Greening Antitrust: The Dutch and EU Assessment of Sustainability Agreements

MARISKA VAN DE SANDEN AND WOLF SAUTER

IN JUNE 2022, THE NETHERLANDS Authority for Consumers and Markets (ACM) published a no-action letter regarding a multi-billion euro, joint project by energy majors Shell and TotalEnergies for large-scale carbon capture and storage (CCS) using depleted gas fields in the Dutch section of the North Sea.[1] In the EU, the European Commission (Commission) published draft Horizontal Guidelines with a specific chapter on sustainability in March 2022 (Horizontal Guidelines of the Commission)[2], and is likely to formally adopt a final version in Spring 2023. In the Netherlands, ACM has published its own draft Guidelines on this topic (in June 2020, with an update in January 2021: Sustainability Guidelines of ACM), and, over the past two years, has started providing informal guidance on actual sustainability cases such as that on CCS cited above.[3]

Sustainability concerns cover climate change, biodiversity and sustainable development, and are co-extensive with economic social and governance goals (ESG).[4] When and how can the antitrust rules accommodate sustainability agreements?[5] In this contribution, we focus on the Dutch approach to these questions as well as the relevant proposals by the European Commission. In addition, we will discuss ACM's guidance on specific cases in some detail in order to provide examples of the compatibility of antitrust and sustainability in practice. Would a similar approach be possible in the U.S., and elsewhere? In the interest of human survival and well-being on the planet that we share—we obviously hope a perspective like that which has emerged in Europe will break through on the other side of the Atlantic as well.

The authors are senior officials in the Competition Department of the Netherlands Authority for Consumers and Markets (ACM) and members of its sustainability team handling the requests for informal guidance on sustainability agreements. Wolf Sauter is also professor of law, markets and behaviour at the Vrije Universiteit (VU), Amsterdam. This article was written in a personal capacity, and does not necessarily reflect the position of ACM. *We would like to thank Céline Tessel for research assistance.*

Legal context

The Dutch system of antitrust is based on prohibitions of cartels and of abuse of dominance that mirror the relevant provisions of the Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102 TFEU. ACM is competent to apply the Dutch rules, Sections 6 and 24 of the Dutch Competition Act (*Mededingingswet*, or Mw), to purely national situations. If there are cross-border effects, ACM must also apply EU law. The application of the Mw must, as a matter of Dutch law, be in line with that of EU law, the interpretation of which is coordinated by the Commission's DG Competition and adjudicated by the Court of Justice of the European Union (CJEU) as the ultimate arbiter of the EU legal system. This allows ACM a modicum of freedom of interpretation, especially where the Commission's approach is not yet set in stone, and/or not fully in line with the *MasterCar*d case law of the CJEU (see below under the discussion of the European Commission's draft Horizontal Guidelines).[6] Also, ACM enjoys broad freedom to decide whether to take up enforcement actions.

For present purposes, the provisions on cartels are of primary interest. The first paragraph of Section 6 Mw and Article 101 TFEU contains a prohibition on anticompetitive agreements, concerted practices, and decisions of associations of undertakings. The second paragraph determines that any prohibited decision or agreement is void. The third paragraph contains a legal exception to the prohibition that is predicated on four conditions: (i) there are benefits (net) in terms of efficiencies; (ii) a fair share of the resulting benefits accrues to consumers; (iii) the restrictions of competition involved are indispensable for the benefits achieved by the agreement; and (iv) not all competition is eliminated.

