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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## **Sustainability and Competition – Note by the Netherlands**

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This document reproduces a written contribution from the Netherlands submitted for Item 1 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

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## *Netherlands*

### 1. Introduction

1. More and more policymakers around the world have started to realize that, after the current Covid-19 crisis, the most critical issues at the moment are related to climate change and the protection of the environment for future generations. There is a sense of urgency to reduce the emission of greenhouse gases, including mainly, but not exclusively, carbon dioxide (CO<sub>2</sub>), to combat climate change and its negative effects on social welfare. A great responsibility rests on governments, businesses, and people to act, to ensure that future generations, too, have the opportunity to live under good conditions in this world.<sup>1</sup>

2. Companies sometimes need to collaborate to achieve sustainability goals. Agreements between undertakings can contribute in an effective manner to the realization of public sustainability objectives. Furthermore, such agreements can strengthen the support for the efforts that are needed for the realization of those objectives. However, competition laws sometimes stand in the way or are perceived to stand in the way. According to the Netherlands Authority for Consumers and Markets (ACM), competition authorities could facilitate the transition to a more sustainable economy, by i. explaining in general how competition laws relate to joint sustainability initiatives, ii. giving specific guidance to parties that collaborate with the aim to make their products, services and production processes sustainable, iii. granting immunity from fines to companies that entered into bona fide agreements when guidance is taken into account and by iv. taking into account the benefits of joint initiatives for people and businesses that are not direct or indirect customers, especially if these benefits aim to reduce negative externalities of production and consumption.

### 2. A new approach by competition authorities is required

3. The traditional role of competition authorities is to promote competition and ensure a fair competitive process. However, competition is not a goal in itself, but an instrument, or rather, an economic process that promotes the achievement of certain public interests. Therefore, the ultimate goal of competition policy should be broader than short-term consumer welfare. Competition also contributes to total welfare in the long run and should not block public and private initiatives with the same public goals. Competition can also trigger and accelerate sustainability as this is or can become a competition parameter.

4. The transition to a sustainable economy requires competition authorities more than ever to position themselves as specialist guides rather than enforcers. Since not all individual companies have the incentive, the means, the knowledge or the market strength to change traditional production to sustainable production processes single-handedly, cooperation could be necessary for these undertakings. Fierce price competition and first-mover disadvantages could trap them into a prisoner's dilemma, leading to inaction and suboptimal outcomes for society. If such undertakings take the initiative for agreements

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<sup>1</sup> See for example OECD (2016), 'Better Policies for 2030 - An OECD Action Plan on the Sustainable Development Goals'. In this report, the OECD already proposed to integrate gradually the SDG framework into other OECD reviews at the request of interested countries and in collaboration with substantive committees, including reviews of agricultural, market and competition policies, labour markets, social policy, open government reforms, gender equality, education, environmental performance, health, and development co-operation.

that aim to promote sustainability, competition authorities should be reluctant with strict enforcement and find other ways to intervene, stimulate competition and to ensure that markets work well for consumers and businesses, now and in the future.

### 3. More guidance on horizontal sustainability agreements

5. The Netherlands Authority for Consumers and Markets issued new draft guidelines on horizontal sustainability agreements in July 2020<sup>2</sup>. In these guidelines, ACM explains that certain types of collaboration do not restrict competition and are therefore already permissible. In cases where agreements do restrict competition, they will be permitted if the exemption criteria of the prohibition on cartels (Section 6 of the Dutch Competition Act, equivalent to Article 101 TFEU) are fulfilled.

6. Other agencies take initiatives to offer more clarity surrounding the relation between competition laws and sustainability, too. In September 2020, the Hellenic Competition Committee started the dialogue on the relation between competition and sustainability<sup>3</sup>, and also the European Commission's DG Competition launched a public consultation on how competition rules and sustainability policies work together and whether they could do that even better.<sup>4</sup> Ideally, authorities around the world will team up and come up with an aligned approach towards sustainability initiatives.

