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The Dutch version of this document is  
authentic.*

**Policy rule**

# ACM's oversight of sustainability agreements

Competition and sustainability

4 October 2023



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The Netherlands Authority for Consumers and Markets

Considering Article 6, paragraph 1, of the Dutch Competition Act and Article 4:81 of the Dutch General Administrative Law Act,

decides:

## 1 Introduction

1. 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 all people and businesses, now and in the future. Agreements between undertakings to realize sustainability objectives can contribute in an effective manner to achieving that mission.
2. The importance of such sustainability agreements has grown tremendously. Over the past few years, societal, political and legal attention for climate change, biodiversity, and sustainable development has risen. As a result of such developments, concrete policy goals and binding standards have been established. For example, the Convention on Biological Diversity held in Rio de Janeiro (1992), the Paris Climate Agreement (2015), the seventeen Sustainable Development Goals (SDGs) of the United Nations to which the Netherlands and the European Union committed themselves (2015), and the Dutch Climate Act (2019). 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 by 25% by late 2020 compared with 1990.<sup>1</sup> As a result of the enormous effort that is needed to realize such objectives, as well as the role that the Dutch government believes undertakings can play in that effort, sustainability agreements have become more important.
3. 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. Consumers often see sustainability as a quality improvement of a product. In doing so, the availability of sustainable products increases competition and choice for consumers.<sup>2</sup> However, pressure on prices and efficiency may result in negative externalities (for example, harm to third parties as a result of production, transport, and consumption, such as with CO<sub>2</sub>-emissions) being passed on to society. In principle, each company has an individual responsibility to prevent harm to third parties. Nevertheless, from a societal point of view, it could sometimes be optimal if undertakings agree to reduce negative externalities. Sustainability collaborations to counteract this may be hindered by competition rules, especially if companies are uncertain about what is and what is not allowed. ACM acknowledges that, in some situations, this tension exists.
4. With the first<sup>3</sup> and second<sup>4</sup> draft versions of its Guidelines on Sustainability Agreements, ACM provided insight into what agreements undertakings could make with each other in order to take away any unnecessary tensions and undertakings could do business in a more sustainable manner. In addition ACM wanted to contribute to the international debate on the application of competition rules

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<sup>1</sup> Supreme Court, 20 December 2019, *Staat der Nederlanden / Stichting Urgenda*, ECLI:NL:2019:2006. One could also think of agreements such as the 2013 Energy Agreement (in Dutch: Energieakkoord 2013), the 2017 Raw Materials Agreement (in Dutch: Grondstoffenakkoord 2017), the 2018 National Prevention Agreement (in Dutch: Nationaal Preventieakkoord 2018), and the 2019 Climate Agreement (in Dutch: Klimaataakkoord 2019) and other policy measures.

<sup>2</sup> In that context, it is important that consumers are well informed about the sustainability characteristics of products. Using correct and clear sustainability claims will help consumers make more-sustainable choices with confidence, and will protect businesses that are committed to sustainability against businesses that compete unfairly by using misleading claims. For more information see ACM's Guidelines on Sustainability Claims: <https://www.acm.nl/en/publications/guidelines-sustainability-claims-0>.

<sup>3</sup> ACM, 1<sup>st</sup> draft guidelines on sustainability agreements, 9 July 2020, <https://www.acm.nl/en/publications/acm-opens-more-opportunities-businesses-collaborate-achieve-climate-goals>.

<sup>4</sup> ACM, 2<sup>nd</sup> draft guidelines on sustainability agreements, 26 January 2021, <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law..>

on sustainability agreements. ACM has also since offered undertakings the opportunity to contact ACM to discuss their planned sustainability agreements.

