



Vision Document Competition & Sustainability

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Brief summary

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

1 Introduction

1.1 Sustainability and competition

In this Vision Document, ACM explains its perspective on the cooperation between undertakings with respect to sustainability (hereafter also referred to as: 'sustainability initiatives') and the cartel prohibition. ACM does so in order to offer businesses more clarity about the room for cooperation with regard to sustainability. This Vision Document demonstrates that the competition rules do offer such room.

1.2 Clarification of the competition rules is desirable

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

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

² With this Vision Document, ACM aims to reduce the likelihood of unnecessarily blocking welfare-increasing arrangements (false positives) without unnecessarily raising the risk of allowing harmful arrangements (false negatives). Such false positives occur if an agreement is incorrectly designated as anticompetitive and as falling outside the scope of Section 6, paragraph 3. False negatives are the opposite.



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

1.3 Private initiatives to realize sustainability objectives

In situations where sustainability interests are considered a public interest by the government, it may choose to enshrine this in legislation. However, a current trend is to promote objectives related to sustainability through market forces. This trend is a reason for ACM to respond to the earlier mentioned requests for clarification. An increasing number of undertakings formulate sustainability objectives. Sometimes, this is done at the request of the government. This can lead to self-regulation. Undertakings determine, more or less autonomously, the best way to achieve certain sustainability objectives, sometimes laying this down in formal arrangements⁵. If such arrangements affect factors that are normally considered competition parameters (price, quality, quantity etc.), the cartel prohibition of Section 6 of the Dutch Competition Act (Mw) and Article 101 of the Treaty on the Functioning of the European Union (TFEU) may be violated.⁶ As a result of these trends, ACM in practice often faces questions or complaints about sustainability initiatives.

1.4 ACM wishes to offer clarity

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

Additionally, ACM organized a roundtable discussion with representatives from the corporate sector in November 2011, and an expert meeting on sustainability and competition in January 2013. In

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

⁴ Dijkgraaf/Geurts motion of 24 January 2013, *Parliamentary Documents II*, 2012/2013, 33 400 XIII, no. 99.

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

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

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



March 2013, ACM launched the Sustainability Knowledge Database [*Kennisbank Duurzaamheid*] on its website.⁸ This [Knowledge Database](#) offers guidance for assessing sustainability initiatives based on decisions in actual cases. Furthermore, this Vision Document provides an overall picture of the way ACM looks at sustainability initiatives from both a legal and an economic point of view. This Vision Document, in which the reactions to its draft version during a consultation round have been included⁹, explains in what way ACM aims to implement the policy rule on Competition and Sustainability of the Minister of Economic Affairs.

2 Key principles

ACM works on the basis of the following principles.

2.1 Interpretation of the cartel prohibition when applied to sustainability initiatives

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

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

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

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

⁹ An overview of the reactions, together with ACM's reaction to those reactions, can be found in the Knowledge Bank on Sustainability (in Dutch).



applicable to this exemption. This document does not change anything to this burden of proof¹⁰, however, it aims to assist undertakings in their self-assessment.

2.3 The term Sustainability

Sustainability is a very broad term that does not have a single definition¹¹. It encompasses topics such as environmental protection, public health, fair trade production, animal welfare, etc. The activities and products that currently exist in sustainable versions include organic food, sustainable wood, sustainable fishery, fair-trade products, and renewable energy. As a regulator, ACM must be alert to the fact that not all arrangements that are labeled 'promoting sustainability' are exactly just that. Similarly, not everything that is arranged collectively under the banner of sustainability truly benefits, on balance, consumer welfare (or even just welfare in general). The mere fact of invoking sustainability will in itself not be enough for ACM to clear collaborations between competitors. The fact that the term sustainability cannot be properly defined is, in itself, not a problem, because each case is to be assessed on its own merits. In that context, it is not a deciding factor whether or not an arrangement is made under the banner of sustainability, but rather what interest is served with the arrangement, and to what extent this interest offsets the associated restriction to competition.

