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SUSTAINABILITY AND ANTITRUST

Editors:
Leonardo Rocha e Silva and Miguel del Pino

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Sustainability and Antitrust

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Editors' Note

By Leonardo Rocha e Silva and Miguel Del Pino[1]

As the world is facing unprecedented environmental, social, and economic challenges, there is a growing demand for cooperation and innovation to achieve sustainability goals, such as reducing greenhouse gas emissions, promoting circular economy, and ensuring social justice. However, at the same time, sustainability agreements may restrict competition. Therefore, there is a need to ensure that such cooperation and innovation does not harm competition and consumer welfare or create barriers to entry and innovation for new or smaller players. The intersection of sustainability and antitrust law is one of the most topical and complex issues that businesses, regulators, and society are facing nowadays.

It is clear that there is a correlation between sustainability and antitrust, but there is a lack of a coordinated approach by agencies around the world to translate that correlation into a common understanding of antitrust policy.

The first country to incorporate sustainability benefits into antitrust analysis was Austria, which introduced the "world's first green exemption" in antitrust law, specifically enacted to promote environmental progress as this directly relates to consumer welfare. Previously, China had enacted an Anti-monopoly Law that included a public interest exception for "serving public interests in energy conservation, environmental protection and disaster relief." After these first moves, 2023 could be defined as a "green antitrust year", with sustainability related antitrust law developments in many jurisdictions.

While these initiatives are positive, companies considering a sustainable collaboration should be very mindful of the geographical scope of such collaboration to benefit from a legal exception rule, since different antitrust authorities have different approaches. At this point, it seems that it is more trustworthy for companies to evaluate the case law, regardless of whether there are different guidelines, considering that the principles adopted in the case law will most likely be referenced in their soft law.

In this context, this issue of the Perspectives on International Antitrust Magazine provides an overview of the current state of play, the recent developments and the prospects of environmental sustainability and antitrust law in various jurisdictions. Some of the questions that the authors of this issue address, from different angles and jurisdictions, are: How can antitrust law and policy accommodate and support environmental sustainability initiatives, while maintaining its core objectives of protecting and promoting competition? How can antitrust authorities and courts balance the short-term and long-term effects of sustainability agreements, mergers, and conduct on the relevant markets and society as a whole? How can antitrust law and policy evolve and adapt to the changing realities and expectations of the green transition, while ensuring legal certainty, consistency, and transparency for businesses and consumers?

[1] Leonardo Rocha e Silva is the co-chair and Miguel Del Pino is a former Co-Chair and a member of the International Antitrust Committee of the ABA International Law Section.

The 20 articles in this issue cover a range of topics such as:

- The role of the European Commission and the national competition authorities of the EU Member States, including Germany, Spain, Greece, the Netherlands, and Portugal, in aligning competition rules with sustainability goals, as reflected in the revised Horizontal Guidelines and the national guidelines and cases on sustainability agreements and mergers.

- The approaches and challenges of integrating sustainability into antitrust law in other jurisdictions, such as Australia, Brazil, Canada, Chile, China, Colombia, India, Mexico, New Zealand, Singapore, South Africa, Argentina, and the US, highlighting the similarities and differences in the legal frameworks, the enforcement practices, and the policy debates.

- The implications and risks of sustainability cooperation and shareholder stewardship for antitrust law, especially in the context of the lawsuit filed by 11 US State Attorneys General against BlackRock, State Street Corporation, and Vanguard Group, alleging antitrust violations related to their cooperation as shareholders in coal companies to reduce coal production.

- The potential reforms and strategies for achieving a proactive global consensus among antitrust agencies on sustainability agreements, such as international forums and working groups, research and analysis, case studies and workshops, and best practices guides.

This issue demonstrates that sustainability and antitrust law are not necessarily in conflict, but can be complementary and mutually reinforcing, if applied with flexibility, proportionality, and pragmatism. Furthermore, it offers valuable insights, perspectives, and recommendations for businesses, regulators, courts, academics, and practitioners who are interested in or involved in this fascinating and important field.

We hope that this issue encourages further discussion and debate on sustainability and antitrust law and contributes to the development of a more sustainable and competitive future for all.

We thank all the outstanding authors for their excellent contributions, and the staff of the International Law Section of the American Bar Association, as well as Pilar Moreyra, Delfina O'Farrell and Eliane de Souza Lopes for their support and cooperation for the release of this International Perspectives Magazine; and invite the readers to share their feedback and comments with us and the authors.

Co-Chairs Note

By John Eichlin, Tamara Dini and Leonardo Rocha e Silva

We are pleased to introduce the winter 2025 edition of Perspective on International Antitrust. This insightful issue, edited by Leonardo Rocha e Silva and Miguel del Pino, includes articles from a broad set of jurisdictions. We would like to thank each of the authors for their valuable contributions!

The intersection of sustainability and antitrust law has become an increasingly important topic for policymakers, legal practitioners, and businesses alike. This edition seeks to explore how antitrust frameworks can adapt to the rising tide of sustainability initiatives, balancing the need for robust competition with the imperative of combatting environmental and social crises.

