



COMPETITION LAW AND SUSTAINABILITY IN THE NETHERLANDS

Sustainability exemptions to competition law
in the Netherlands as role model for Europe?

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About this document:

This study was commissioned by the [Fair Trade Advocacy Office](#) (FTAO) as an exploratory research in the frame of the [Make Fruit Fair](#) (MFF) project and the [Power in Supply Chains](#) campaign. Its aim was to gain a broad strokes overview and a better understanding of the latest developments around the sustainability exemptions to competition law in the Netherlands exemplified by the “Chicken of tomorrow” case.

The document was intended as an internal resource document for non-expert in the Fair Trade Movement and Make Fruit Fair coalition.

The research was concluded in February 2016 and is published in June 2016.

For acknowledgements to author, commissioning party, and funders refer to the end of the document.

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“Competition Law and Sustainability Exemptions”

Context

Competition is a cornerstone of a free market capitalist society. By encouraging commercial enterprises to compete and create new, technologically-superior products, it ensures efficiency, innovation, increasing the selection of products and therefore ultimately also lowering consumer prices. This process also implies that companies and enterprises will inevitably grow stronger and dominant, therefore creating imbalances that can distort the market and be detrimental to the consumer. Competition law thus seeks to regulate and control the dominance of certain actors either by merger control or by preventing cartel agreements and price-fixing.

While European Competition Law was initially instituted to safe-guard consumers against such abuses, the ever-faster and cheaper production of goods is encouraging a “race to the bottom” in terms of prices. The high levels of concentration amongst retailers and sub-contractors in food and textile industries are diminishing bargaining power for the small suppliers, who are often left with a painful choice - to sell on poor and unpredictable terms, or not to sell at all. These reduced margins also trickle down to workers, who spend long hours in unsafe conditions for wages which do not assure to a decent standard of living for their families.

Current study

In this context, the publishing of the ‘Vision Document Competition and Sustainability’ by Dutch Competition Authorities (ACM) in May, 2014 offers hope that an evolution in the rhetoric that low prices are the single and ultimate benefit for consumers might be taking place. While the discussion is ongoing, the aspiration of many civil society organizations would be to have long-term environmental and social sustainability benefits acknowledged as valid arguments for providing exemptions to competition law and sector-wide agreements on minimum pricing. Such a shift promises improve the situation of producers both within and outside of the EU.

The current paper aims to offer a comprehensive summary of the Dutch debate on sustainability exemptions, as well as discuss the conditions under which Dutch competition authorities consider these acceptable under EU Competition Law. Besides a meta-legal analysis, the report will also focus on the ‘Tomorrow’s Chicken’ (Kip van Morgen) test case to underline lessons learned and windows of opportunity for translating the debate to a European audience.

Summary

In its vision document on sustainability and competition, the ACM outlines four key principles which, if applied concomitantly against an economic background, could constitute exceptions to the cartel prohibitions outlined in Art 101(3) TEFU ([see Chapter II](#)). Nevertheless, ACM’s ruling in both the case of the Energieakkord and that of ‘Tomorrow’s Chicken’ show that these provisions are still interpreted in a conservative manner ([see Chapter III-ii](#)), leading to both cases not being able to fulfil these exemption requirements. In spite of this, the two multi-stakeholder agreements mentioned above have been at the forefront of public attention and have sparked heated criticism from ministries, parliamentarians, supermarkets, industry representatives, legal experts and civil society alike ([see Chapter III-iii](#)). The high profile of the cases in the Netherlands therefore offers FTAO and the MFF coalition ample opportunities to advocate for the evolution of EU competition law towards a more balanced view on consumer welfare and sustainability ([see Chapter IV](#)).

I. Part I – Competition Law in EU and NL

A. EU Competition Law – Articles, principles and application

Relevant Legal and Economic Principles

Before starting the discussion on sustainability exemptions in Competition Law, it is important to first acknowledge that achieving *sustainable development* goals within the scope of the current EU economic system is a matter of *public policy*. From a legal perspective, it means that the task of the government is to decide that *this topic has become a matter of public interest as a result of changing global realities and public perception*. Such goals express ideals related to “the caring, idealistic and spending policy areas [...] characterized by the Court of Justice as non-economic, but with economic consequences”¹.