2.4 Sustainability initiatives are not granted a special status

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

¹⁰ This follows from Article 2 of Regulation 1/2003 of the Council of 16 December 2002, Official Journal of the European Union L1/1, 4 January 2003: "In any national or Community proceedings for the application of Articles [101] and [102] of the Treaty, the burden of proving an infringement of Article [101] (1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article [101] (3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled." [Articles renumbered in accordance with the current numbering in the TFEU].

¹¹ An often used definition of sustainability comes from the Brundtland Report (*World Commission on Environment and Development (WCED), Our common future*, Oxford: Oxford University Press, 1987 p. 43). Both CBS (Statistics Netherlands) and CPB (Netherlands Bureau for Economic Policy Analysis) apply this definition in their joint 'Monitor Sustainable Netherlands' (2009 and 2011). Please refer to: <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2012/01/10/monitor-duurzaam-nederland-2011.html> (in Dutch).

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

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



2.5 Emphasis on assessment of sustainability under paragraph 3

Not all arrangements with regard to sustainability fall under the cartel prohibition¹². In addition, it is possible that sustainability initiatives are anticompetitive, yet also comply with the exemption criteria of the cartel prohibition. This will be discussed in this Vision Document more extensively, as most questions are about this assessment.

2.6 A broad welfare concept

From an economic point of view, a broad welfare concept is used. In this welfare concept, consumer preferences play a central role. For this Vision Document, it is essential to note that consumers may also find product characteristics related to sustainability important, and may therefore value the fact that products are produced in an environmentally friendly or animal-friendly manner. From that same economic point of view, it is also important that scarce resources are used as efficiently as possible, which benefits welfare. This may also include the way the environment and depletable resources are used.

3 Assessment of sustainability initiatives

3.1 Introduction

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

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

The sections below look back on decisions where ACM and the European Commission applied this framework in competition cases in which sustainability initiatives played a role. Per criterion, the

¹² See sections 3.3.1 and 3.3.2.



various elements of the economic and legal assessment of sustainability initiatives are then explored.

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

Based on past assessments of the most common anticompetitive practices in sustainability initiatives, the following general conclusions can be drawn¹³:

- a) Arrangements relating to the selling price generally fall under the cartel prohibition. Only very few exceptions fall within the exemption criteria of paragraph 3.¹⁴
- b) Collective plans regarding an ancillary service (such as collective waste removal systems), if such systems are anticompetitive, can meet the exemption criteria in paragraph 3 subject to certain basic requirements.¹⁵
- c) Standardization for the purpose of logistics, distribution or packaging does not easily fall within the scope of the cartel prohibition, and, if it does, will relatively easily meet the exemption criteria of paragraph 3.¹⁶
- d) The cartel prohibition also offers room for arrangements that involve a qualitative restriction of supply. This may concern arrangements to only bring to market products that are sustainable (in one or more respects). Such arrangements are more likely to be anticompetitive, and also to a higher degree, if they:
 - concern a key competition parameter, as a result of which they may cause prices to rise, or to cause certain products with existing consumer demand to no longer be supplied; and
 - concern a larger share of supply on the relevant market¹⁷.

In summary, the following can be concluded from the case overview:

If a sustainability initiative benefits a certain interest that is deemed valuable by consumers and society, while no key competition parameters are restricted, then market-wide arrangements may be reconcilable with the cartel prohibition.¹⁸

In the case of qualitative supply restriction, if a key competition parameter is affected - for instance when shifting to offering only sustainable, but therefore also more expensive products - the paragraph 3 test still offers sufficient room. This test can be met relatively easily if buyers still have

¹³ ACM explained these conclusions in greater detail in the document 'The assessment of anticompetitive practices as a result of sustainability initiatives in practice,' which was released in March 2013.

¹⁴ An example of an exception is the VOTOB case: see the 1992 Competition Report of the European Commission and 'Melkdubbelte' (Milk Tuppence) NMa case 2432 (2001).

¹⁵ For example: *Stichting Papier Recycling Nederland*, NMa case 3007 (2003).

¹⁶ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal of the European Union C11/1, 14 January 2011, paragraph 331.