5. When the second version of the draft Guidelines on Sustainability Agreements was published, it was announced that ACM would not yet publish a definitive version in view of European developments and discussion.<sup>5</sup> After all, many of the agreements submitted to ACM have an effect on trade between Member States of the European Union (EU), making the European competition rules applicable. By now, the European Commission (EC) has revised its Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (EC Horizontal Guidelines).<sup>6</sup> This includes a chapter about competition and sustainability agreements. Now that the EC Horizontal Guidelines have been adopted, ACM replaces the draft Guidelines on Sustainability Agreements with this policy rule. In this document ACM provides insight into the application of competition rules on sustainability agreements, and how ACM implements its oversight in this area.
6. **Chapter 2** contains the framework that ACM applies to both horizontal and vertical sustainability agreements. ACM will assess sustainability agreements between competitors on the basis of (also) the EC Horizontal Guidelines. Agreements in the agricultural sector that are subject to the CMO regulation fall outside the scope of this document.<sup>7</sup>
7. In **chapter 3** ACM sets out how it exercises its powers. As an independent supervisor, ACM has discretionary freedom within certain boundaries on how it investigates potential violations or what sanctions it imposes. In two situations, ACM chooses in principle not to investigate. This means that ACM does not take action against undertakings in those cases. Undertakings therefore do not have to fear a fine from ACM.
8. The first situation refers to undertakings that conclude agreements regarding compliance with a binding sustainability rule. Under the EC Horizontal Guidelines, such agreements that relate to compliance with international rules fall, under certain conditions, outside the scope of the cartel prohibition of Article 101, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU). ACM follows this line. Additionally, ACM will also in principle not further investigate agreements concerning compliance with binding sustainability standards based on other rules, like national or European rules. See paragraph 3.1.
9. The second situation refers to so-called environmental-damage agreements that, in an efficient manner, help comply with an international or national standard or concrete policy goal to prevent or reduce such environmental damage. ACM will not further investigate such agreements if it is plausible that the agreement is necessary to obtain the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages. In addition, consumers in the relevant market must receive an appreciable and objective part of the advantages. This means in any case that the consumers should belong to the group that benefits from the agreement. Furthermore, there should remain a degree of residual competition. See paragraph 3.2.
10. As in previous years, undertakings have the opportunity to ask ACM for informal guidance of their sustainability agreement.<sup>8</sup> This means that, if undertakings are unsure about the permissibility of their sustainability agreement, they can submit their self-assessment regarding the applicability of the competition rules to ACM. When applicable, ACM will assist in finding solutions to any bottlenecks. Fines will not be imposed in such cases. This also applies to publicly disclosed sustainability

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<sup>5</sup> ACM, *Guidelines on sustainability agreements are ready for further European coordination*, 26 January 2021, <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination>.

<sup>6</sup> *PbEU* 2023/C 259/01, 21 July 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C.2023.259.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A259%3ATOC>.

<sup>7</sup> See the Guidelines regarding collaborations between farmers of ACM of 1 September 2022, <https://www.acm.nl/en/publications/guidelines-regarding-collaborations-between-farmers>.

<sup>8</sup> For other agreements the ACM procedure regarding informal opinions of 26 February 2019 applies (*Government Gazette*, 2019, 11177).

agreements within which this document has been demonstrably followed in good faith. See **chapter 4**.

11. ACM emphasizes that this document does not alter the legal framework and the interpretation of the competition rules by national and European courts. Similarly, the document does not prejudice the enforcement actions by the European Commission or by other competition authorities within the European Union either.
12. **Chapter 5** discusses the entry into force of this document.

## 2 Competition rules and sustainability agreements

13. In this chapter, ACM explains what sustainability agreements are (paragraph 2.1) and what framework it uses for its assessments of sustainability agreements (paragraph 2.2).

### 2.1 Definition of sustainability agreements

14. Sustainability agreements are all agreements that pursue a sustainability objective, irrespective of the form of the cooperation. In that context, it is about the ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental, and social (including labour and human rights) development. Examples include: addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.

### 2.2 Application of the cartel prohibition to sustainability agreements

15. Article 6, paragraph 1, of the Dutch Competition Act (DCA) and Article 101, paragraph 1, TFEU, respectively, prohibit agreements that have as their object (also: aim) or effect the prevention, restriction or distortion of competition. The prohibition applies to agreements between undertakings and to decisions of associations of undertakings that compete with one another (so-called 'horizontal agreements'). The cartel prohibition also applies to agreements between undertakings that are active in different levels in the distribution chain or value chain (so-called 'vertical agreements').
16. If it is established that an agreement restricts competition by object, its effects on competition do not need to be examined. If the parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and if this casts reasonable doubt on whether the agreement reveals by its very nature a sufficient degree of harm to competition to be considered a by object restriction, the agreement's effects on competition will have to be assessed. This is not the case if the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, or limitation of output or innovation.
17. Agreements that restrict competition, because they have either an anti-competitive object or anti-competitive effects, but also offer benefits that outweigh the negative effects of those agreements may be exempted from the cartel prohibition. This statutory exemption has been laid down in Article 6, paragraph 3, of the DCA and/or in Article 101, paragraph 3, TFEU.<sup>9</sup> Agreements do not fall under the scope of the prohibition if they meet the following four criteria (cumulative):