The modern economic policy at the basis of Competition Law requires however for such a view to be balanced against primarily economic goals and the idea of optimal use of resources through *market efficiency*². The ideal scenario mentioned in economic theory textbooks is that in which a market reaches *pareto efficiency* – an equilibrium point where no improvements can be brought to *consumer or producer surplus*³ without making another market player worse off.

Currently, the concept of *consumer welfare*, meaning the maximisation of *consumer surplus* (and therefore price benefits) lies at the centre of European competition policy⁴. In spite of the broad use of the term, (as far as we can see) an official definition has never been given in a legal context⁵. While economists might tend to use a *broad welfare concept*, encompassing other non-financial interests (such as sustainability and the environment) into its meaning, it seems that EU competition policy authorities favour a *narrow interpretation of the term*, based solely on economic considerations⁶. This leaves room for debates and is an opportunity which will be further discussed in subsequent chapters.

Relevant Competition Law Articles

EU Competition Law is set in Articles 101-109 of the [Treaty of the Functioning of the EU \(TFEU\)](#), while more specific provisions and exemptions are set out in various EU regulations and Directives.

¹ K.J.M. Mortelmans, ‘Horizontal and Flanking Policies’ in Kapteyn & Verloren van Themaat, *The Law of the European Union and the European Communities* (fourth revised edition, Wolters Kluwer 2008); K.J.M. Mortelmans, ‘De interne markt en het facettenbeleid na het Keckarrest: nationaal beleid, vrij verkeer of harmonisatie’ (1994), Sociaal Economische Wetgeving (SEW) in S.R.W de Hees (2013) ‘A sustainable competition policy for Europe’, viewed on 18.02.2016, available from <http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/SRW-van-Hees-Master-Thesis-A-sustainable-Competition-Policy-for-Europe-final-version2.pdf>

² Stiglitz and Walsh (n 10) 221-222 in S.R.W de Hees (2013) ‘A sustainable competition policy for Europe’, viewed on 18.02.2016, available from <http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/SRW-van-Hees-Master-Thesis-A-sustainable-Competition-Policy-for-Europe-final-version2.pdf>

³ Surplus is a way to measure the gain market players get out of trade: it is the difference between the price a consumer is willing to pay for a certain product and the actual market price (consumer surplus), or the difference between the price for which a producer wants to provide a product and the actual market price (producer surplus).

⁴ Idem 2

⁵ Idem 2

⁶ A 2011 survey of International Competition Network (ICN) on European National Competition Authorities (NMA) found that many consider consumer welfare to have primarily an economic meaning. Especially the Dutch NMA stated that it does not even look at non-economic consideration in its enforcement practices, in ICN Discussion Document “Competition Enforcement and Consumer Welfare – Setting the Agenda” (2011), Viewed on 18.02.2016 from <http://www.atp.nl/nma/image.php?id=146&type=pdf>

The four main policy areas of EU Competition Law include:

- **Article 101 (TFEU)** - Cartels, or control of collusion and other anti-competitive practices
- **Article 102 (TFEU)** - Market dominance, or preventing the abuse of firms' dominant market positions.
- **Merger Regulation**⁷- Mergers, control of proposed mergers, acquisitions and joint ventures involving companies that have a certain, defined amount of turnover in the EU.
- **Article 107-109 (TFEU)** - State aid, control of direct and indirect aid given by MS of EU to companies.

Considering the focus of the current research, this section will focus on outlining **Article 101 of TFEU**, which is designed to directly tackle **Price-Fixing**. It specifically prohibits:

“(AI 1) All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention distortion or restriction of competition within the internal market”

In particular it invalidates (AI 2) any such agreements which (AI 3) (See [Annex i](#)):

- (a) **Directly or indirectly fix purchase or selling prices or any other trading conditions;**
- (b) **Limit or control production, markets, technical development, or investment;**
- (c) **Share markets or sources of supply;**

European policy makes certain exceptions to Art 101 specifically for vulnerable production chains of EU Agriculture, which are characterized by numerous small producers and strong market imbalances (see [Part I – Section ii](#)). Nevertheless, **the Commission and the European Court of Justice regard price-fixing to be a *hardcore* restriction on competition** and consistently find that such protective agreements are beyond the scope of the law⁸.