Since the prior administrative notification and exemption requirement for the application of the third paragraph was eliminated by the modernization and decentralization of EU antitrust in 2004, corporations (or undertakings in EU parlance) must rely on self-assessment to determine whether the directly effective legal exception applies. Among the competition authorities in the EU, based on Article 10 of Regulation 1/2003[7], only the Commission is formally competent to adopt so-called negative decisions

finding that the conditions set out in the third paragraph of Article 101 TFEU apply. National competition authorities can only make findings of violation of the prohibition or decide not to act if they find a violation cannot be proven based on prioritization of their enforcement activities. As a rule, the Commission and ACM provide informal opinions to undertakings on the interpretation of the antitrust provisions only in cases where new legal issues arise, which tends to set a high bar.[8]

Historical context

ACM started out with a more traditional approach to sustainability issues in two high-profile cases involving respectively (i) a public-private accord for the decommissioning of five coal-fired power plants (2013)[9] and (ii) animal-welfare standards for broiler chickens agreed between supermarkets (2015).[10] It blocked both initiatives under the competition rules based on the argument that the sustainability benefits did not outweigh the negative effects for the consumer.

- In the power plants case, this was largely due to the fact that the benefits of reduction in CO_2 emissions were not factored into the antitrust analysis, because ACM assumed the existence of a waterbed effect. Any CO_2 reductions resulting from the power plant closures were assumed to lead to a mere displacement of emissions but not eliminate them. Consequently, there were insufficient benefits to outweigh the cost increase. This assessment would probably turn out differently today.[11] This is because starting in 2018, emission rights under the EU's Emission Trading Scheme (ETS) for CO_2 are largely removed from the market when reductions in actual emissions are achieved, rather than traded on. Hence, the waterbed effect would today be reduced and the benefits of reductions would be commensurately larger.
- The negative outcome in the broiler chicken case was based on ACM's willingness-to-pay analysis among consumers because the projected price increase to promote animal welfare exceeded the additional amount consumers were prepared to pay for this purpose. As it turns out, the agreement could equally well have been decided based on the indispensability condition, as an ex-post assessment has shown that, individually, the supermarkets subsequently achieved higher animal welfare standards for broiler chickens than those that had been planned under the agreement.[12] Hence, this assessment would not be much different today.

The negative fallout of these ACM positions has been considerable. It inspired a 2019 draft law on Sustainability Initiatives that would allow the Dutch Minister of Economic Affairs and Climate Policy to declare such sectoral initiatives universally binding. If adopted, this proposed route would bypass any negative rulings by ACM on sustainability issues. However, in the meantime, ACM itself has taken a new direction regarding sustainability agreements, which is among the most progressive in Europe.[13] This was inspired by the 2015 Paris Agreement and UN Sustainable Development Goals, and reflects board changes at ACM, which placed Martijn Snoep at the helm with strong views on the need for a proactive sustainability agenda. It also reflects a broader trend among National Competition Authorities in Europe.[14]

ACM Guidelines on sustainability agreements

This change of direction led to the adoption (following consultation) of draft Sustainability Guidelines that aim to provide clarity on the scope for sustainability agreements within Section 6 Mw and Article 101 TFEU, as seen by ACM.[15]

In the first place, the Sustainability Guidelines set out that not all agreements between undertakings fall under the first paragraph of these provisions, i.e., the cartel prohibition. Agreements which, for example, concern less important competition parameters and the impact of which on competition is negligible, may fall outside the scope of the cartel prohibition. This is spelled out in the Sustainability Guidelines also to illustrate that there is considerable scope for agreements outside the cartel prohibition. To this end, ACM included five categories of such agreements that would fall within a safe harbour. These concern agreements (i) that are non-binding, if undertakings determine their own contributions and how to realize them; (ii) creating codes of conduct, joint standards and certification labels, if transparent criteria and reasonable non-discriminatory access apply; (iii) improving product quality—where less sustainable products may no longer be sold if there are no appreciable effects on price and product diversity; (iv) involving innovation markets where agreement is necessary for know-how or scale, including exclusivity if necessary during the start-up phase; and (v) where necessary to ensure respect of national or international standards that apply to doing business in countries outside of Europe, e.g. protecting natural resources or respecting fair trade rules.

Next, the Sustainability Guidelines set out how ACM intends to apply the four cumulative criteria of the legal exception under the third paragraph of the relevant provisions (efficiencies; a fair share for consumers, indispensability of restraints; and no elimination of competition—see above).

