Competition Policy supporting the Green Deal
Call for contributions

Reaction: Authority for Consumers and Markets (ACM), the Netherlands
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Introduction:

Given that sustainability is one of its areas of special interest, the ACM appreciates the opportunity to react to this call for contributions to the European Green Deal. Recently, the ACM has published its *Draft Guidelines on Sustainability Agreements* ("the Guidelines") which provide specific guidance on the application of competition law to business-to-business sustainability arrangements. In short, these Guidelines show what opportunities market participants have for making sustainability arrangements, but also where such arrangements are limited by competition law. The Guidelines reflect a more open attitude than traditionally applied, in order to allow for more joint initiatives to improve sustainability. In particular, the ACM has committed itself to actively engage in a dialogue with businesses on when the competition rules provide room for joint sustainability initiatives, with a flexible approach responding to new demands of a changing sustainable society.
The main new element in our guidelines concerns a new proposed interpretation of what a fair share for the consumers (Article 101, paragraph 3, TFEU) could amount to, with specific regard to the potential benefits that a specific group of sustainability agreements bring (namely, environmental damage agreements). Traditionally, a fair share is interpreted as follows: consumers in the relevant market must (as a group) be fully compensated for the negative effects due to the restriction of competition by the benefits that result from the agreement. Our proposal means that, under specific circumstances and in some well-defined cases, a fair share does not necessitate full compensation for consumers.
The first draft version of the Guidelines has already been shared with the European Commission and the ECN-Network and went through a national consultation. This consultation period is now closed. The ACM is currently working on a new version of the Guidelines, which we expect to publish in the course of January.

Our response to this call for contributions is focused on Part 2, Antitrust Rules, since our experience covers cartel/art. 101 sustainability cases and not State Aid or Merger control.

Part 2: Antitrust Rules

As input to the debate on how antitrust policy and environmental and climate policies work together – and how they could do so even better, our answers are as follows:

1. Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

With respect to this question the ACM refers to one specific case in the past (2013) that was not implemented due to antitrust risks. This is the coal power plants case (see below). In addition, we include a hypothetical example.

Coal power plants:
The intended agreement concerns a coordinated closure of five power stations in the Netherlands, which were all built in the 1980s.

- The arrangement would lead to a cost increase of, on average, 75 mln euro per year for total electricity consumption in the Netherlands in the period of 2016 through 2021.
- On the other hand, the environmental gains resulting from a reduction in emissions of SO2, NOx, PM10 and CO2, were, on average, 29.7 mln euro per year, built up as follows:
    - For SO2, a reduction of 2 kton at a shadow price of 5.4 euro/ton = 10.9 mln euro
    - For Nox, a reduction of 1.5 kton at a shadow price of 9.4 euro/ton = 14.4 mln euro
    - For PM10 (particulate matter), a reduction of 0.1 kton at a shadow price of 44.3 euro/ton = 4.4 mln euro.

There would be a direct reduction in CO2 emissions of, on average, 4.7 Mton per year. This would be predominantly caused by a shift in utilization from coal-fired power plants to gas-fired power plants. However, this could not be considered a genuine emission reduction for the following reason: as the electricity producers operate within the European Trading System (ETS), they were required to use emissions allowances when producing electricity. The closings of the power plants would leave a share of these allowances unused as a result of the difference between the needed allowances for coal-fired power plants and those for gas-fired power plants. However, the arrangement did not lead to a reduction in the number of available allowances. The allowances would thus be used elsewhere within the ETS (the 'waterbed theory', the emissions will just take place elsewhere).

Closing down the plants would therefore not result in an emissions reduction within the relevant area (the ETS area in Europe). Since the reduction in emissions of CO2 was based on a European policy standard, no environmental gains were achieved. With regard to SO2 and NOx, a national policy standard was used as the starting point. And emissions allowances could not be traded, which meant that the emissions would not take place elsewhere in the Netherlands. The environmental gains were therefore real. With a cost increase of on average 75 mln, and environmental gains amounting to 29.7 mln, the net balance of the cost-benefit analysis of the arrangement was a negative 45.3 mln euro per year.

Under the newly proposed Dutch Draft Sustainability Guidelines, provided specific conditions as set out in the Guidelines are met, any efficiency gains 'out of market' could have been taken into account. The arrangement to jointly withdraw coal-fired plants falls in the category of 'environmental-damage arrangements'- see f below on this categorization and the way the ACM approaches this category of agreements under question 3. In addition, there were specified governmental policy objectives to which the arrangement contributed. The users benefited from the arrangement as well as society as a whole. The arrangement could therefore be assessed using the assessment framework that is currently being finalized by the ACM , in which out of market benefits can be taken into account.