1. The agreements offer efficiency gains, including sustainability benefits;
2. The users of the products in question are allowed a fair share of those benefits;

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<sup>9</sup> Next to this statutory exemption, there are also other exemptions from the cartel prohibition. See articles 12 and 13 DCA (block exemptions) and Article 7 DCA (agreements of minor importance).

3. The restriction of competition is necessary for reaping the benefits, and does not go beyond what is necessary; and
  4. Competition is not eliminated in respect of a substantial part of the products in question.
18. When enforcing the prohibition of anticompetitive agreements, ACM follows the European and Dutch legal frameworks, which include the horizontal and vertical block exemption regulations and guidelines, as well as relevant national and European case law.<sup>10</sup>

### 3 ACM's oversight of sustainability agreements

19. In this chapter, ACM discusses the policy choices that it makes with regard to compliance with binding sustainability rules (paragraph 3.1) and environmental-damage agreements (paragraph 3.2).

#### 3.1 Compliance with binding sustainability rules

20. The EC Horizontal Guidelines stipulate that agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law (for example, compliance with fundamental social rights or prohibitions on the use of child labor, the logging of certain types of tropical wood or the use of certain pollutants) and which are not fully implemented or enforced by a signatory State, fall outside the scope of Article 101, paragraph 1, TFEU.<sup>11</sup> ACM also applies this.<sup>12</sup>
21. The example in the previous paragraph is limited to requirements or prohibitions in international treaties, agreements or conventions. Undertakings may also enter into agreements on compliance with rules following from national or European sources of law. In those cases, too, ACM will, in principle, not take enforcement action against such agreements. Thereby, ACM will apply the same preconditions as those that apply when complying with international treaties, agreements or conventions in accordance with marginal 20. This means that it should concern agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions laid down in legally binding national or European sources of law and which are not fully implemented or enforced. This is because ACM does not consider it expedient to protect illicit competition, i.e. competition that would not have existed if binding sustainability rules had been complied with. This applies irrespective of where or at what (legal) level the relevant rule has been laid down.<sup>13</sup>

#### 3.2 Oversight of environmental-damage agreements

22. ACM defines environmental-damage agreements as agreements that contribute efficiently to compliance with an international or national standard or to the achievement of a specific policy objective to prevent environmental damage. In that context, environmental damage can be defined as environmental damage in the production, transport and consumption of goods or services. Environmental damage is caused, for example, by the emission of harmful substances and greenhouse gases, and by the wasting of raw materials. The damage it causes, which is not included in the price, is referred to as negative externalities. This damage is reflected in, for example, atmospheric warming, reduced biodiversity and/or a less healthy living environment. Environmental damage also implies an inefficient use of scarce natural resources (common resources). When

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<sup>10</sup> For example, see <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> (European competition rules), Guidelines regarding agreements between suppliers and buyers, 8 July 2022 <https://www.acm.nl/nl/publicaties/leidraad-afspraken-tussen-leveranciers-en-afnemers> and Guidelines regarding arrangements between competitors, 26 February 2019, <https://www.acm.nl/en/publications/guidelines-regarding-arrangements-between-competitors>.

<sup>11</sup> EC Horizontal Guidelines, paragraph 528.

<sup>12</sup> As a result of which, agreements aimed at compliance with international rules will also fall outside the scope of the cartel prohibition laid down in Article 6 DCA.