The first of these is the positive balance between costs and benefits (sustainability or otherwise), which must involve objective benefits (e.g., based on scientific or official studies). The main relevant category of benefits here is the reduction of negative externalities, i.e., costs imposed on third parties that are not incorporated in the agreement, that may result from emissions of greenhouse gases, pollution, and environmental degradation.

The application of the second criterion, that of the fair share for consumers, is based on whether the agreements are (i) environmental-damage agreements that aim to limit damage to the environment in the production of goods and

services that help comply with a national or international standard on a concrete policy goal, or (ii) other sustainability agreements (e.g., related to animal welfare, workers' rights or supply-chain due diligence). By reducing environmental damage such as CO_2 emissions, environmental-damage agreements achieve a more efficient use of scarce natural resources with gains that are accrued not just by consumers within the relevant market, but also by society. Consequently, these broader gains are included in the fair share that consumers must receive (a related line of reasoning is the 'polluter pays' principle, which means that consumers contributing to environmental damage cannot hope to be fully compensated when this damage is avoided). For other sustainability agreements, the fair-share requirement requires full compensation of consumers within the relevant market (in line with the approach of the Commission discussed below).

ACM does not require quantification of benefits if the combined market share of the undertakings involved is <30%, or where benefits exceed costs by an order of magnitude. Quantification methods include not only willingness to pay but also shadow prices or prevention cost prices, which consider the cost of emissions.[16]

For the third criterion, indispensability, the test is whether the restriction involved is necessary to realise the sustainability objective and benefits. Both the agreement itself and each of the relevant restrictions must be necessary. In practice, this is often taken up first in the sequence of analysis. If clearly disproportionate restrictions are involved, the remainder of the agreement will not need to be assessed, as the four requirements are cumulative.

The fourth and final criterion of 'no elimination of competition' looks at whether the agreement eliminates competition in respect of a substantial part of the products in question. Therefore, it concerns the market shares of the undertakings participating in the agreement and the remaining parameters of competition. So long as the market participants involved continue to compete with one another on key parameters, there may still be sufficient room for competition, even in the case of market-wide sustainability agreements.

ACM's informal-guidance process

Based on these principles as set out in its draft Sustainability Guidelines, ACM provides informal guidance to undertakings.[17] The informal guidance is based on the prior self-assessment of the parties as to whether their agreement restricts competition, and falls under the scope of Section 6, paragraph 1 Mw and, if such is the case, whether it fulfils Section 6, paragraph 3 Mw.[18] However, in case of doubt, undertakings may discuss their agreement with ACM, preferably at an early stage. ACM will then indicate what options it sees, identify any risks, and will help find possible solutions.

The informal guidance process does not involve independent data collection by ACM. It may however ask questions and consult other parties such as other authorities. As the outcome of the guidance process, ACM provides an informal opinion on possible risks, not an exemption or a formal 'green light'. If there are no major concerns, the undertakings can proceed, yet still at their own risk. The benefit for the parties is having an extra pair of eyes from none other than the authority itself. Probably even more valuable for the parties is that, if an agreement is subsequently found to restrict competition, e.g., because new information puts the initiative in a different light, ACM will not impose fines if (i) the sustainability agreement was publicly announced and the draft Guidelines were followed in good faith; or (ii) the sustainability initiative was discussed with ACM, the information provided was in good faith, and ACM did not identify any major risks. In such cases, if competition issues arise, it will suffice to modify the agreements concerned accordingly in consultation with ACM.

There is a low bar for issuing guidance as ACM seeks to stimulate undertakings to take up its offer, also to be able to publicize the results in order to inform undertakings more broadly. A small team of ACM officials deals with these guidance cases.