One of the unfounded criticisms was that the ACM overlooked the future benefits or benefits outside the Netherlands. So long as the arrangement had an actual effect on harmful emissions (through 2021), it was, in principle, taken into account. Also the fact that the benefits of a reduction in the emissions of greenhouse gases can have an effect for many generations to come has not been overlooked. It must be assumed that the government takes these benefits into account when specifying its policy objectives. Those objectives and the policy standards that are based upon them can be seen as a reflection of the willingness to pay of the Dutch society as a whole. The future benefits and the benefits for society at global scale have

accordingly been included in the shadow prices, the level of which is determined by Dutch policy choices as taken by lawmakers with an eye to the future and to solving a global problem.

Changes to the preconditions could lead to different outcomes.
The outcome of the above analysis was partially determined by the circumstances at that time, in 2013. That means that the same analysis could have a different outcome, taking into account several developments after ACM's analysis in 2013:

1) A reduced waterbed effect: After 2013, measures have been taken in order to reduce the effect of the waterbed theory. National measures within the ETS domain now lead, to a certain extent, to a reduction in the number of emissions allowances. Under that condition, the closings of the coal-fired power plants would have a positive effect for all European citizens because, within Europe, slightly less different measures must be taken in order to achieve the European objectives (as the European contribution to the obligations that follow from the Paris Climate Agreement). This means that, for the evaluation of national measures within the ETS domain, a shadow price larger than zero should be used now. This benefit may have canceled out the net costs of the agreement for Dutch electricity consumers. As a result thereof, the arrangement could now perhaps pass the paragraph-3 test.
2) The Urgenda ruling: In late-2019, the Supreme Court of the Netherlands ruled that the Netherlands should take stronger measures to reduce CO2 emissions in the Netherlands. In that context, a distinction between the ETS-domain and the non-ETS domain is no longer relevant, as the Supreme Court did not make such a distinction. The closings of the power plants could therefore now be taken into account in full in order to meet the criteria as developed by the Supreme Court.

It must be noted that in this analysis, out-of-market efficiencies do not play a role because all Dutch citizens are also electricity consumers (directly and/or indirectly). If however, in a similar case, the agreement would involve a product that is only consumed by a part of the Dutch citizens, the situation would be different. It is obvious that in the assessment of such a case in relation to the second requirement of art. 101(3) it can make a huge difference whether or not also the benefits for non-consumers can be taken into account

Theoretical example:

Example 5
Five pig slaughterhouses want to agree to offer for the Dutch market only meat with a number of "green" features. For example, when purchasing slaughtered pigs, they will use several standards to limit the emissions of substances X, Y and Z that are harmful to people and the environment. In addition, requirements are imposed that benefit the living conditions of the pigs. The slaughterhouses have a combined market share of 80% of the distribution of pork in the Netherlands. The agreed standards were developed in consultation with the main organizations of pig farms and retail trade organizations in the Netherlands. In consultation with ACM, an estimate has been made of the expected increase in costs for pork as well as of environmental benefits. In addition, studies have been carried out into the consumers' valuation of meat obtained from pigs that have lived under better living conditions. As it is expected that the agreed standards will be superseded in the longer term by statutory standards at the European level, ACM has indicated that the assessment of the costs and benefits of the arrangement will be limited to the next ten years.

Assessment
The calculation shows, first of all, that, as a result of the arrangement, pork will become more expensive for the consumer, initially 10% and then, due to economies of scale, decreasing to 5% at the end of the 10-year period. Considering the combined market share of the slaughterhouses concerned and the predicted price increase, which point at appreciable effects of a restriction in competition, ACM considers it necessary to make a quantitative assessment in this case.

The benefits of the emission reductions of substance X mainly include health benefits for citizens living in the vicinity of pig farms. According to the General Guidelines on Cost-Benefit Analyses, these benefits must be estimated using environmental prices on the basis of damage costs.[i] Substances Y and Z are greenhouse gases. The reduction in emissions is estimated using environmental prices ("shadow prices") based on prevention costs. These environmental prices are based on national policy standards. The benefits resulting from the emission reduction from Y and Z accrue to the whole of Dutch society. They will be taken into account as a whole in the assessment of the arrangement under the second requirement of paragraph 3.