<sup>13</sup> One such example is ACM, *Letter response sustainability initiative about reduction illegal pesticides garden retail sector*, 2 September 2022, <https://www.acm.nl/en/publications/letter-response-sustainability-initiative-about-reduction-illegal-pesticides-garden-retail-sector>.

undertakings reduce or prevent environmental damage by cooperating, they therefore generate an advantage. Such agreements may be necessary for achieving the environmental benefits, which, by definition, extend to a wider group than just the consumers of the products alone. Depending on the type of damage avoided, the benefit can be enjoyed by everyone in a given region, country or even worldwide (as is the case with CO<sub>2</sub> emission reductions).

23. Given the importance of preventing environmental damage and the role that collaborations between undertakings can play in that context, ACM does not consider it expedient to continue investigating an environmental-damage agreement if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages. It is important that consumers in the relevant market receive an appreciable and objective part of the advantages. This means in any case that the consumers should belong to the group that benefits from the agreement. Furthermore, there should remain a degree of residual competition. In the foregoing, the 'polluter pays' principle<sup>14</sup> and the principle of an effective enforcement of Article 101 TFEU by ACM and other members of the European Competition Network (ECN) is taken into account.
24. Environmental-damage agreements that meet these requirements serve the public interest by contributing towards the goals as mentioned in paragraph 2. This strengthens people's and businesses' confidence in the proper functioning of markets and contributes to ACM's mission.

## 4 Informal guidance sustainability agreements

### 4.1 Introduction

25. Undertakings are expected to conduct a self-assessment first (possibly together with their advisor) in order to assess whether their agreement (potentially) restricts competition and falls under the scope of Article 6, paragraph 1, DCA and/or Article 101, paragraph 1, TFEU. If this is the case, it is up to the undertaking itself to assess whether its sustainability agreement can qualify for the statutory exemption of Article 6, paragraph 3, DCA and/or Article 101, paragraph 3, TFEU.<sup>15</sup>
26. Undertakings that are unsure about how to conduct their self-assessment, about the reliability of their assessment, or about the question whether ACM would investigate their agreement with a view to paragraph 3 of this document can contact ACM about this. Preferably at an early stage, provided the initiative is sufficiently concrete. ACM will indicate what possibilities it sees and identify any anticompetitive risks. In that process, ACM will make an initial assessment of the sustainability agreement and help find solutions for any bottlenecks.
27. Below, ACM explains the procedure for filing a request for informal guidance (paragraph 4.2), what method and procedure ACM uses when processing such requests (paragraph 4.3), how informal guidance is issued to undertakings (paragraph 4.4) and what the consequences thereof are (paragraph 4.5).

### 4.2 Filing a request for informal guidance

28. A request for informal guidance of a sustainability agreement can be filed by undertakings, associations of undertakings, or their representatives ('applicant').

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<sup>14</sup> Article 191, paragraph 2, TFEU. ACM also refers to Article 3 TEU, Article 11 TFEU, and marginal 2 of this document.

<sup>15</sup> Article 2 Regulation no. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU and Article 6, paragraph 4, DCA. The burden of proof for invoking the exemption criteria of the third paragraphs of Article 6 DCA and Article 101 TFEU lies with undertakings. This document does not change this legal burden of proof.

29. The request can be sent to the following address with reference 'Request for informal guidance of a sustainability agreement by ACM's Competition Department':

The Netherlands Authority for Consumers and Markets (ACM)  
c/o Competition Department  
P.O. Box 16236  
2500 BH THE HAGUE  
The Netherlands

Or by email to [info@acm.nl](mailto:info@acm.nl).<sup>16</sup>

30. A requests for informal guidance must contain at least the following information<sup>17</sup>:
- a. The identities of the undertakings involved;
  - b. A contact person for the applicant;
  - c. A description of the proposed sustainability agreement;
  - d. An explanation as to why the agreement qualifies as a sustainability agreement (and possibly an environmental-damage agreement, see paragraph 3.2);
  - e. The specific question for which informal guidance is requested;
  - f. The undertaking's self-assessment, to the extent possible<sup>18</sup>, of the applicability of the competition rules to the agreement;
  - g. All other information and/or documentation relevant for ACM to provide informal guidance;
  - h. Whether there is contact with another (competition) authority in relation to the proposed sustainability agreement and/or whether there are proceedings pending before a court; and
  - i. Whether the request contains any business-confidential information, and if so, which (this may also be explained at a later stage).
31. Prior to filing a request for informal guidance one can contact ACM's Competition Department (DM) via the before mentioned (email) address to (pre)discuss this.