The underlying reasoning guiding the *recent* application of Article 101 (see [Part I – Section iii](#)) has been that price-fixing (even for sustainability purposes) causes a *deadweight loss* for consumers⁹ (also known as allocative inefficiency), by which a certain category of the population would be robbed of their possibility to purchase goods at a low price equilibrium level.

B. EU Competition Law – General & CAP-related Exemptions

General Exemptions to Competition Law

Art 101 – 3 (TFEU). The provisions of paragraph 1 may, however, be declared inapplicable in the case of any “agreement or category of agreements, decisions or category of decisions, concerted practice or category of concerted practices between or by associations of undertakings, which **contribute to improving the production or distribution of goods** or to

⁷ Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 (The "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS), viewed on 18.02.2016, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0802:20081023:EN:PDF>

⁸ Setting minimum prices was considered a violation in the case of a cement association ([CASE 8/72](#)) while in the [Woodpulp cartel](#) cases the European Court found that even the supply of information such as future pricing strategies by one party, particularly a leading party in the market, at a meeting, can amount to a concerted agreement.⁸

⁹ Wikipedia 'Deadweight loss', viewed on 15.02.2016, available from https://en.wikipedia.org/wiki/Deadweight_loss

promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

CAP-Related Exemptions to Competition Law

Recognising that **CAP-based price-fixing exemptions to Competition Law** fall outside of the scope of the current study, a few remarks regarding the way these exemptions have so far been interpreted by the European Commission and Court of Justice **provide insights into their potential reaction to Sustainability-based exemptions**.

European legislation recognises the vulnerable bargaining position of EU farmers, individual or atomised agricultural producers within the EU Single Market. Article 42(1) of the TFEU therefore grants the Council and the European Parliament the power to determine the extent to which Competition Law will be applied to the EU agricultural sector¹⁰. Consequently, in **various jurisdictions exemptions are in place to allow for farmers to form cooperatives in order to bargain for a better price**. These exemptions are implemented within the objectives of the Common Agricultural Policy (CAP) set out in Article 39 TFEU.

In order to avail the exemption, **all of the objectives within the CAP must be met**¹¹. These include *inter alia* the divergent objectives of farmers and consumers, either a fair price for goods or promoting a consumer desire for reasonable prices.¹² The Commission found that in spite of this, in a dynamic sense, *“the five objectives can be met if there are sufficient efficiencies or productivity gains that are passed onto consumers in the form of reasonable prices, while entailing higher farming incomes”*.

The exemption has been applied in a restrictive manner. Firstly, in respect of the original exemption, shelter from competition law was **only to be applied to farmers or their associations**. Given that the exemption is in place in order to stabilize the market and rebalance power deficiencies of farmers within the supply chain, **it did not extend to manufacturers or retailers in the agricultural sector**¹³. Even if large retailers were covered by the exemption, the European courts and the Commission have viewed price fixing as not being capable of fulfilling all of the objectives of CAP, namely the objective of providing farmers with a fair standard of living alongside that of consumers obtaining goods at reasonable prices.

¹⁰ It provides: “The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39”.

¹¹ Joined Cases T-70/92 and T-71/92, [Florimex](#)

¹² The objectives of CAP are prescribed in Art 39(1) of the TFEU: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increase in individual earnings of persons engaged in agriculture; (c) to stabilize markets; (d) to assure availability of supplies; (e) to ensure supplies reach consumers at reasonable prices.

¹³ Thus, in the [French beef](#) case it was held that slaughterhouses in the beef industry could not benefit from the exemption and the normal rules of competition applied.

Secondly, the exemption has **only been provided to a few producer sectors**, such as milk packaging.

Overall, the **exact interpretation of the exemption has proved problematic** and has not been uniformly applied, leaving a grey area between competition law application and exemption. The law of the European Court of Justice and the decisions of the Commission are still instructive in how the exemptions should be interpreted.