Since the publication of the draft Sustainability Guidelines in 2021, ACM has given informal guidance on approximately 30-40 initiatives. Although the starting point was that ACM would publish its informal guidance on the initiatives, it turned out that not all guidance could be published. Some reasons for not publishing guidance are the agreements still being at a confidential stage, where parties just want to test the water, or where public parties are involved. For instance regarding agreements on responsible business conduct facilitated by the Social and Economic Council of the Netherlands (SER)[19] and when the Human Environment and Transport Inspectorate (ILT) was preparing its regulation imposing a duty of care and higher standards on fuel exporters to West Africa.[20]

Examples of informal guidance on sustainability initiatives in 2022

In 2022, ACM published guidance on five initiatives, which included, on the one hand, initiatives that were deemed not to violate the prohibition in Section 6, paragraph 1 Mw and, if applicable, Article 101, paragraph 1 TFEU, and, on the other hand, initiatives where ACM had to verify whether the exception in Section 6, paragraph 3 Mw and, if applicable, Article 101, paragraph 3 TFEU was justified.

Initiatives deemed not to violate the prohibition of Section 6 Mw and Article 101 TFEU.

- *Agreement between soft-drink suppliers on plastic handles*

  ACM assessed plans by Coca-Cola and the largest Dutch supermarket chains to remove the plastic handles on all soft-drink and water multipacks.[21] By removing the non-recyclable handles on these multipacks, the wrap becomes more recyclable, and less plastic is needed, which helps in realizing sustainability

goals. The agreement means that over 70% of multipacks would no longer have handles.

Based on a market study conducted by the parties, it appeared plausible to ACM that the handles do not play a role in the competitive process. Therefore, ACM concluded that the agreement did not restrict competition. ACM also found it important that the agreement is non-binding, as the undertakings could determine their own contributions and how to realize them.[22]

- *Joint purchasing by business users of green energy from an offshore wind farm*

This initiative concerns a collaboration involving the joint purchase of wind energy in order to stimulate green-energy supply.[23] A large association of business energy users, *Vereniging voor Energie, Milieu en Water* (VEMW), wanted to offer its members the opportunity to jointly conclude a power-purchasing agreement with a future developer of an offshore wind farm in the Dutch North Sea. By joining forces, the business energy users, including small and medium sized enterprises could be offered the opportunity to procure green energy straight from the producer and secure an attractive rate for green electricity for several years. The agreement also promotes the business case for wind farms by providing investment security. As a result, the initiative would help in realizing sustainability goals.

ACM concluded that it was plausible that the joint purchasing initiative is not restrictive of competition. As this initiative concerns one specific wind farm both the business energy users and the wind farm developers continue to have options to buy, respectively sell, sustainable energy elsewhere: business energy users tend to purchase energy from several sources while wind farm developers may also sell to traders, retailers etc.

- *Collaboration between garden centres to reduce the use of illegal pesticides*

This initiative concerns a collaboration between garden centres to reduce the use of illegal pesticides in the production of ornamental plants.[24] In spite of long-standing efforts to ban their use, illegal and environmentally harmful pesticides are frequently still used for the growth of ornamental plants in the Netherlands. Because previous private initiatives to stop their use, for instance by means of certification, have failed, the sellers of ornamental plants decided to introduce a collective boycott scheme. Growers who use the illegal pesticides—even after a first warning—are blacklisted by the participating garden centres. Before resuming delivery, growers must declare that they no longer use the illegal substances, and they must show what preventive actions they have taken.

Agreements among competitors to exclude certain suppliers are anticompetitive. However, the Guidelines stipulate that initiatives aimed at making the undertakings involved, their suppliers and/or their distributors respect national or international standards, and preventing illicit competition can be allowed (category (v)). The competition rules are not designed to protect such illicit competition, where growers that use illegal pesticides may gain a competitive advantage. However, when deciding not to raise objections to this agreement, ACM stressed that before any supplier is excluded, due process must be observed.

Initiatives exempted from the prohibition in Articles 6 Mw and 101 TFEU. In addition to the three initiatives that were not caught by the cartel prohibition, ACM has published guidance on two initiatives that were caught but were still allowed as they fulfilled the requirements of the exception under paragraph 3 of the Dutch and EU cartel prohibition.