¹⁷ Guidelines on the application of Article [101] (3) of the Treaty, Official Journal No C 101 of 27 April 2004, paragraphs 109-110.

¹⁸ NMa case 6456 (2008), short-form opinion on anaesthetized castration of piglets.



enough options for choosing a non-sustainable product. If the latter is not the case because the arrangement is more or less market-wide, a paragraph 3 test will be relatively difficult. In such a case, an assessment must be made of the benefits and disadvantages for consumers.¹⁹ In the case of market-wide arrangements, more attention must also be paid to the requirement of having sufficient residual competition, even though this requirement does offer some leeway.

In general, undertakings will know themselves whether or not the initiative they take affects a key competition parameter. If the initiative concerns a key element of the competitive process, the companies involved in the initiative can check, based on their joint market position, if consumers still have the option between both the more expensive, sustainable product and other products. If an arrangement is market-wide, companies must review in greater detail whether, from a consumer perspective, the benefits of the sustainable production process offset the drawbacks of the restriction of consumer choices, and whether there will be enough residual competition, for example because new players can enter the market that offer sustainable products cheaper in an innovative way.

Below are the assessments of sustainability initiatives under paragraph 1 and paragraph 3 respectively.

3.3 Assessment of sustainability initiatives under paragraph 1

Not all cooperation initiatives related to sustainability fall under the cartel prohibition. This is also illustrated by examples in the Knowledge Bank on Sustainability. There are cooperation initiatives that, from an antitrust point of view, are harmless, because they concern an aspect of the operational process with regard to which it is not likely that cooperation will harm buyers. For example, undertakings may agree on the joint use of sustainability labels.

Sustainability initiatives that do not fall under paragraph 1 are therefore allowed of course. Before examining the exemption criteria for arrangements that do fall under paragraph 1, two aspects concerning the application of paragraph 1 are discussed separately: the appreciability requirement (3.3.1) and the inherent restrictions (3.3.2).

It is also possible that undertakings make arrangements under the banner of sustainability that restrict competition, and offer consumers no benefits. It goes without saying that ACM will take action against cartel agreements that are made under the banner of sustainability. One such example is the laundry detergent cartel²⁰, which was fined by the European Commission in 2011. It started as an

¹⁹ Case IV 36.718, CECE decision of the European Commission of 24 January 1999.

²⁰ See: Elina Laurinen, The Consumer detergents cartel in Competition Policy Newsletter, No 2, 2011, and the press release of the European Commission of April 13, 2011 (IP/11/473) on http://europa.eu/rapid/press-release_IP-11-473_en.htm.



initiative of a trade association to improve the environmental performance of detergent products. However, this environmental objective unfortunately also prompted coordination about, among other aspects, prices, which was not required.

3.3.1 Appreciability

The first question in the assessment of a possibly anticompetitive sustainability initiative is if it *appreciably* restricts competition. Some arrangements fall outside the scope of the cartel prohibition due to low appreciability, for example, because of the low combined market share of the undertakings involved in the sustainability initiative.²¹

3.3.2 Inherent restrictions

In a few cases, the European Court of Justice accepted that a competition restriction was acceptable in view of the legitimate public interest served.²² The competition restriction was considered to be 'inherent' to that public interest served, and, for that reason, the cartel prohibition did not apply. In the literature on this European case law, it has been suggested that this principle of inherent restrictions may also be applied to sustainability initiatives. In the consultation of the draft version of this Vision Document, it was pointed out that it is possible that sustainability initiatives are acceptable based on this doctrine. Also after reconsideration, ACM, in principle, does not rule this out. However, ACM believes this question has been insufficiently explored yet in the jurisprudence in order to be able to make statements on its application in this Vision Document.

²¹ Also, agreements can fall within the 'bagatelle' or De Minimis provisions of Section 7 Mw due to the low combined market share of the undertakings involved, which keeps them outside the scope of application of the cartel prohibition set out in Section 6. In respect of Article 101 (1) TFEU, the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) is relevant (Official Journal of the European Union, C 368/13, 22 December 2001).