Given the approach to purely price-fixing based industry agreements for farmers within CAP, **it would be unforeseeable that the Commission would tolerate such agreements between supermarkets, even if such agreements had the admirable aim of helping small producers outside of the EU.** [Part II](#) of the current study will focus on further unravelling the argumentation used by Dutch Competition Authorities (ACM) and Dutch campaigners to argue for sustainability-based exemptions for pricing fixing agreements, as well as the parties and industries that could be considered eligible for this.

C. EU Competition Law - Enforcement within EU Member States

At a policy level, the **European Commission, through its Directorate General for Competition** (DG Competition) is the primary authority responsible for establishing EU-wide coherency, consistency and quality on this subject. The Commission does so through guidelines, directives, regulations, decisions, recommendations and communications which guide the development of Competition Law and have a high influence on its application.

At a legal level, the **European Court of Justice** (ECJ) settles cases of violations of EU Competition Law laid out in TFEU and other treaties, provides clarity on its implementation especially in cases that affect trade between member states. The case-law of the ECJ (and the General Court) is one of the major sources of evolution for EU Competition Policy overall.

Following the Modernisation Regulation 1/2003 (May 2004), some of the powers of DG Competition were decentralized and delegated to the level of **National Competition Authorities (NCAs)** in Member States (MS). While the regulation states that the competition rules shall be applied by the two institutions in close collaboration, NCAs become responsible for overseeing, challenging and defending the implementation of Articles 101-102 TFEU in national jurisdictions and courts of law. While these articles serve as a uniform legal baseline, some MS have variations or stricter rules in place¹⁴. NCAs **have the power to investigate practices which are possibly harmful to competition, prohibit them, but also to grant exceptions**¹⁵ (Art 104 – TFEU).

The European Commission and the national competition authorities in all EU MS cooperate with each other through the **European Competition Network (ECN)**¹⁶. This body allows NCAs to discuss cases of companies whose operations have cross-boarder implications for competition. Furthermore, it assures effective and consistent application of regulation between MS by informing each other regarding decisions, taking on comments from other NCAs and identifying best practice.

¹⁴ Certain member states have lately developed a doctrine of abuse of economic dependence which appears to be an off-shoot of Article 102 of EU competition law relating to the abuse of a dominant position in the market place and the control of mergers.

¹⁵ Of course, if these decisions are appealed they are settled by the national courts of law.

¹⁶ European Commission (2016) 'European Competition Network – Overview', viewed on 18.02.2016, available from http://ec.europa.eu/competition/ecn/index_en.html

Table 1 - Relationship between EU Competition Policy and relevant authorities

| | Mechanisms | RELEVANT AUTHORITIES |
|--|---|---|
| ART 101-109 TFEU & other treaties | EU Case Law | European Court of Justice (ECJ) (& General Court) |
| | EU Guidelines, Directives and Regulations | European Commission (EC) DG Competition |
| | EU - Coordination of NCAs | European Competition Network (ECN) |
| | MS - National Case Law | National Competition Authorities (NCA) |
| | MS - National Exemptions | National Courts of Law |

EU Competition Law – Law and Enforcement in the Netherlands

In the Netherlands, the corresponding articles of the TFEU are 6 (1) and (3) of the Dutch Competition Act (Mededinging Wet - MW). Under Section 6, paragraph 1 of the Dutch Competition Act, agreements between undertakings which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited. Any arrangements concerns key competition parameters such as price, quality or quantity are seen as having a negative impact on consumers and are therefore prohibited¹⁷.

EU Competition Law – Sustainability in Law Enforcement after 2003

While achievement of EU sustainable development goals (Art 3(3) TFEU) are often talked about as idealistic public aspiration of the EU, it must be noted that, before the introduction of Regulation 1/2003¹⁸, the Court of First Instance had issued several rulings on Article 101(3) TFEU based on a broad consumer welfare approach.¹⁹

One of the cornerstone cases under Article 101(3) was the approved CECEDEC agreement between European importers and manufacturers of washing machines to eliminate energy inefficient models from the market to the environmental benefit of consumers. Whereas the CECEDEC decision was used as an example of an environmental-related exemption to competition law in the 2001 Guidelines on Horizontal Agreements (OJ 2001 C 3/2), this category of agreement no longer has a special chapter devoted to it in the 2011 Guidelines on the application of Article 101 TFEU to horizontal agreements. Here the CECEDEC case is presented as an example of the standardisation agreement (OJ 2011 C 11/1, para. 329).²⁰