Featuring perspectives from 20 different countries, this collection of articles provides a comprehensive, cross-jurisdictional view of how sustainability is shaping antitrust enforcement and regulatory approaches around the globe. From the European Union's Green Deal to antitrust concerns in emerging markets, the contributions highlight the diverse ways in which different regimes are navigating the tension between fostering competition and promoting sustainable practices.

As businesses and governments strive to meet international climate targets and implement social responsibility measures, the role of antitrust law in facilitating or hindering progress is becoming more pronounced. Our hope is that these articles are not only informative but also inspire further discussion on how competition laws can evolve to support the global shift towards a more sustainable future.

We are grateful to all the contributors for sharing their insights and expertise, offering a truly global perspective on a topic that will shape the future of both competition policy and environmental stewardship.

A final comment about our Committee, the International Antitrust Committee of Section of International Law of the American Bar Association: The International Antitrust Law Committee, through live programs, teleconferences, publications, and policy comments, provides a forum for members to learn about and share competition law developments, influence international competition law and policy, and connect with an interesting, diverse and fun group of professionals from all corners of the globe.

The Netherlands

Sustainability Collaborations: The Dutch Policy Rule In Action

By Helen Gornall, Valentine Szita Marshall, and Shubhanyu Singh Aujla[579] *of De Brauw Blackstone Westbroek*

1 INTRODUCTION

The Netherlands Authority for Consumers and Markets ("**ACM**") has recently informally assessed and supported five sustainability agreements under its nonconformist national policy rule on oversight of sustainability agreements (**"Policy Rule**").[580] Although the ACM makes it clear in its Policy Rule that it will evaluate sustainability agreements in accordance with the approach outlined by the European Commission ("**EC**") in revised EU guidelines for horizontal cooperation agreements between competitors ("**EU Horizontal Guidelines**"),[581] it nevertheless grants businesses more leeway to conclude two types of sustainability agreements: (i) agreements ensuring compliance with binding European or Dutch sustainability rules, and (ii) environmental-damage agreements. The ACM does so by declining to take enforcement action against such sustainability agreements if the relevant criteria of its Policy Rule are met. The ACM's guarantee not to enforce in some situations, including a commitment not to impose fines, notably covers sustainability agreements potentially incompatible with applicable EU rules set out by the EC in the EU Horizontal Guidelines.

Until the end of 2024, only five ACM informal assessments were publicly available online, providing some additional insight into the ACM's application of its Policy Rule. Nevertheless, the ACM's enforcement divergence from the EU Horizontal Guidelines does not exclude the potential for EC intervention, adding complexity and reducing legal certainty for businesses seeking to act upon the ACM's informal assessments. That said, the sustainability agreements informally assessed and supported by the ACM under its Policy Rule to date, generally do not test the boundaries of EU competition law,[582] and would likely have been acceptable to the EC as well. At the same time, and to the best of our knowledge, no proposed sustainability collaboration has yet been brought to the EC for its review, so we cannot comment on the EC's enforcement practice.

The lack of examples at the EU level does, however, cast doubts over the effectiveness of the EC's outreach to businesses to come forward and discuss their sustainability

[579] Respectively partner, associate, and legal adviser at De Brauw Blackstone Westbroek.
[580] Policy Rule on ACM's oversight of sustainability agreements, (4 October 2023) ACM/UIT/596876.
[581] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, (21 July 2023) 2023/C 259/01.
[582] The most likely exception being the ACM's informal assessment of sustainability initiative regarding the recycling of commercial waste, (4 October 2023), ACM/UIT/605715.

dilemmas and the related need to cooperate with competitors. It is possible that businesses are sceptical of the EC's overtures, given it has been prioritising sustainability-related antitrust investigations in recent years.[583] It must, however, now be borne in mind that the recent appointment of Teresa Ribera as the EC's Executive Vice-President for a Clean, Just and Competitive Transition has raised questions about whether the EC's approach to competition and sustainability may change, with the possibility of the EC's approach becoming more radical, potentially even going beyond the bold steps of the ACM.[584]

In this context, our article provides a concise overview of the ACM's Policy Rule, including its background and general construction, and the proposed treatment of environmental damage agreements and agreements ensuring compliance with binding sustainability rules. In addition, we also provide a summary of each of the ACM's five publicly available informal assessments.

2 THE ACM'S POLICY RULE

A. BACKGROUND

Competitors are increasingly considering joining forces to pursue sustainability goals, thereby pre-empting a potential "first mover disadvantage". This is a situation where customers do not reward the choice of an undertaking to adopt higher sustainability standards (e.g. because the product is more expensive) thereby opting for the less sustainable product or service of a competitor instead. As a result, the sustainability efforts of one company lead to sales of products increasing for the more polluting / less sustainable party. By sharing risk and costs, companies are able to avoid this problem, enabling the pursuit of new and, often, costly innovations to achieve greener business practices.

