are unsure about the way in which their self-assessments should be done or 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 options it sees, identify any risks, and it will help find possible solutions. ACM itself will not launch any investigations, but it will base its assessment (informal) on the basis of public information as well as on the information submitted by the undertakings. Undertakings can thus contact ACM at all times to discuss the potential anticompetitive risks of sustainability agreements they wish to make. In consultation with market participants, ACM will, with an eye to more guidance, publish its informal assessments of risks and solutions in future concrete cases, taking into account the confidential nature of the stage in which agreements are made, as well as the confidential nature of some business data.
72. With regard to sustainability agreements that have been published, and where these Guidelines have been followed in good faith, 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*

73. 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.
74. 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.
75. 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).

76. 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.
77. The bill may offer options for initiatives the benefits of which are predominantly realized 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***

78. 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.
79. These Guidelines supersede the 2014 Vision Document on Competition and Sustainability<sup>37</sup> as well as the 2016 Basic Principles for ACM's oversight of sustainability agreements.<sup>38</sup>

## Endnotes of the Guidelines regarding Sustainability Agreements

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<sup>1</sup> 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).

<sup>2</sup> In addition to innovation, there are other options to improve sustainability, for example, by withdrawing a product from the market, not longer using a production process, or changes to the production process that are not innovations.

<sup>3</sup> <https://www.acm.nl/en/publications/acm-draws-rules-thumb-sustainability-claims>

<sup>4</sup> 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).

<sup>5</sup> Paris Climate Agreement, 12 December 2015, Treaty Series 2016, no 162 (to combat man-made climate change).

<sup>6</sup> *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.

<sup>7</sup> 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.

<sup>8</sup> ECLI:NL:2019:2006 Supreme Court of the Netherlands 19/00135 dated 20-12-2019, State of the Netherlands v. Urgenda Foundation.

<sup>9</sup> 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.

<sup>10</sup> 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

<sup>11</sup> <https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten> (in Dutch)

<sup>12</sup> <https://www.acm.nl/nl/publicaties/leidraad-afspraken-tussen-leveranciers-en-afnemers> (in Dutch)

<sup>13</sup> Alliances, coalitions, and network agreements in the circular economy (in the transition thereto) or the circular agriculture can emerge simultaneously, for example, within a production and distribution chain, and between production and distribution chains.

<sup>14</sup> 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).



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<sup>15</sup> ECJ, 19 February 2002, case C-309/99 (Wouters/Nederlands Orde van Advocaten), ECJ, 18 July 2006, case C-519/04 (Meca Medina), ECJ, 18 February 2013, case C-1/12 (OTOC) and ECJ, 18 July 2013, case C-136/12 (CNG).

<sup>16</sup> The basic principles for the permissibility of information exchanges have been laid down in the Guidelines regarding arrangements between competitors, section 3.6.

<sup>17</sup> For a general assessment of the anticompetition objective or effects (of the lack thereof), see Guidelines on the application of Article 101(3) TFEU, particularly marginals 18 – 22.

<sup>18</sup> 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).

<sup>19</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, marginal 280.

<sup>20</sup> Court of First Instance, judgment of 26 September 2018, EAEPC, T-574/14, marginals 130, 133 and 134.

<sup>21</sup> 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).

<sup>22</sup> 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.

<sup>23</sup> See Section 6 (4) of the Dutch Competition Act.

<sup>24</sup> Guidelines on the application of Article 101(3) TFEU, marginals 59 through 72

<sup>25</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, marginal 95 – 100 and 208 – 310.

<sup>26</sup> Guidelines on the Application of Article 101 (3) TFEU, particularly marginals 43 and 85.

<sup>27</sup> Guidelines on the Application of Article 101 (3) TFEU, particularly marginals 87 – 89.

<sup>28</sup> See: CE Guide on environmental prices (CE Delft 2017)

<sup>29</sup> General Guidance for Cost-Benefit Analysis (CPB and PBL 2013).

<sup>30</sup> In this context, a distinction can be made between studies on the basis of stated preferences and revealed preferences. Measuring preferences on the basis of revealed preferences is generally considered to be more reliable, and is therefore preferred.

<sup>31</sup> Stefan Thomas and Roman Inderst, Prospective Welfare Analysis – Extending Willingness-to-pay Assessment to Embrace Sustainability, 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699693)

<sup>32</sup> General Guidance for Cost-Benefit Analysis (CPB and PBL 2013).

<sup>33</sup> Guidelines on the Application of Article 101 (3) TFEU, particularly marginals 75 – 82.

<sup>34</sup> Guidelines on the Application of Article 101 (3) TFEU, marginal 79

<sup>35</sup> idem

<sup>36</sup> Guidelines on the Application of Article 101 (3) TFEU, particularly marginals 75 – 82.

<sup>37</sup> ACM, Vision Document on Competition & Sustainability, May 2014.

<sup>38</sup> <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/duurzaamheid-en-concurrentie/uitgangspunten-toezicht-acm-op-duurzaamheidsafspraken> (in Dutch).