According to some legal experts, the decentralization of EU Competition Law enforcement also means that the scope of applicability of Article 101(3) becomes limited, as national courts and NCAs are not in the right position to balance restrictions of competition against non-economic public policy objectives, such as EU sustainability policy. A narrow interpretation of the exemption article therefore becomes easier to apply. Whether this opinion is true or not, the Guidelines on the application of Article 101(3) leave no doubt that after 2004 non-economic public policy no longer plays a role in the Commission’s assessments on this matter.²¹

¹⁷ ACM (2014) ‘Policy Rule on Competition and Sustainability’, viewed on 16.02.2016, available from <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/>

¹⁸ For exact text of the Regulation see <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>

¹⁹ Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision* [1996] ECR II-00649, para 118, Commission Decision 93/49/EEC, *Ford/Volkswagen* [1993] OJ L 20/14; Commission Decision 94/296/EC, *Stichting Baksteen* [1994] OJ L 131/15.

²⁰ European Law Blog (2013) “Sustainable Competition law; Competition Law Kills Coal Closure Plan, Or Does It?”, viewed on 01.02.2016, available from <http://europeanlawblog.eu/?p=1974#sthash.fqHt4jcC.dpuf>

²¹ See also: T.R. Ottervanger, ‘Maatschappelijk verantwoord concurreren. Mededingingsrecht in een

II. Part II – Dutch Guidelines for Sustainability Agreements within Competition Policy

Having painted a general picture regarding the content of Competition Law, its enforcement mechanisms and history with regards to sustainability exemptions, the current chapter will further delve into the factors that lead the Dutch Competition Authorities (ACM) to publish the 'Vision Document Competition and Sustainability', as well as the document's contents and the initial reactions it created in the Netherlands.

A. PESTLE Analysis - Factors leading to ACM's 'Vision Document Competition and Sustainability'

(T)echnological

For centuries, the Dutch have been **at the fore-front of technological innovation**, especially in managing natural landscapes. Furthermore, the high level of welfare and consumption in the country has fuelled Dutch interest into **the development of sustainable supply chain management technologies and know-how (T)**. Economic sectors with high environmental impacts are analysed, together with appropriate policies and technological upgrades that could help mitigate risks.

(P)olitical

Sustainability is therefore an intrinsic part of the Dutch government's vision for long-term economic development (P), alongside other 3 key policy areas such as knowledge and research or education. All 9 top economic sectors, including the green energy and agricultural industries are expected to contribute to the overall vision of developing a **bio-based economy while promoting economic growth**²².

(E)conomic

With four out of nineteen Dow Jones Sustainability Index sectors being led by Dutch companies, it can be said that sustainability is a **key element of the country's international competitive advantage (E)**²³. A reputation for sustainability makes sense to the country's commercial nous as well. Having products that are healthier, cheaper (due to greater efficiencies) and more environmentally friendly distinguishes them on the international market.

(S)ocial and (E)nvironmental

The Netherlands has also been a country where the **consensus-based 'Polder' model has long been used for decision-making (S)**²⁴. This has meant that businesses and the robust civil society in the country have been tightly collaborating with the government in materializing economic policy in a way agreeable to all parties. Furthermore, Dutch culture is also characterized by open, outward-driven, with a **high level of public awareness for**

veranderende wereld' (2010), Markt & Mededinging, in S.R.W de Hees (2013) 'A sustainable competition policy for Europe', viewed on 18.02.2016, available from <http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/SRW-van-Hees-Master-Thesis-A-sustainable-Competition-Policy-for-Europe-final-version2.pdf>

²² Government of the Netherlands 'Encouraging innovation', viewed on 16.02.2016, available online from <https://www.government.nl/topics/entrepreneurship-and-innovation/contents/investing-in-top-sectors>