- *Collaboration among distribution system operators to internalize the cost of CO_2 emissions*

First, ACM assessed a collaboration between distribution system operators for electricity and natural gas that aimed to reduce their CO_2 emissions by using a joint uniform internal price for emitting one ton of CO_2, which they can use in network investment and purchase calculations.[25] The idea behind internal pricing is that it encourages initially more costly low-carbon investment and deprioritizing high-emission projects. The distribution system operators want to jointly determine the internal CO_2 calculation price as they would otherwise find themselves at a competitive disadvantage given that they are subject to yardstick competition that normally incentivizes them to minimise costs.[26]

As the uniform internal price would be based on a growth model, ACM could not exclude that the agreement might eventually appreciably restrict competition. Therefore, ACM verified whether the collaboration could qualify for an exception to the cartel prohibition. ACM concluded that the sustainability gains outweighed the potential costs for users. In that context, ACM showed that the agreement always meets the requirement of a positive cost-benefit assessment if the internal CO_2 price is lower or equal to the CO_2-shadow price,[27] i.e., the theoretical or assumed cost per ton of carbon emissions which costs are avoided by using the internal CO_2 price.[28] The (sustainability) gains are in that way always larger than the costs of the collaboration. Moreover, all energy users impacted by the potential harm of the collaboration also benefit from the agreement if CO_2 emissions are reduced.

This approach opens the way for other companies to make similar investments in CO_2-reduction. In this context it is helpful to have a publicly certified price at hand when environmental benefits are balanced against the costs of an initiative.

- *Collaboration between Shell and TotalEnergies to store CO_2 in empty North Sea gas fields*

The second published initiative that was caught by the cartel prohibition, but fulfilled the requirements of the exception under paragraph 3 of the Dutch and EU cartel prohibition concerns a collaboration between Shell and TotalEnergies to jointly market an initial volume of carbon capture and storage (CCS) services in depleted North Sea gas fields to large-scale emitters of CO_2.[29] The collaboration is part of the Aramis project, in which the government, Gasunie and Energie Beheer Nederland are working together with Shell and TotalEnergies in order to build a high-capacity trunkline that connects with empty gas fields, among other activities. In addition, it concerns new, innovative methods as the parties would like to integrate transport and storage of both gaseous and cryogenic CO_2.

Major investments are therefore needed. In order to get the project off the ground, Shell and TotalEnergies need to offer the CO_2 storage together, and therefore jointly set the price with an eye to putting the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made. Because Shell and TotalEnergies are competitors, this collaboration could negatively affect price, quality, and innovation. They therefore requested ACM guidance on their initiative to jointly market this Launching Volume to emitters.

As ACM could not exclude that the initiative would restrict competition, it assessed whether the initiative qualified for exemption from the cartel prohibition. ACM concluded affirmatively.

- First, it found that Shell and TotalEnergies' initiative brings environmental benefits as CCS helps reduce CO_2 emissions of especially those emitters that, at the moment, still have few alternatives, avoids infrastructure duplication (offering economies of scale and scope), and reduces risk while creating an innovative market for CCS services. A fair share of those benefits is passed on to the users.
- Second, ACM found that the two companies would not have been able to reach the same result individually and the parties' prices for CCS are constrained by, amongst other things, limits on the subsidies that emitters can expect when choosing CCS, and their alternative of using the ETS, as a result of which the price should not be unreasonably high.
- Third, competition is not restricted for the remaining 80% of transport and storage capacity. Shell and TotalEnergies will then compete for the provision of CCS services, including on price, and other operators will also be allowed access to the infrastructure to provide CCS services in competition with the parties.

In this way the joint marketing initiative of Shell and TotalEnergies helps create a high capacity CCS infrastructure and a wider new market for CCS in the Netherlands. Given these considerations, ACM concluded that Shell and TotalEnergies are allowed, under both Dutch and EU competition law, to restrict competition when selling the first ±20% of CCS.

ACM experience with an informal-guidance process. Based on ACM's experience with the Sustainability Guidelines and the informal guidance process, ACM is convinced that these are beneficial. Instead of seeing the competition rules as a barrier to sustainability initiatives, the guidance cases show they can be compatible. By providing informal guidance, ACM can also remove potential doubts that might have hindered the development of a sustainability initiative. At the same time, this process not only promotes dialogue with parties, trade organisations, NGOs, and other institutions, but also furthers thinking about the interplay between competition law and sustainability.