However, if competitors join forces, they may risk flouting the prohibition on anticompetitive agreements. Therefore, companies and their legal advisers need to assess if any proposed pro-sustainability collaboration affects competition parameters (price, quality, choice, innovation, etc.). If competition parameters are likely to be affected, companies must assess if the sustainability objective they seek to pursue can be met individually, i.e., without coordinating with their competitors. In many cases, sustainability efforts may well be rewarded by consumers, allowing the greener product or service to be used as a parameter of competition to the benefit of the innovating party. However, if this is not the case and a first-mover disadvantage exists, a joint initiative with competitors could be the only realistic way to effect change. Firstly, before embarking on any collaboration, it is prudent – under consumer law as

[583] See, among other examples, European Commission, *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars,* (8 July 2021); European Commission, *Antitrust: Commission opens investigation into PPC's behaviour in the Greek wholesale electricity market*, (16 March 2021); and European Commission, *Antitrust: Commission carries out unannounced inspections in the automotive sector*, (15 March 2022).

[584] Please see section 2E, below, for a more detailed discussion of this development.

well as competition law – to ensure all aspects of a proposed sustainability agreement contribute towards achieving a genuine and verifiable sustainability objective. There must be no "greenwashing" risks. Secondly, it must be assessed whether a proposed sustainability agreement that is likely to affect the parameters of competition can benefit from a statutory exemption under Article 101 (3) TFEU

One of the conditions that is critical in this regard, i.e. to avail a statutory exemption, is that the consumers affected by a restriction of competition receive a 'fair share' of the possible benefits stemming from the sustainability agreement in question. As per the EC, consumers only receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral, or in other words, consumers are fully compensated. In addition, another important condition is that the restriction of competition should be indispensable to the attainment of the benefits.

Against this background, both the ACM and the EC have sought to clarify how companies must proceed with such pro-sustainability collaborations without infringing competition rules. To this end, the ACM first published draft sustainability guidelines in July 2020,[585] revising them in January 2021 after a public consultation.[586] The ACM's draft guidelines demonstrated its comparatively progressive approach on several issues, such as diverging from the EC's position that benefits stemming from sustainability agreements that restrict competition must fully compensate affected consumers regardless of the type of sustainability objective pursued.[587] The ACM had argued in its draft guidelines that depending on the sustainability objective driving the collaboration, it should be acceptable if consumers are not always fully compensated for any price increase or decrease in choice as long as there are wider benefits to society. In this regard, the ACM was also more open to accepting out-of-market benefits and unlike the EC, it did not impose a strict condition requiring a substantial overlap between the affected consumers in the relevant market and the beneficiaries outside that market.

Given the ACM recognised the need for a uniform EU approach, it did not finalise its draft guidelines while the EC was working on revising the EU Horizontal Guidelines.[588] The ACM, nonetheless, clarified that it would rely on the draft guidelines as a reference instrument in its review of sustainability agreements. True to its word, the ACM relied on its draft guidelines to assess and support five agreements covering industry sectors as diverse as energy, beverages, and the floricultural

[585] ACM Guidelines on Sustainability agreements — Opportunities within competition law, (9 July 2020), first draft.
[586] ACM Guidelines on Sustainability agreements — Opportunities within competition law, (26 January 2021), second draft. See also Helen Gornall and Shubhanyu Singh Aujla, *Guidelines on Opportunities Within Competition Law for Sustainability Agreements (The Netherlands)*, (2022), Thomson Reuters.
[587] Contrast the EU Horizontal Guidelines (n 3), paras 583–584, in which the EC clarifies consumers only receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral, or in other words, consumers are fully compensated, with the Revised Draft Guidelines (n 8), paras 45–50. See also ACM Legal Memo, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?,* (27 September 2021).
[588] ACM, *Guidelines on sustainability agreements are ready for further European coordination*, (26 January 2021).

market.[589] However, once the EC finalised the EU Horizontal Guidelines, the ACM's approach become contradictory and so it replaced its draft guidelines with the Policy Rule.[590]

B. Policy Rule: General Construction

Unlike ACM guidelines that explain its interpretation of statutory provisions, its policy rules instead explain how the ACM will exercise certain administrative powers.[591] A policy rule of this kind can be categorised as a type of formal decision by a governing body concerning its exercise of an administrative power.[592] The ACM's Policy Rule on its oversight of sustainability agreements accordingly outlines the ACM's enforcement approach regarding sustainability agreements.[593]

Similar to the EU Horizontal Guidelines,[594] the Policy Rule provides a broad definition of a sustainability agreement, which is any agreement (horizontal or vertical[595]) that pursues a sustainability objective, regardless of its specific form.[596] The ACM reiterates the relevant framework for reviewing sustainability agreements, i.e. the prohibition of anticompetitive agreements (Article 101(1) TFEU/Article 6(1) Dutch Competition Act "**DCA**"), and the four cumulative criteria for availing a statutory exemption (Article 101(3) TFEU/Article 6(3) DCA).[597] The ACM also explicitly affirms that it will follow the EU Horizontal Guidelines and relevant national and European case law when applying this framework.[598] This is important given most Dutch sustainability agreements are covered by EU competition rules since they are likely to have a cross-border effect.[599] As such, it is worth noting that according to the EU Horizontal Guidelines, sustainability agreements are not a distinct category of horizontal agreements. If agreements between competitors are one of the forms of cooperation agreements covered elsewhere in the EU Horizontal Guidelines, their assessment will be based on the relevant chapter together with the guidance in the separate chapter on sustainability agreements. For example, an agreement to purchase exclusively from suppliers that respect specific sustainability standards is evaluated according to the chapter on purchasing agreements while taking into consideration the