7. To facilitate sustainability, competition authorities could explain that competition principles are sufficiently flexible and fit for the future. They should underline that sustainability and competition often go hand in hand. Just as competition can stimulate innovation in the form of new or improved products and processes, so can it stimulate sustainability too. Consumers often see sustainability as a quality improvement of a product, and the availability of sustainable products increases their options. They value sustainability and are prepared to pay a premium for sustainable products.<sup>5</sup>

8. With respect to competitors starting collaborations related to sustainability initiatives, there are at least four avenues to explore by competition authorities, without the need to adapt competition laws.

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<sup>2</sup> ACM (2020), Draft guidelines sustainability agreements, 9 July 2020.

<sup>3</sup> Hellenic Competition Committee (2020), 'Draft Staff Discussion Paper on sustainability issues and competition law, online available via <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>,

<sup>4</sup> European Commission (2020), 'Competition contributing to the European Green Deal', 13 October 2020, online available via [https://ec.europa.eu/competition/information/green\\_deal/index\\_en.html](https://ec.europa.eu/competition/information/green_deal/index_en.html)

<sup>5</sup> However, consumers and competitors need to be protected against companies that make false or misleading sustainability claims. If such protection cannot be given, consumers may no longer trust also honest sustainability claims, leading to a drop in demand for sustainable products and a welfare loss. Also, companies that see that their competitors are free-riding based on false and misleading claims, may stop further investing in sustainable production processes. Therefore, competition authorities should team up with consumer protection agencies to come to a coherent approach.

In other sectors, regulatory authorities and government ministries work in tandem to take sustainability initiatives as well, see for example: The Sustainable Finance Platform (2020), '*Climate risk and the financial sector: sharing of good practices*', 9 July 2020, available on website Dutch Central Bank via [https://www.dnb.nl/en/binaries/Climate%20Risk%20Working%20Group\\_tcm47-389509.pdf](https://www.dnb.nl/en/binaries/Climate%20Risk%20Working%20Group_tcm47-389509.pdf).

### 3.1. General guidance from competition authorities could be helpful

9. In the first place, to prevent a potential stalemate in sustainable initiatives, for example, because market participants refer to competition rules as a barrier to sustainable production, competition authorities could provide more clarity.<sup>6</sup> On their websites, in presentations, guidance documents, or via other communication channels, they can proactively inform companies, trade associations, non-governmental organizations and other relevant stakeholders on the opportunities that competition law offers to make collective agreements on sustainability. For example, authorities can indicate what types of agreements are, in general, not anticompetitive, such as agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings. Another category concerns covenants by which companies bind themselves and their suppliers to comply with laws abroad in areas such as labor rights or the protection of the environment, and for which the companies, for example, jointly organize oversight by an independent body. Also, agreed codes of conduct, joint trademarks or logos promoting environmentally-conscious or climate-conscious practices are, in general, not anticompetitive if the participation criteria are transparent, and access will be based on the basis of reasonable and non-discriminatory criteria.

10. In situations in which agreements do restrict competition, authorities could indicate that they may be permitted if certain conditions are fulfilled.<sup>7</sup> They can provide guidance and examples on how undertakings could substantiate that these conditions are fulfilled.

### 3.2. Authorities should be open to giving individual guidance to sustainability initiatives on a case-by-case basis

11. Second, upon request, competition authorities could give specific guidance to concrete initiatives. Collaborating undertakings with specific plans to improve their production processes in a sustainable manner should be able to ask for guidance from competition authorities, if they are uncertain if their initiative is compatible with competition laws. For example, if competitors in a specific industry would like to agree on adjusting production processes leading to a significant decrease in CO2 emissions, but with an increase of costs, competition authorities should be prepared to give guidance in advance by indicating if or under what circumstances the agreement will fulfill the exception criteria. If necessary, in close cooperation with undertakings, competition authorities could explore what adjustments to an agreement are necessary to ensure an efficient contribution

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<sup>6</sup> See for example Linklaters (2020), ‘Competition law needs to cooperate: companies want clarity to enable climate change initiatives to be pursued’. Based on a survey of 200 sustainability leaders in the UK, USA, France, Germany and the Netherlands, Linklaters has found that sustainability leaders want to see changes to the competition rules to remove obstacles preventing collaboration. 93% of businesses want to work closely with peers when pursuing sustainability goals, with 9 in 10 saying that collaboration is key to achieve progress on environmental, social and governmental issues.