The European Commission's draft Horizontal Guidelines

The European Commission has a track record of enforcing the competition rules against anticompetitive agreements involving sustainability claims. In the decision that culminated in the *Der Grüne Punkt* ruling, it found a company had abused its dominance in relation to pricing in a system for the collection and recovery of used packaging,[30] and, in the trucks cartel and the Ad Blue settlement decisions, it found instances of anticompetitive agreements involving environmental standards.[31] This trend of active enforcement will likely continue, but is now combined with a more proactive approach to help sustainability initiatives stay on track.

Recently, the European Commission amended its informal guidance notice in order to lower the threshold for parties to contact them about sustainability initiatives, in part also inspired by the reintroduction, in the context of agreements to deal with the COVID-19 pandemic, of informal administrative 'comfort' letters where the Commission indicates that there are no objections to the agreement under EU competition rules.[32] The Commission made clear that it is willing to help undertakings with their interpretation of the competition rules (including, as in the Netherlands, a commitment not to impose fines for bona fide initiatives).[33]

On substance, in March 2022 the Commission published draft Guidelines on horizontal agreements that include a chapter on sustainability.[34] In these Guidelines, the Commission opened a so-called 'soft safe harbour' for sustainability standards that are assumed not to violate Article 101 (1) TFEU. This soft safe harbour is based on such standards being (i) transparent; (ii) voluntary; (iii) non-exclusive of efforts to attain higher standards; (iv) there being no unnecessary exchange of commercially sensitive information;

(v) effective and non-discriminatory access to the outcomes of the standardisation procedure being ensured; (vi) the process not resulting in a significant increase in price or reduction of choice; and (vii) there being a monitoring system to ensure compliance.

Under Article 101 (3) TFEU, the Commission identified three sources of benefits for consumers that fulfil the fair share criterion: (i) individual use value (traditional consumer benefits in terms of price, quality or choice); (ii) individual non-use value (where consumers are willing to pay for environmental benefits that do not qualify as individual use value); and (iii) collective sustainability benefits to the extent there is a significant overlap between the consumers enjoying the benefits and the consumers within the relevant market, as in the case of a reduction in CO2 emissions. (In its CECED decision of 2000, the Commission had already considered such collective benefits,[35] but subsequently backtracked,[36] only to return to this possibility now.) These benefits would have to fully compensate consumers within the relevant market for the restriction of competition for the fair share criterion to be met. However, much remains uncertain, especially regarding the third category of collective benefits. Finally, the Commission generally insists on quantification of benefits.

The main bone of contention that remains is the fair share issue. In this context, it is worth noting that the CJEU in its 2013 *MasterCard* Case[37] ruled that: (i) out-of-market benefits count, if they affect substantially the same group; (ii) benefits to other consumers can also be counted toward a fair share for consumers overall; and (iii) full compensation of affected consumers is not required, just appreciable objective advantages. However, the *MasterCard* ruling, while reflecting earlier case law going back to *Consten/Grundig* (1966),[38] was handed down in the context of two-sided markets rather than sustainability. Hence, it would be highly welcome if the CJEU were to return to the fair share issue in a sustainability case. Given that the Commission and the national competition authorities will soon start deciding more individual sustainability cases under the Horizontal Guidelines and their national equivalents, it may be expected that such a case will come about before long, and hopefully provide the necessary clarity.

Conclusion

ACM's informal guidance practice shows how undertakings can be aided in developing sustainability initiatives that are compatible with the competition rules. This practice is likely to be extended to the EU level based on the sustainability chapter in the Horizontal Guidelines, and the more proactive approach to providing informal guidance that the Commission has adopted.