[589] See also Helen Gornall et al., *Dutch Competition Authority Willing to walk the talk on sustainability agreements,* (21 September 2022), De Brauw Blackstone Westbroek.
[590] Policy Rule (n 2), para. 43. See also Helen Gornall, Agnieszka Bartlomiejczyk and Shubhanyu Singh Aujla, *Oversight of Sustainability Agreements in the Netherlands: New Policy Rule Issued by the ACM,* (2024), Oxford Journal of European Competition Law & Practice.
[591] Dutch General Administrative Law Act, Article 4:81; and Article.1:3(4) of the Dutch General Administrative Law Act: "an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority."
[592] H.E. Broring et. al., *Bestuursrecht 1*, The Hague: Boom Juridisch 2020, p. 207
[593] Policy Rule (n 2), para. 5.
[594] EU Horizontal Guidelines (n 3), para. 521.
[595] In other words, at the same level of the supply chain, or at different levels of the supply chain, respectively.
[596] Policy Rule (n 2), para. 14.
[597] Policy Rule (n 2), para. 15.
[598] Policy Rule (n 2), para. 18.
[599] Policy Rule (n 2), para. 5. See also Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance), (27 April 2004) 2004/C 101/07.

chapter on sustainability agreements. If there is a discrepancy between chapters, the parties may rely on the more favourable guidance.

The ACM has thus largely drafted its Policy Rule around the EU Horizontal Guidelines and clarified that it did so to facilitate a harmonised pan-EU approach. Yet the ACM's Policy Rule differs from the EU Horizontal Guidelines when it comes to two specific types of sustainability agreements.

C. COMPLIANCE AGREEMENTS

Firstly, compared to the EC, the ACM grants a broader ambit to agreements aimed at ensuring compliance with binding sustainability rules (**"Compliance Agreements"**). The EU Horizontal Guidelines only place outside the scope of Article 101 TFEU those agreements which aim to ensure compliance with legally binding and sufficiently precise requirements or prohibitions based on international legal sources (international treaties, agreements, or conventions).[600] The ACM goes beyond the EU Horizontal Guidelines by stating that it will not investigate such agreements that are aimed at ensuring compliance with EU or national rules as well.[601] This deviates from the EC's position that where EU or national law already requires market participants to comply with specific obligations that have a sustainability objective, agreements between competitors and any competitive restrictions they entail are not indispensable to ensure compliance with the obligations imposed. According to the EC, obligations stemming from European or national sources of law do not necessitate Compliance Agreements as the legislator has already decided that each undertaking must individually comply with the obligation in question.[602] The ACM, unlike the EC, instead focuses on the actual compliance with and factual enforcement of sustainability rules,[603] regardless of their source, arguing it would be inexpedient to protect "illicit competition" that would not exist if these binding rules had indeed been properly followed.[604] Even before the ACM issued its Policy Rule, it had endorsed a joint initiative by garden centres to boycott suppliers that use illegal pesticides,[605] thereby ensuring the enforcement of statutory requirements. Such a collective boycott would typically fall foul of the prohibition on anti-competitive agreements. However, according to the ACM, the initiative was not anticompetitive as it targeted the elimination of competition based on illegal production methods, which competition law should not protect.

It is questionable whether the ACM's position is in keeping with the *Slovak Banking* judgement of the Court of Justice of the European Union (**"CJEU"**)'. In this case, the CJEU held that ensuring compliance with statutory requirements is the responsibility

[600] EU Horizontal Guidelines (n 3), para. 528.
[601] Policy Rule (n 2), paras. 20-21.
[602] EU Horizontal Guidelines (n 3), paras. 564-565.
[603] See Helen Gornall et al., (n 12), p.p. 4-5.
[604] Policy Rule (n 2), para. 21.
[605] Informal Guidance regarding Sustainability Initiative of Dutch Garden Retail Sector, (21 September 2022) ACM/UITNZP/001508.

of public authorities, not private entities,[606] also since the application of statutory provisions may require complex assessments. The CJEU's demarcation of the area of responsibility of public authorities may preclude certain Compliance Agreements allowed under the Policy Rule.[607] At the same time, it has also been argued by some that by focussing on the complexity of assessments that the application of statutory provisions may require,[608] the CJEU has left room for those Compliance Agreements which target sufficiently precise sustainability rules that do not require complex assessments, and in particular, the weighing of different public interests.[609]

D. ENVIRONMENTAL-DAMAGE AGREEMENTS

Secondly, unlike the EC, the ACM distinguishes "environmental-damage agreements" from "other sustainability agreements".[610] Compared to the general approach outlined in the EU Horizontal Guidelines, the ACM grants greater leniency to environmental-damage agreements which it defines 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".[611] The ACM states that it will not further investigate environmental-damage agreements, provided that the initial assessment shows that (i) it is plausible that the agreement is necessary for achieving the environmental benefits, and (ii) the environmental benefits *sufficiently* outweigh any potential anti-competitive effects.[612]