### 4.3 Processing the request for informal guidance

32. In principle, ACM processes the request on the basis of the information provided and, in general, does not conduct an additional investigation. However, ACM may use any information available to it from public sources, case law, decision-making practices or other sources in its assessment. ACM will ask the applicant to provide additional information if such is necessary for its informal guidance.<sup>19</sup>
33. ACM aims to inform an applicant within a reasonable period of time of the follow-up to the request for informal guidance. Thereby, ACM takes into account the circumstances of each case wherever possible. The lead time depends on, among other things, the complexity of the initiative and (own) assessment as well as the speed with which undertakings provide the requested information. Experience shows that this process often takes several months. If no informal guidance will be provided, ACM will inform the applicant thereof as soon as possible.
34. An applicant can withdraw the request for informal guidance at all times. In such cases, no informal guidance is issued. However, the information provided in the context of the request for informal guidance remains available to ACM.

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<sup>16</sup> Cryptshare can be used for sending confidential information. For more information: <https://www.acm.nl/nl/contact/adresgegevens/bereikbaarheid-per-e-mail> (in Dutch).

<sup>17</sup> ACM protects your personal data as required by the GDPR. For more information: <https://www.acm.nl/nl/privacy> (in Dutch).

<sup>18</sup> For the required content and scope of the self-assessment, ACM takes into account the size and resources of the undertaking(s) involved.

<sup>19</sup> Where appropriate, ACM may also ask third parties for additional information.



#### 4.4 Issuing informal guidance

35. Informal guidance can be provided verbally, by email or by letter. The form can be determined in consultation with the applicant, but also depends on the stage of the sustainability agreement.
36. The informal assessment contains at least the following elements:
  - a. A brief description of the facts and circumstances on which the informal guidance is based;
  - b. The principal legal and economic considerations underlying ACM's view on the application of Article 6 DCA and/or Article 101 TFEU using the framework as set out in this document.
37. If it is argued that an agreement is aimed at complying with a legal rule or qualifies as an environmental-damage agreement which meets the criteria (see paragraph 3), the informal guidance may consist of the preliminary conclusion that no further investigation will be conducted into the sustainability agreement.
38. With a view to future cases, ACM will in principle also publish on its website all informal guidance that it issues on the basis of this document to undertakings. Prior to the publication of the informal guidance, ACM will come agree with the applicant on a public version. This takes into account the (confidential) stage of the initiative and the confidential nature of personal and business data.

#### 4.5 Consequences of informal guidance

39. Informal guidance is, first of all, meant to take away any obstacles that undertakings experience when concluding sustainability agreements due to doubts about the applicability of competition rules. ACM does so by helping undertakings assess sustainability agreements. Informal guidance is not a decision by ACM. Informal guidance reflects an initial assessment of ACM on the facts submitted to it and does not create any rights or obligations for the applicant or a third party.
40. In principle, ACM will not impose fines on undertakings that (i) have submitted their sustainability agreement to ACM and (ii) with regard to which ACM has indicated that it does not appear to be in breach of the competition rules, even if it later turns out that the agreement is not compatible with the competition rules. The same applies if ACM has indicated that no further investigation will be conducted, if it later turns out that the criteria required for this are not met after all. The foregoing only applies if the undertakings informed ACM in good faith, ACM did not include an explicit caveat in its informal guidance, and the undertakings adjust the agreement (expeditiously) so that they act in line with the competition rules or required criteria still (either after consulting with ACM, or after an intervention by ACM). The same applies to publicly announced sustainability agreements that have not been submitted to ACM, but where this document has demonstrably been followed in good faith.

## 5 Entry into force and application

41. This policy rule will be published in the Dutch Government Gazette.
42. This policy rule shall enter into force on the day after publication in the Dutch Government Gazette.
43. With the entry into force of this policy rule, the (second) draft Guidelines on Sustainability Agreements, the 2014 Vision Document on Competition and Sustainability as well as the 2016 Basic Principles for the Oversight of Sustainability Agreements will be replaced.
44. This policy rule shall be cited as: Policy Rule on ACM's oversight of sustainability agreements (*Beleidsregel Toezicht ACM op duurzaamheidsafspraken*).