²² For general details on 'ancillary restraints', reference is made to the Court's decisions in *Remia* (11 July 1985, Case 42/84) and *Métropole* (18 September 2001, Case T-112/99). The following court decisions are especially relevant to the category referred to in literature as 'inherent restrictions':

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

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

3) ECJ ruling of February 18, 2013 in Case C-1/12 (*OTOC*). The Court ruled that the elimination of competition with regard to permanent education for Portuguese accountants (which, in part, had to be taken out with the trade association) could not be considered necessary for ensuring the service quality of certified accountants, which meant that Article 101, paragraph 1, TFEU, was applicable as usual.

4) ECJ ruling, July 18, 2013 in Case C-136/12 (*CNG*). With regard to a tariff scheme that was incorporated in a code of conduct of the Italian National Council of Geologists, the Court ruled that, in principle, the protection of consumers of geological services, which was the aim of this code of conduct, is a valid goal, but that it is up to the national courts to assess whether the tariff scheme is necessary for the realization thereof.



3.4 Application paragraph 3: arrangements must meet four exemption criteria

3.4.1 Introduction

As soon as a sustainability initiative is appreciably anticompetitive, the question arises of whether it meets the exception criteria of paragraph 3. The relevant arrangement is then tested against the four exemption criteria of these provisions. These criteria are cumulatively applicable and must be applied in relationship to each other. The latter means that, in practice, each of the criteria is not always given the same weight, which will become clear when each of the exemption criteria is explained.

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

3.4.2 The welfare criterion when applying paragraph 3

For the application of paragraph 3, it is important to know what benefits are allowed to be included when answering the question of whether the first two criteria of this paragraph are met. It has already been noted in section 2.6 that, in that context, a broad welfare concept can be assumed, taking into account how much value (subjective) consumers attach to certain product features that relate to sustainability as well as the benefits that result from a more efficient use of scarce natural resources. In that context, it should be about real and objective efficiencies. Profit-enhancing effects of arrangements in themselves are not efficiencies. In other words, value must be created²³.

For the application of the *first* criterion of paragraph 3, such real efficiencies can, in principle, be taken into account. In that context, it is not relevant whether such efficiencies occur in certain relevant markets. In addition, it is not necessary either to verify whether the consumers (or a certain group of consumers) evidently reap all of these benefits. For the application of the *second* criterion of paragraph 3 however, it must be verified whether the benefits resulting from the arrangement are *also* reaped by the consumers of the products that are the subject of the arrangement, now and in the future. A minimum requirement is that consumers on the relevant markets cannot be worse off²⁴.

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

In most situations, the market mechanism is an excellent way to ensure an efficient use of scarce resources. However, market failures can occur. This is the case, for example, when the value of the environment or that of scarce resources is not sufficiently reflected in the price and/or the quality of

²³ Article 101(3) Guidelines, paragraph 49 and 70.

²⁴ See section 3.5.2 below. Even though, strictly speaking, paragraph 3 does not require any welfare enhancement for consumers on the relevant market, one does speak of a consumer welfare criterion in this context (OECD, *The Role of Efficiency Claims in Antitrust Proceedings*, Background note DAF/COMP (2012) 23, page 26-27).



the products for which they were used. This causes inefficiencies in the market process, which in turn lead to a sub-optimal welfare level. Welfare increases are thus, in principle, possible. This is a factor that relatively often plays a role in issues related to sustainable development.

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

3.4.4 Cooperation may lead to a more sustainable supply

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

3.4.5 Arrangements may solve coordination problems

A coordination problem may arise if a sustainable product brings with it higher production costs, and, as a result thereof, higher prices. Undertakings would be confronted with a 'first mover disadvantage' if too many customers wished to switch to non-sustainable products. In such cases, the market may be unable to create sufficient incentives to help implement sustainable production. A joint approach could be successful in such cases.

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

Therefore, making arrangements may offer a solution in order to correct market failures. The welfare increase, in such cases, is the avoided welfare costs resulting from the market failure. The solutions, however, may be imperfect and/or involve additional costs themselves (such as transaction costs). In addition, the assessment and weighing of the interests involved will not always be straightforward in



practice. A cost/benefit analysis is required. This does not alter the fact that, if it is assumed that the purpose of competition law is promotion of consumer welfare, there is an argument for taking into consideration in the assessment the solution of market failure.