However, different from the framework in its previous draft guidelines, the ACM now furthermore expressly requires that affected consumers in the relevant market must receive an "appreciable and objective part" of the benefits.[613] This requirement is not the same as the EC's requirement that in order to be exempted, a sustainability agreement that restricts competition must grant affected consumers full compensation for any harm caused (creating an at least neutral overall effect on consumers in the relevant market).[614] It remains to be seen to what extent the ACM will use this seemingly less demanding threshold to pull away from the EC's twin enforcement standpoints for exempting sustainability agreements, namely, (i) the overall effect on consumers affected by the restriction of competition be at least neutral, and (ii) that

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606 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitelina a.s.,* (7 February 2013) ECLI:EU:C:2013:71, para 20.
607 Namely, agreements aimed at ensuring compliance with binding rules given in national or European legal sources. See Helen Gornall et al., (n 12), p.p. 4-5.
608 *Slovak Banking* (n 28), para. 20.
609 See, Mariska van de Sanden & Wolf Sauter, *De Beleidsregel Toezicht ACM op duurzaamheidsafspraken: toepassing prioriteringsbeleid bij oneigenlijke concurrentie en milieuschade*, (2023), Markt en Mededinging.
610 See Helen Gornall et al., (n 12), p.p. 2-3; The ACM in its draft guidelines had made a distinction between environmental damage agreements and other sustainability agreements that concerned social or other forms of sustainability (working conditions, animal welfare, social sustainability, and human rights) such as establishing minimum animal welfare requirements for meat production. Although it does not explicitly retain this distinction in the Policy Rule, it does single out environmental-damage agreements and its enforcement approach towards these agreements.
611 Policy Rule (n 2), para. 22.
612 Policy Rule (n 2), para. 23.
613 Policy Rule (n 2), para. 23.
614 EU Horizontal Guidelines (n 3), para 569.

out-of-market benefits are only relevant if the consumers affected by the restriction and those benefiting outside the relevant market are substantially the same, and only if the benefits are significant enough to compensate the affected consumers in the relevant market.[615]

In particular, we await in anticipation to see how broadly or narrowly the ACM will, in practice, interpret its requirement of an "*appreciable and objective part"* of the benefits stemming from an environmental-damage agreement being passed on to affected consumers. Although the ACM has clarified that this obviously makes it a prerequisite that affected consumers belong to the group that benefits from the agreement, it has still not imposed a strict condition that affected consumers and ultimate beneficiaries must be substantially the same.

It is also noteworthy that the ACM additionally explicitly states that it will also consider the *polluter pays principle* in the competitive assessment of environmental damage agreements. This enforcement slant, in turn, may provide some additional room to exempt environmental damage agreements that do not fully compensate consumers of the concerned polluting products.[616] In this respect, the ACM has consistently advocated for consumers to be held accountable for their demand, which in turn means they should be accountable (at least to a certain extent) for the environmental damage caused by their demand which is sought to be addressed via an environmental-damage agreement. Thus, the ACM, through its Policy Rule, appears to indicate that it may not require a neutral effect on consumers in all cases,[617] which would deviate from the EU Horizontal Guidelines and – in the views of some – potentially the jurisprudence of the CJEU.[618]

E. IMPACT ON PROSPECTIVE SUSTAINABILITY AGREEMENTS

While the Policy Rule confirms that the ACM will largely follow the EU Horizontal Guidelines, in section 3, it deviates with respect to Compliance Agreements and environmental-damage agreements.[619] Yet neither this enforcement divergence nor the ACM's commitment to refrain from fining informally endorsed agreements or publicly

[615] EU Horizontal Guidelines (n 3), paras 583–584.
[616] See, among others, Maurits Dolmans, *The 'Polluter Pays' Principle as a Basis for Sustainable Competition Policy*, (22 October 2020), Competition Law & Environmental Sustainability, p.p. 18-19; and Helen Gornall et.al. (n 11).
[617] The ACM has also issued numerous public statements disagreeing with the EC's principle of full compensation. See, among others Martijn Snoep, *What is fair and efficient in the face of climate change?,* (31 May 2022); and ACM Legal Memo (n 9). See, also for a contrasting view on why this approach may not always be appropriate, OECD, *Out-of-Market Efficiencies in Competition Enforcement, OECD Competition Policy Roundtable Background Note* (2023), p.p. 30-31.
[618] In *Asnef-Equifax* the Court held that the application of article 101(3) TFEU requires that the overall effect on consumers in the relevant markets be favourable. See *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL/Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, (23 November 2006), ECLI:EU:C:2006:734, para. 72.
The EC cites *Asnef-Equifax* in its reasoning for requiring at least a neutral effect on consumers, see EU Horizontal Guidelines (n 3), para 569. The ACM has publicly disagreed with this reading of the decision. See, among others, ACM Legal Memo (n 9), p. 3.
[619] Though it must be remembered that a certain degree of divergence within the EU's multi-level governance system is more widely present. See, among others, Or Brook, Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities (2019), Common Market Law Review.

announced sustainability agreements that adhere to the Policy rule in good faith,[620] shield prospective participants from potential EC enforcement. This is because, within the EU, both national competition authorities and the EC jointly enforce EU competition rules. EU competition rules apply, inter alia, when there is an effect on trade between EU member states, a condition that is quite easily fulfilled.[621] As many sustainability initiatives in the Netherlands are likely to have an effect on trade between member states, the EC could potentially pursue such agreements even if the ACM chooses not to.