It was also found that consumers appreciate the animal-friendliness of the new meat product. On average, they are willing to pay 3% more for this meat. This is not sufficient in itself to compensate them for the financial disadvantage they suffer from the deal. However, the assessment should be based on the total benefits, including those that come from the reduction of harmful emissions. A comparison of costs and total benefits shows that, in the first two years, the costs for the user are higher than the benefits, but that, from the third year onwards, the reverse is the case. Discounting costs and benefits shows that the net balance is positive. The arrangement thus meets the second requirement of paragraph 3 and can be exempted.

2. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

The ACM would welcome further clarification and comfort by the Commission in similar guidelines. The Dutch Draft Guidelines provide concrete examples that could inspire companies and organizations to take new joint sustainability initiatives.
The guidelines also open the way to future case-by-case (informal) assessments that could in principle be published to give more guidance in the future (provided that the parties to of a sustainability initiative have no objections against publishing that (informal) decision). The ACM would welcome it if the Commission adopted a similar approach

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

With respect to this question the ACM refers to its explanation of environmental damage agreements in the

Draft- Guidelines. By environmental damage agreements the ACM means agreements that are aimed at preventing or limiting environmental damage and that contribute in an efficient way to achieving a concrete policy objective. By "environmental damage" is meant the damage caused by over-use of natural resources (*common resources*) which cause negative externalities. When companies in a particular sector work together to reduce such environmental damages resulting from their economic activities, this could imply an efficiency advantage for the society as a whole. The ACM is of the opinion that these social benefits should be taken into account in compensation for the negative effects due to the agreement that experienced by consumers.

The main new element in our guidelines is this proposed interpretation of what a fair share for the users is with regard to the benefits that environmental damage agreements bring. Traditionally, a fair share is interpreted as follows: users in the relevant market must be fully compensated for the negative effect resulting from the restriction of competition, by the benefits of the agreement.
The ACM believes that there is good reason to depart from the principle of full compensation of users in the relevant market if two conditions are met:

I. the arrangement is intended to prevent or limit environmental damage, and
II. the arrangement provides an efficient contribution to the compliance with an international or national standard or policy goal for preventing environmental damage. For example as a result of a treaty, like the Paris Treaty or the European Convention of Human Rights. These conditions are cumulative.

Under these two specific circumstances, we believe that users receive a fair share of the environmental benefits if they benefit from the agreement in the same way as the rest of society. Even if the environmental benefits for the users do not outweigh the higher prices paid by them, their share of the benefits is still fair, as long as the benefits to society as a whole outweigh the harm to users.

The valuation in monetary terms of environmental damage caused by the emission of a specific substance (e.g. a greenhouse gas or air pollutant) is given by so-called environmental price of that substances. Because they are not market prices, they are called "shadow prices." The choice which environmental prices should be used can be based on the guidelines that apply to the government for making social cost-benefit analyzes (SCBA). When an environmental price has been set with a view to achieving a concrete policy goal, it is referred to as a shadow price based on prevention costs. By applying environmental prices, it can be ascertained whether a sustainability agreement makes an efficient contribution to the realization of that concrete policy goal. The basic idea here is that the costs of a sustainability agreement are compared with the costs of the policy measures that are available to the government to achieve a comparable sustainability gain. When the cost increase resulting from the restriction of competition is lower than the costs of those policy measures, this is an indication that the contribution of the initiative can be considered efficient.

Another question is how Green Deal objectives can be differentiated from other important policy objectives such as job creation or other social objectives. ACM has received a similar question in the consultation of its Draft Guidelines to justify its special treatment of environmental-damage agreements. In ACM’s opinion, first of all there is no legal obligation to take into account the net benefits for users in the relevant market in all cases. Next, this approach can be justified on the basis of general principles of international and EU law. First, the “polluter-pays” principle implies that producers and consumers of products that bring environmental harm upon others must pay for the damage done. Second, on the principle that governments are obliged to take precautionary measures and take careful action to limit damages.

Secondly, there is, we believe, also an economic argument that separates environmental damage agreements from agreements with respect to other concerns like social concerns. Environmental-damage agreements contribute, by limiting negative externalities, to the efficient use of natural scarce resources that are (to a large extent) freely accessible (so-called '*commons*'). The benefits of such agreements can be considered as real (economic) efficiencies. Other types of interests, like social concerns or e.g. animal welfare, fall in a different category. Social concerns about equity and animal welfare is a concern of an ethical (deontological) nature. Agreements that address these kinds of concerns still can make use of the guidance and explanations given in the other parts of the draft Guidelines. Products that pay attention to such concerns have a certain quality that may be appreciated by the consumers. Our view is that in these kinds of cases the requirement can hold that consumers must be fully compensated.