<sup>7</sup> For example, in its guidelines on sustainability agreements ACM explains that the statutory exemption from the cartel prohibition has been laid down in Section 6, paragraph 3 of the Dutch Competition Act and in Article 101, paragraph 3 of the TFEU, respectively. It applies to agreements that restrict competition but also offer benefits that offset the disadvantages of those agreements. The assessment must be made using the following four criteria (cumulative): a. The agreements offer efficiency gains, including sustainability benefits; b. The users of the products in question are allowed a fair share of those benefits; c. The restriction of competition is necessary for reaping the benefits, and does not go beyond what is necessary; d. Competition is not eliminated in respect of a substantial part of the products in question.

to sustainability within the boundaries of competition laws. By giving case-specific guidance, competition authorities can have a significant role in facilitating sustainability.

12. Without an opportunity to ask for case-specific guidance, there will be a risk that the undertakings will not proceed with a sustainability initiative because they fear violating competition rules, potentially leading to enforcement and fines. If this fear prevents sustainability initiatives from getting off the ground in situations where agreements would not have restricted competition in practice to start with, a hold-up of investments would be harmful to society as a whole. As illustrated, it might be the case that agreements could be easily adjusted based on some instructions from a competition authority. Case-specific guidance can thus prevent underinvestment, which leads to suboptimal outcomes for society.

13. While it would normally be up to the parties themselves to assess whether a horizontal collaboration is compatible with competition laws, there is good reason to deviate from this rule for sustainability agreements. The benefits of the collaboration will not only accrue to the undertakings involved and their customers, but also to society as a whole. This justifies the use of public resources for case-specific guidance from competition authorities.

### **3.3. Authorities could grant immunity from fines to bona fide agreements when guidance is taken into account**

14. Third, in situations in which authorities have issued guidelines or have been in contact with parties initiating sustainability agreements, it might be useful to introduce an extra level of comfort. Authorities could promise not to impose any fines for bona fide joint agreements where undertakings have clearly followed the guidance given by authorities in good faith. In the event that agreements, in the end, do not meet all the conditions, authorities can ask for the agreements to be amended first. If parties do not comply to such a request from the authority, other types of enforcement (e.g. formal warnings, binding orders) can be considered.

15. By staying away from punitive enforcement actions in these cases, it is more likely that parties will take steps to come to horizontal agreements to improve sustainability.

### **3.4. Authorities could take into account sustainability benefits for non-users, especially if these benefits aim to reduce negative externalities**

16. As indicated above, sustainability agreements that do restrict competition may be permitted if certain conditions are fulfilled. One of these conditions is that the benefits of the collaboration must outweigh the disadvantages. The benefits could include lower carbon emissions; the disadvantages could include a price rise for users. A traditional fair-share-to-consumers condition under Article 101, paragraph 3, TFEU would not work well in such a case where the main resulting benefits are not confined to the consumers of the product in question. It would not take the crucial out-of-market benefits of environmental agreements into account. It is therefore inadequate to facilitate private cooperation initiatives to reduce environmental damage.

17. Therefore, a new feature of the ACM sustainability guidelines is the way in which the benefits of agreements reducing environmental damage are weighed against the disadvantages, the trade-off is different: the benefits for society as a whole must be equal to or greater than the disadvantages for users. If the benefits for all of society are taken into account, they are more likely to outweigh the disadvantages. The sustainability agreement

will then be permitted, because society as a whole benefits from it, and it contributes to the government's objectives.