Due to this risk, only participants in purely domestic Dutch sustainability agreements, i.e. those without an effect on trade between EU member states, can take full comfort from the ACM's position. However, even the ACM acknowledges in its Policy Rule[622] that many prospective agreements in the Netherlands are likely to affect trade between member states and thus fall within the scope of EU competition rules.[623] Therefore, the EC may still scrutinise and take enforcement actions against agreements informally supported by the ACM, which can increase legal uncertainty.

That said, one may expect such differences of opinion to happen behind closed doors between the agencies where a proposal is material enough to have a clear EU dimension. Moreover, with Teresa Ribera being appointed as the EC's Executive Vice-President for a Clean, Just and Competitive Transition, there may now be a greater chance of the EC adopting an approach to sustainability agreements which is more closely aligned with the ACM's position. Ribera has a strong track record in the area of sustainability,[624] and President von der Leyen's mission letter to Ribera builds upon this priority topic, calling for a new approach to, and the modernisation of, the EC's competition and sustainability policy, such as through reviewing the EU Horizontal Merger Guidelines and adopting the Clean Industrial Deal.[625] As such, Commissioner Ribera is set to become a major "green" influence on the EC's future competition

[620] See Policy Rule (n 2), para. 40. This commitment is arguably broader than that provided by the EC. See Mariska van de Sanden & Wolf Sauter (n 31).
[621] See, among others, Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance), (27 April 2004) 2004/C 101/07.
[622] Policy Rule (n 2), para. 5.
[623] Even where a prospective participant deems this to be unlikely, the EC's enforcement actions can at times be difficult to predict. See, for an illustration of this unpredictability, the situation concerning bellow threshold referral at issue in *the Illumina/Grail saga*, in which the CJEU disagreed with the EC's broad interpretation of article 22 of the EU Merger Regulation: *Joined Cases C-611/22P and C-625/22P, Illumina Inc. v. European Commission and Grail LLC, and Illumina Inc. v. European Commission,* (3 September 2024) ECLI:EU:C:2024:677.
See, for a critical view of the EC's approach, Alan Riley, *The Illumina Opinion: Article 22, Antitrust and the Rule of Law. The Devastating Critique of Advocate General Emiliou in the Illumina/Grail case*, (12 April 2024), Kluwer Competition Law Blog.
[624] Among other functions, she has served as Executive Director of the Institute for Sustainable Development and International Relations, Spanish Secretary of State for Climate Change, and now Spanish Minister for Ecological Transition. See European Parliament, *Hearing of the Commissioner-designate: Teresa Ribera: CV,* (2024).
[625] Ursula von der Leyen, *Mission letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition*, (17 September 2024) p.p. 5-7.

policy, with some voicing concerns that she may even prioritise sustainability gains over competition concerns,[626] though this view is far from universal.[627]

It also has to be considered whether the ACM's Policy Rule is in keeping with the duty of sincere cooperation imposed under EU Law.[628] While Member States and, by extension their competition authorities, are granted a degree of freedom to set their own prioritisation policy,[629] sincere cooperation entails that Member States use their discretion to fulfil EU Law obligations. Thus, in principle, the ACM should guarantee the effective enforcement of EU competition law[630] and not deliberately underenforce.[631] It therefore remains a moot point whether the ACM can prioritise enforcement, based not on resource and capacity constraints, but instead based on specific sustainability policy considerations which some may argue lead it to effectively ignore EU competition rules, reducing legal certainty.[632]

3 THE ACM'S POLICY RULE IN PRACTICE

The ACM has promptly implemented its new Policy Rule through five informal assessments. These assessments provide insights into the ACM's application of its Policy Rule. The ACM chose not to investigate each assessment further, while reserving the right to review if new facts were to arise.[633] While the ACM reached similar conclusions in each assessment, its reasoning differed, making it useful to evaluate each assessment separately.

A. FIRST ASSESSMENT - RECYCLING COMMERCIAL WASTE

On 4 October 2023, the ACM issued informal guidance on an initiative by the Dutch Waste Management Association and several waste collectors regarding the recycling of commercial waste.[634] The participants who are competitors wanted to agree to always offer new corporate clients (waste disposers) a contract for at least two sorted waste streams (such as biodegradable waste, paper, or yard waste). In this way, the

[626] See, among others, Francesca Micheletti and Zia Weise, *Competition poses the toughest test for climate chief Ribera,* (12 November 2024), Politico.
[627] See, among others, Cristina Pricop, *Questions for Ribera — can we really compete our way to decarbonisation?*, (11 November 2024), Politico.
[628] Article 4(3) of the Consolidated version of the Treaty on European Union, (26 October 2012) 2012/C 326/01.
[629] This way, national competition authorities have more control over how to manage their limited resources. See: Directive (EU) 2019/1 to Empower the Competition Authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (11 December 2018), directive (EU) 2019/1, article 4(5). See, on the allocation of competition authorities' resources more generally, William E Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness* (2018), The Competition Law Review.
[630] It has been argued that this duty extends even further, requiring the maximalisation of European competition law's effectiveness and uniformity. See, among others, Miguel Sousa Ferro*, Institutional Design of National Competition Authorities: EU Requirements,* (30 November 2017), SSRN, p. 9.
[631] Ondrej Blažo, *Proper, Transparent and Just Prioritization Policy as a Challenge for National Competition Authorities and Prioritization of the Slovak NCA,* (18 February 2021), Yearbook of Antitrust and Regulatory Studies, p. 125.
[632] Or Brook, *Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy,* (13 June 2020), Journal of Competition Law & Economics, p.p. 486-487.
[633] In line with the ACM's policy rule. See Policy Rule (n 2), para. 40.
[634] Informal assessment regarding the recycling of commercial waste, (n 4).