In the interest of the uniform interpretation of EU law, ACM has committed to adopting its final version of its own Sustainability Guidelines in line with the approach taken by the Commission. Where necessary however, ACM intends to rely on its prioritization: the freedom of not pursuing possible violations in cases where it believes the agreements are justified even if the Commission's approach either does not provide a clear answer, or would provide a negative answer. It will then be up to the Commission to decide whether to take such cases up itself, if there is a cross-border dimension.

In the meantime, however, the greening of EU antitrust has commenced, and there is no turning back. Hopefully, other jurisdictions will choose a similar path. ■

---

[1] ACM, *No Action Letter for the Agreement between Shell and TotalEnergies Regarding a Joint Marketing Initiative for CCS Services (Project Aramis)*, (June. 27, 2022), https://www.acm.nl/sites/default/files/documents/informele-zienswijze-samenwerking-shell-totalenergies-co2-opslag-noordzee.pdf.

[2] European Commission, Guidelines on Horizontal Agreements (draft) (2022), https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

[3] ACM, Guidelines on Sustainability Agreements (draft) (2020), https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf; ACM, Second draft version: Guidelines on sustainability agreements—opportunities within competition law, (2021), https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

[4] See Paris Climate Agreement, 12 December 2015, Treaty Series 2016, no 162; and The 2030 Agenda for Sustainable Development, A/RES/70/01, United Nations.

[5] *See* Simon Holmes, Dirk Middelschutte, and Martijn Snoep, Competition Law, Climate Change & Environmental Sustainability (Concurrences Books 2021); Simon Holmes, *Climate change, sustainability, and competition law*, 8 J. Antitrust Enforcement 354–405 (2020).

[6] Case C-382/12 P, MasterCard Inc. and Others v Comm'n, 2014 E.C.R. 1-0000.

[7] Council Regulation (EC) No 1/2003 2003, O.J. (L 1),1–25 (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty).

[8] ACM, *ACM Werkwijze Informele Zienswijzen* (Feb. 26, 2019), https://zoek.officielebekendmakingen.nl/stcrt-2019-11177.html; Commission Notice on Informal Guidance relating to Novel or Unresolved Questions Concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) C(2022) 6925 final, (Oct. 3th 2022); revising Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (guidance letters) 2004 O.J. (C101/78).

[9] ACM, *Analysis of the Planned Agreement on Closing Down Coal Power Plants from the 1980s as Part of the Social Council of the Netherlands' SER Energieakkoord*, (Sept. 26, 2013) https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

[10] ACM, *Analysis of the Sustainability Arrangements Concerning the 'Chicken of Tomorrow* (Jan. 16, 2015), https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf.

[11] Ilaria Noviello & Shaun Tey, *Anticipating Future Public Policy Changes in Environmental Cost-Benefit Analysis*, Oxera (March 30, 2022), https://www.oxera.com/insights/agenda/articles/anticipating-future-public-policy-changes-in-environmental-cost-benefit-analysis/.

[12] ACM, *Ex-post Assessment of Welfare of Today's Chicken and that of the 'Chicken of Tormorrow'* (Sept. 1, 2020), https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf.

[13] Jurgita Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, 13 J. Eur. Comp. L. & Prac. 336–348 (2022).

[14] Martijn Snoep, *What is fair and efficient in the face of climate change?* J. Antitrust Enforcement, jnad001, https://doi.org/10.1093/jaenfo/jnad001 (Jan. 13, 2023).

[15] ACM has also adopted guidelines on sustainability claims which aim to combat greenwashing. ACM, Guidelines: *Sustainability Claims* (Jan.18, 2021), https://www.acm.nl/sites/default/files/documents/guidelines-sustainability-claims.pdf.

[16] Shadow pricing is the assignment of a monetary value to an abstract commodity that is not ordinarily quantifiable as having a market price but needs to be assigned a valuation to conduct a cost-benefit analysis. See Adam Hayes, *Shadow Pricing: Definition, How it works, Uses, and Example* (Sept. 25, 2021), https://www.investopedia.com/terms/s/shadowpricing.asp.

[17] This is so far unique in the EU. Although the German Bundeskartellamt in January 2022 published guidance on two individual sustainability cases it does not use a comparable informal process based on sustainability guidelines. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html.