3.4.6 Economic approach implies careful assessment

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

In exceptional circumstances, the solution to a sustainability question may call for a market-wide arrangement. In that case, more attention needs to be focused on the question of whether the benefits offset the drawbacks of the arrangement such as price increases of the products involved or a reduction in quality and variety thereof.

3.5 Applying the economic approach to the four exemption criteria

What does the above economic approach mean for the application of the four exception criteria on sustainability initiatives? The following discussion is based on the principle that the sustainability initiative is anticompetitive, and therefore falls under the cartel prohibition.²⁵

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

3.5.1 Criterion 1: Efficiencies

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

In its Guidelines regarding Article 101 (3), the European Commission states that the benefits that can be included in the Article 101 (3) assessment may include cost reductions or qualitative improvements in the form of new or improved products, a wider product range etc.²⁶ In practice, this concerns benefits that will be enjoyed by consumers of those products. The benefits must be

²⁵ However, it should be noted that this is not the case with all sustainability initiatives.

²⁶ Guidelines on the application of Article 101(3) of the Treaty, paragraph 59.



objectively and evidently appreciable, but do not have to be limited to certain relevant markets²⁷.

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

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

3.5.2 Criterion 2: Fair share of the benefits to consumers

The second exemption criterion requires a fair share of the benefits resulting from the improvements as referred to in the previous section be given to consumers. The benefits resulting from an arrangement must also be sufficiently passed on to consumers.

The definition of 'consumers'

The Commission has clarified that the term 'consumer' must be defined as follows: 'all direct or indirect consumers of the products covered by the agreement'. In other words, the consumers within the meaning of Article 101 (3) are the buyers of the parties in the arrangement, but, in some cases, also the next level of buyers²⁸. Arrangements may benefit others than the consumers that are directly involved in the arrangement, but the European Commission uses a minimum requirement that the benefits must sufficiently benefit the group of consumers that suffer the drawbacks of the arrangement in order to compensate them for those drawbacks. *At the very least*, it means that these consumers cannot be worse off as a result of the arrangement.

Effects on different markets

²⁷ Ruling of the General Court of May 24, 2012, in case T-111/08 (Mastercard), section 228.

²⁸ Guidelines on the application of Article 101 (3), paragraph 84.



Negative effects on consumers in a geographical or product market generally cannot be compensated by positive effects elsewhere.²⁹ However, if two markets are related, both markets can be taken into consideration if they largely involve the same group of consumers. This is the case, for example, with arrangements between laundry machine manufacturers not to produce any longer any machines not complying with certain environmental standards on power consumption efficiency. This arrangement leads to more environmentally friendly products, but also to more expensive products. At the same time, such new products offer qualitative efficiencies in the form of more wash cycles that can be used by consumers. Buyers of these laundry machines may also achieve savings thanks to reduced consumption of water, power and detergent. These savings are realized in other markets than the relevant market of the arrangement. Nevertheless, these efficiency improvements may be taken into consideration, since the markets where the anticompetitive effects and the efficiencies occur are related, and the groups of consumers affected by the restriction and the efficiencies are essentially the same.³⁰

The principle of compensation

The principle that the benefits must at least compensate the consumers for the negative effects of the arrangement applies to the group of consumers as a whole in the relevant market, rather than to each individual consumer.³¹ If the restriction of competition leads to rising prices, these consumers must be compensated together, for example with better quality of the new or existing products involved.³²

Long-term benefits

In the above sections, it has been explained why cooperation may sometimes be necessary for solving a coordination problem and taking away a negative external effect. If production or consumption of a certain product involves negative external effects to other consumers, a sustainability initiative that reduces these negative external effects will also have a favorable effect on the welfare of other consumers. This may be the case in the short term, but also in the long term. The benefits of a sustainability initiative often become visible in the long term, whereas consumers often already pay more for the product in question in the short term. In ACM's opinion, the earlier mentioned principle of compensation can also be applied in such a way that, within the scope of paragraph 3, it may be possible that current consumers, on balance, are disadvantaged by an arrangement if that arrangement is beneficial to future consumers.