participants sought to facilitate compliance with the obligation to separate waste required under the Netherland's National Waste Management Plan, which obliges disposers of 240–660 litres of waste (virtually all the participants' customers) to separate at least one waste category, thereby delivering at least two separate waste streams.[635] This requirement was not being fully enforced by Dutch authorities.

The ACM concluded that the initiative plausibly met the criteria outlined in section 3.1 of the Policy Rule with respect to waste disposers with a statutory obligation to separate waste streams,[636] as it would give effect to Dutch waste separation laws. Additionally, the ACM concluded that it was plausible that the purpose of the initiative was solely to achieve compliance with Dutch waste separation laws, thereby promoting sustainability. In reaching these conclusions, the ACM considered that the initiative was (i) limited to the waste disposer's legal requirements, (ii) contained sufficient safeguards to limit the initiative to that which is necessary and proportionate, as it was voluntary and non-exclusive, and (iii) allowed its participants a degree of freedom to choose which waste streams to separate, as well as to exceptionally deviate from the agreement. While the ACM determined that the agreement could potentially restrict competition for waste disposers who fell below the applicable legal thresholds for requiring separated waste streams (to whom Section 3.1 accordingly did not apply), the ACM concluded that this group was so small that any effect on the Dutch market would be negligible.

B. SECOND ASSESSMENT - E-COMMERCE SUSTAINABILITY STANDARD

On 11 April 2024, the ACM issued informal guidance on the launch of a new sustainability standard for the e-commerce sector by *Thuiswinkel*, an industry association for the e-commerce sector.[637] The proposed certification system aims to help participating webshops reduce their environmental impact in six targeted areas: strategy, product offering, packaging, delivery, returns, and circularity.

Despite stating in its Policy Rule that it would in principle publish all its assessments, [638] the ACM has not (yet) done so in this case. The press release does not explicitly state how the ACM categorised the proposed agreement.[639] However, the ACM appears to have decided that the agreement constituted a sustainability standardisation agreement which posed no appreciable risk of restricting competition. The ACM stated that it found the following considerations important: (i) participation in the initiative would be voluntary, (ii) an independent third party would determine whether a webshop meets the requirements to be certified, (iii) the participants would maintain a degree of freedom over their sustainability visions, goals and choices within the

[635] National Waste Management Plan, LAP3 / NWMP3, Chapter B.3.4.2.3, p.111–112.
[636] Which made up the vast majority of the prospective participants' clients.
[637] ACM, *ACM: duurzaamheidsinitiatief Thuiswinkel past binnen concurrentieregels,* (11 April 2024).
[638] Policy Rule (n 2), para. 38.
[639] Despite the fact that doing so could provide additional clarity, in particular with respect to press releases regarding informal assessments which are not published online.

boundaries of the certification system, (iv) the proposed agreement would leave room for new sustainability innovations, and (v) Thuiswinkel guaranteed it would ensure that no commercially sensitive information would be exchanged. The ACM also favourably considered that the certification system would require participants to communicate about their sustainability efforts in line with the Sustainability Claims Guide,[640] providing consumers with concrete, transparent information about the sustainability benefits of their products and services.

C. THIRD ASSESSMENT - COFFEE CAPSULE RECYCLING

On 4 July 2024, the ACM issued informal guidance on a proposed agreement through which the Royal Dutch Association for Coffee and Tea Companies and nine coffee capsule manufacturers would, through the newly established Association for Coffee Capsules Recycling Netherlands, jointly make arrangements with waste-processing companies to facilitate the sorting and recycling of coffee capsules, including through jointly investing in technologies such as sorting machines.[641] The agreement thus aimed at expanding the percentage of aluminium and plastic coffee capsules recycled.

The ACM concluded that the initiative constituted a sustainability agreement, as amongst other things, its goal was to promote the recycling of plastic and aluminium coffee capsules. The ACM partially based its conclusion that the agreement could be considered a sustainability agreement, on the fact that the most recent EC proposal to amend EU rules on packaging and packaging waste required coffee capsules to be recyclable,[642] as opposed to compostable (as a previous EC proposal had required).[643] The ACM further concluded that the initiative posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM considered that the agreement did not (i) facilitate the sharing of sensitive information, (ii) pose a significant risk of excluding competing producers of coffee capsules or waste processors, or (iii) pose a risk of increased prices. While the ACM also did not find an unacceptable risk of the agreement stifling future innovation, it did advise the participants to actively guard against the initiative precluding innovation in more sustainable alternatives to recycling. Additionally, the ACM clarified that it may request further information about the latest innovation and sustainability developments at a later date.