18. It is fair as well as more efficient from a social-welfare perspective that the consumers of polluting products are the ones that pay the higher price for the reduction of the negative external effects they cause with their consumption. By comparing the negative price-increasing effects paid for by the consumers with the benefits that occur both inside and outside the market, this polluter-pays principle is followed.

19. A qualitative assessment of the fair-share-to-consumers condition can suffice in some cases. For example, when it is obvious that the total benefits are much larger than the costs. The fair-share assessment of most environmental-damage agreements, however, is expected to be quantitative, for example through environmental cost-benefit analyses that make use of shadow prices to monetize reductions of emissions of environmentally damaging substances. In the new version of its sustainability guidelines, which will probably be issued by the end of 2020, ACM will provide more clarity on methods that can be used for practical assessments, although the real proof of the pudding will be in the eating.

#### 4. Vigilance is still required

20. Some critics might argue that now all brakes have been released for all kinds of environmental cartel agreements with a suboptimal result for society, because, without those agreements, companies would do more to prevent environmental damage. Those fears are unfounded. Authorities should remain critical of whether agreements are necessary to achieve the set goals. They must also ensure that competition is not completely eliminated. Furthermore, they should force parties to substantiate the benefits properly and quantitatively in principle. Wishful thinking and environmental fairytales cannot justify a violation of the cartel prohibition. The latter is also possible because, in particular, the external effects of environmental damages have been properly researched and expressed in monetary terms.<sup>8</sup>

21. According to skeptics, another potential risk of this open approach of giving guidance instead of strict enforcement is that all kinds of cartel agreements contributing to any public goal could now apply for the soft regime. This would be a misconception. Without closing their eyes for other public goals, the main responsibility of competition authorities remains to enforce competition laws. An important difference between sustainability and other public goals is the fact that sustainability is intrinsically related to competition – and sometimes it takes a restriction of that competition in order to initiate sustainability improvements. Furthermore, the policy objective of sustainability has been laid down in international and national declarations and requirements to which governments around the world are bound, which is not the case for most other public goals. Together with the social benefits that come about when reducing the over-use of common resources and its associated negative external effects (which is what environmental-damage agreements achieve), this justifies a more open approach, with a more prominent role for guidance, in cases with agreements on sustainability.

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<sup>8</sup> CE Delft (2017), CE Guide on environmental prices.

## 5. Conclusion

22. The most damaging effects of climate change do not materialize in the very short term. But that makes it an even harder problem to tackle. Measures to increase sustainability are required now but the full benefits come only generations later. The problem is not perceived as immediately pressing enough to overcome political differences. It may be for this reason that public measures do not sufficiently get off the ground. But perhaps more so than with other major physical, economic and social problems, initiatives from the private sector are needed to complement public measures, as is also underlined by the World Economic Forum<sup>9</sup> and the UN<sup>10</sup> in reports in which these organizations indicate that companies can do more to help bring about the social development goals.

23. Obviously, competition policy has only a modest role to play in reaching the world's sustainability goals. But, according to ACM, at the very least, competition authorities could have an open mind when looking into private initiatives leading to agreements contributing to a more sustainable world. By giving clarity on how competition rules relate to horizontal sustainability agreements authorities could show that competition and sustainability go hand in hand. Guidance on what is allowed and what the boundaries of competition laws are will help undertakings start new sustainability initiatives. As soon as competition authorities clearly indicate that they are accessible and open for dialogue on these agreements, it will become more attractive for the business community and their advisors to take the next step to sustainable production.

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<sup>9</sup> World Economic Forum (2020), 'Better Business: What are the challenges in making business more sustainable?', 20 September 2020, online available via: <https://www.weforum.org/agenda/2020/09/better-business-sustainability-inclusion-stakeholder-capitalism-sdi2020/>.

<sup>10</sup> United Nations (2020), 'Business sector still far from reaching sustainability goals, UN report shows, 20 years on from landmark summit', 4 July 2020, online available via <https://news.un.org/en/story/2020/07/1067662>.