As previously stated, from an economic point of view, there is no reason to only take into

²⁹ Idem par. 43.

³⁰ Example 5 (Environmental standards), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 329.

³¹ Idem par. 87.

³² Guidelines on the application of Article 101 (3), paragraph 86.



consideration the benefits to current consumers in the relevant market if those benefits will manifest themselves over a longer period of time. Sustainable development generally involves interests that cover an extended period of time. If these were not taken into account, factors such as depletion of natural resources and environmental pollution could often not be addressed through self-regulation.

ACM therefore sees room to take into consideration benefits in some cases within the context of a paragraph 3-test if such benefits cover an extended period of time, and if they occur within a larger group than the current consumers of the relevant product. This is also in line with the dynamic perspective that is often relevant in competition law, in which effects are considered that go beyond the here and now. On this basis, ACM considers it justified to apply a long-term perspective on 'benefits to consumers' in certain cases. In this context, it should be noted that the user value of a future benefit is not equal to the value of a similar current benefit³³.

Requirements attached to the demonstration of benefits to consumers

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

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

3.5.3 Criterion 3: Necessity requirement

The third criterion of paragraph 3 concerns the necessity of the restrictions. This criterion means that the arrangement cannot impose any restrictions that are not vital for the realization of the efficiency improvements. The Guidelines explain that the relevant question is whether more efficiency improvements could be realized than if the arrangement were not in place.³⁴ Furthermore, there should be no alternatives that are feasible and have a reduced anticompetitive effect to realize the efficiency improvements. The Guidelines also note that restrictions can be essential to harmonize the incentives to parties, and to ensure that their efforts are aimed at the implementation of the

³³ Guidelines on the application of Article 101 (3), paragraph 88.

³⁴ Guidelines on the application of Article 101 (3), paragraph 74.



arrangement.³⁵

Decisional practice of the European Commission and ACM

The necessity criterion is generally not applied too strictly in practice. The key factor is whether the restriction to competition can be reasonably considered necessary to achieve the intended benefits. This means that the European Commission and ACM do not seek less hypothetical or theoretical alternatives. However, if clear, realistic and feasible, less far-reaching alternatives are available, parties can be asked to indicate why these alternatives to the arrangement would be significantly less efficient.

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

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

In ACM's perspective, when applying the necessity requirement, it must be possible to take into consideration the potential existence of the earlier mentioned first-mover disadvantage³⁶. Undertakings are sometimes unable on their own to make a product more sustainable because that would lead to customers switching to a non-sustainable alternative. However, if the arrangement would nonetheless yield consumers benefits on balance, the existence of a first-mover disadvantage could be an argument, in ACM's view, to consider a market-wide arrangement justified.

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

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

³⁵ Idem par. 80.

³⁶ See section 3.4.5.



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

3.5.4 Criterion 4: Sufficient residual competition

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

Dynamic efficiency and residual qualitative competition

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

Relation with other requirements

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

An interesting example in this regard is the case *Stichting Papier Recycling Nederland*.³⁷ With regard to a waste management arrangement that had been submitted for exemption, the NMa's opinion was that the minor surcharges to be added to the price of waste paper and cardboard recycling would support a closed-loop product lifecycle (economic and technical progress) that benefits consumers (they can dispose of waste paper free of charge, and it is good for the environment). With regard to residual competition, the NMa noted that competition on the markets for new paper and cardboard is not eliminated for a substantial part as a result of the financing system for the waste-handling system, since the system does not affect competition parameters other than price, such as quality,

³⁷ NMa case 3007 (2003).



sustainability and service.

Checking room for residual competition

From the above, it can be concluded that undertakings involved in a sustainability initiative can comply with the 'residual competition' requirement in various ways.



Appendix 1

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

Section 6 Dutch Competition Act (Mw)

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

(...).

Article 101 Treaty on the Functioning of the European Union

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



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

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

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

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

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

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