[18] And Article 101, para. 1 and 3 TFEU, if applicable.

[19] Netherlands, *Responsible Business Conduct (RBC) Agreements,* https://www.government.nl/topics/responsible-business-conduct-rbc/responsible-business-conduct-rbc-agreements.

[20] *See* Policy Rule on Maintaining the Quality of Petrol and Diesel Intended for Export to Low and Middle Income Countries Outside the EU, with Special Reference to the ECOWAS Countries 2022, ILT (Aug. 15, 2022); https://english.ilent.nl/documents/publications/2022/08/15/policy-rule-on-maintaining-the-quality-of-petrol-and-diesel-intended-for-export-to-low-and-middle-income-countries-outside-the-eu-with-special-reference-to-the-ecowas-countries-2022.

[21] ACM, *ACM is Favorable to Joint Agreement between Soft-Drink Suppliers about Discontinuation of Plastic Handles* (July 26, 2022), https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles.

[22] The assessment was therefore based on categories (i) and (iii) in the draft Sustainability Guidelines—see above.

[23] ACM, *ACM Favors Collaborations between Businesses Promoting Sustainability in the EnergySector* (Feb. 28, 2022), https://www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector.

[24] ACM, *Letter in response to sustainability initiative about reduction of illegal pesticides in garden retail sector* (Sept. 2, 2022), https://www.acm.nl/en/publications/letter-response-sustainability-initiative-about-reduction-illegal-pesticides-garden-retail-sector.

[25] ACM, *System operators can collaborate in order to reduce CO_2 emissions* (Feb. 28, 2022), https://www.acm.nl/en/publications/system-operators-can-collaborate-order-reduce-co2-emissions.

[26] This is because of sector-specific regulation. For more information, see the informal guidance letter mentioned in footnote 25.

[27] A shadow price is the efficient price of a climate target. The level of this shadow price depends on the maximum global temperature increase in degrees Celsius that is targeted. For example, if a global temperature increase of no more than 4 degrees Celsius is targeted, the government will have to consider less expensive alternatives than in a scenario where an increase of no more than 3 degrees Celsius is targeted. As a general rule, the higher the efficient price, the lower the temperature increase that the government would aim for. In the Netherlands, the shadow price is calculated by the CPB Netherlands Bureau for Economic Policy Analysis (CPB) and the PBL Netherlands Environmental Assessment Agency (PBL).

[28] For a further explanation of how such a cost-benefit analysis can be made, see *supra n.21*.

[29] ACM, *ACM: Shell and TotalEnergies Can Collaborate in the Storage of CO2 in Empty North Sea Gas Fields* (June 27, 2022), https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields.

[30] Case C-385/07 P—Der Grüne Punkt—Duales System Deutschland GmbH, 2009E.C.R. I-6155.

[31] Case AT.39824 -Trucks, Comm'n Decision (July 19, 2016), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8750_4.pdf; Case AT.40178—Car Emissions, Comm'n Decision (July 8, 2021), https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf.

[32] European Comm'n, *Communication from the Commission—Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current COVID-19 Outbreak*, 2020 O.J. (C116I/7) (Apr. 8, 2020) 16, 25.

[33] Commission Notice on Informal Guidance Relating to Novel or Unresolved Questions Concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that Arise in Individual Cases (guidance letters) C(2022) 6925 final, Brussels, October 3th 2022; revising Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (guidance letters) 2004 O.J. (C101/78).

[34] European Comm'n, *Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines*, https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

[35] Case IV.F.1/36.718.CECED, Comm'n Decision, 2000 O.J. (L187/47).

[36] European Comm'n, *Communication from the Commission—Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2011 O.J. (C11/01) (Jan. 14, 2011).

[37] Case C-382/12 P, MasterCard Inc. and Others v Comm'n, 2014 E.C.R. 1-0000.

[38] Joined Cases 56 & 58/64 Établissements Consten S.à.R.L.and Grundig-Verkaufs-GmbH v Commission, 1966 E.C.R. 429.