[640] Guidelines regarding Sustainability claims, (13 June 2023). The ACM also remains vigilant of greenwashing risks from a consumer protection perspective: ACM, *Revised guidelines offer more clarity regarding misleading and vague sustainability claims*, (13 June 2023).
[641] ACM/24/189472 Informal guidance regarding the 'recycling of coffee capsules' initiative, (4 July 2024) ACM/UIT/621991.
[642] European Council, *Packaging: Council and Parliament strike a deal to make packaging more sustainable and reduce packaging waste in the EU,* (4 March 2024).
[643] Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, (30 November 2022) 2022/0396(COD).

D. FOURTH ASSESSMENT - BANKS' ESG REPORTING

On 14 August 2024, the ACM issued an informal assessment of an initiative by the Dutch Banking Association and several Dutch banks concerning their Environmental, Social, and Governance (ESG) data reporting requirements.[644] In its pilot stage, the initiative aimed to standardize the interpretation and reporting of ESG criteria within the transport, agriculture, and real estate sectors, increasing the coherence and comparability of banks' ESG reporting, as required under, among others, the Corporate Sustainability Reporting Directive (CSRD).[645] The CSRD is a directive that stipulates that from 2024 onwards, (large) businesses are required to report on their impact on environmental, social, and governance issues, including in their supply chains. Banks currently encounter several challenges, including the lack of an unequivocal interpretation of ESG data. As a result, different banks' sustainability reports are not comparable. The initiative therefore entailed the creation of a digital platform for banks to enable consensus on the following: how statutory ESG requirements can be interpreted, what calculation methods and data points can be used, and what data sources are suitable for this.

The ACM concluded that the initiative constituted a sustainability agreement which enhances the comparability of sustainability performances in banks' ESG reporting and posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM considered that the initiative was (i) open to all banks and (ii) voluntary. Additionally, the ACM found that the agreement did not (iii) involve the exchange of competitively sensitive information, (iv) otherwise restrict competition (such as by negatively affecting competition between banks on price, quality, choice, or innovation), or (v) stifle innovation, given the transparency regarding the information and methodology used by banks when reporting their ESG data. The ACM partially based its conclusions on the lack of upcoming European legislation.[646]

E. FIFTH ASSESSMENT - TEMPERATURE REDUCTION IN ASPHALT PRODUCTION

On 6 December 2024, the ACM issued an informal assessment of a collaborative initiative between asphalt producers to make asphalt production more sustainable.[647] The prospective participants were members of the Department on Bituminous Works of Bouwend Nederland, a trade association for the Dutch construction and infrastructure industry. Through the initiative, the prospective participants aimed to phase out asphalt production involving high production temperatures, for asphalt production involving lower temperatures. A lower production temperature would

[644] Informal guidance regarding collaboration on ESG data, (14 August 2024) ACM/UIT/622168.
[645] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, (16 December 2022) 2022/2464.
[646] Namely the lack of sector specific ESG standards to provide additional clarity on ESG reporting, as facilitated by the proposed agreement. See informal Guidance ESG data (n 66), p. 2.
[647] ACM/24/188289 Informal guidance regarding initiative on temperature reduction in asphalt production, (6 December 2024) ACM/UIT/634542.

consume less energy and reduce emissions, lowering asphalt production's impact on the environment.

The ACM concluded that the initiative constituted a sustainability agreement and posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM assessed the initiative through the six cumulative conditions for the soft safe harbour for sustainability standards provided under the EU Horizontal Guidelines.[648] The ACM concluded that the initiative (i) was open and transparent, allowing all interested competitors to join, (ii) did not directly or indirectly impose obligations on non-participating asphalt producers, (iii) allowed participants to apply higher sustainability standards, (iv) did not involve the sharing of sensitive information, (v) allowed interested competitors to join on a non-discriminatory basis, and (vi) had no significant effect on competition, including with respect to competition on the price and quality of asphalt. While the ACM could not rule out that the initiative could lead to a minor price increase, it considered the odds of a significant price increase slim enough to satisfy this condition.

4 CONCLUSION

Through its Policy Rule, the ACM is essentially attempting to be as progressive as it can be within the constraints of the EU Horizontal Guidelines.[649] Nevertheless, it remains too early to determine whether the ACM's approach will provide sufficient legal certainty to businesses considering the number of informal assessments publicly available remain limited. Moreover, neither the ACM's commitment not to impose fines, nor its leniency towards Compliance Agreements and environmental-damage agreements bind the EC. Therefore, risks associated with the Policy Rule's national scope, and divergence from the EU Horizontal Guidelines should be taken into account when considering sustainability agreements in the Netherlands. However, with the recent appointment of Teresa Ribera as the EC's Executive Vice-President for a Clean, Just and Competitive Transition we may see a shift of EU policy in the area of sustainability to align with – and potentially even extend beyond – the progressive Dutch approach.

[648] EU Horizontal Guidelines (n 3), para. 549
[649] Simon Holmes, *Sustainability and competition policy in Europe: recent developments*, (21 October 2024), Journal of European Competition Law & Practice.