²³ Ernst & Young (2013) 'Netherlands Attractiveness Survey – Netherlands on track', viewed on 18.02.2016, available from [http://www.ey.com/Publication/vwLUAssets/Netherlands_Attractiveness_Survey_2013/\\$FILE/Netherlands_Attractiveness_Survey_2013_English.pdf](http://www.ey.com/Publication/vwLUAssets/Netherlands_Attractiveness_Survey_2013/$FILE/Netherlands_Attractiveness_Survey_2013_English.pdf)

²⁴ The Guardian (2013) 'Going Dutch: why the country is leading the way on sustainable business', viewed on 12.03.2016, available from <http://www.theguardian.com/sustainable-business/blog/dutch-companies-leading-sustainable-business>

international political and environmental issues (E) such as climate-change or animal welfare. With this background in mind, it is no surprise that numerous **self-regulating sustainability-related multi-stakeholder governance initiatives (S)** have emerged in recent years in the Netherlands to achieve common goals.

One such example is the national **Energy Agreement (Energieakkoord)** signed Sept 6th 2013, which was the main event triggering the publishing of the ACM position on sustainability exemptions. More than 40 organisations representing employers, employees, environmental NGO's, companies and other social actors converged to encourage behavioural change in terms of energy-savings, clean technology and climate policy. The goal was to create a clean and affordable energy infrastructure and increased employment in the green market, contributing also to the Rutte/Asscher Government's (2011) vision of achieving a **sustainable energy supply system by 2050²⁵ (E)**.

In parallel to this multi-stakeholder initiative in the energy sector, the **animal-welfare NGO Wakker Dier (E)** started in 2012 a very **visible public campaign entitled 'Stop the broiler chicken' (S)** ('Stop de plofkip') The NGO requested that all chicken sold in supermarkets should benefit from a minimum one-star rating from the Beter Leven animal welfare certification. In February 2013 organizations in the poultry industry, broiler meat processing industry and the supermarket industry organized a **round-table meeting under the name of 'The Chicken of Tomorrow'** ('Kip van Morgen')²⁶ aimed at phasing out the production and selling of broiler chicken in the Netherlands by 2020.

(L)egal

The policies proposed by the two aforementioned multi-stakeholder agreements nevertheless brought about a few legal dilemmas.

Part of the **Energie Akkoord** is a deal between four electricity producers to close down five older coal fired power plants in a coordinated manner. This get-together of four competitors to **reduce production capacity would have affected 10% of the Dutch energy supply and raised the price of electricity**. As it ran the risk of being considered a 'price fixing' practice, the Netherlands Competition Authority (ACM) was consulted on the compatibility of this plan with Article 101 TFEU and the Netherlands equivalent, Article 6 of the Competition Act (Medededingings Wet)²⁷. In a ruling published on Sept 26th 2013, **the ACM declared that the closing of the coal factories was illegal according to Competition Law (L)**, as it did not demonstrate enough benefits for consumers. The decision sparked heated reactions from the members of the Energie Akkoord, as well as governing officials, who criticised it for it based on a very isolated and narrow assessment of costs and benefits for consumers²⁸.

The **'Chicken of Tomorrow' agreement of stopping with the production of broiler chicken stirred similar concerns**, as it would also raise prices for consumers. In order to clarify the legal framework for such agreements, on January 24, 2013, Members of the Dutch House of Representatives Mr. Elbert Dijkgraaf and Mr. Jaco Geurts **requested the Dutch Government**

²⁵ European Law Blog (2013) "Sustainable Competition law; Competition Law Kills Coal Closure Plan, Or Does It?", viewed on 16.02.2016, available from <http://europeanlawblog.eu/?p=1974#sthash.fqHt4jcC.dpuf>

²⁶ Wakker Dier 'Stop de plofkip!', viewed on 18.02.2016, available from <http://www.wakkerdier.nl/plofkip-campagne/kipvanmorgen>

²⁷ Idem 18 (EU Law Blog)

²⁸ SER (2013) 'Commitment Energieakkoord blijft onverminderd na analyse ACM', viewed on 18.02.2016, available from <http://www.energieakkoordser.nl/nieuws/commitment-energieakkoord-blijft.aspx>

to set policy rules for ACM and requesting instructions on how more room for arrangements in the agricultural and nutritional chain could be created, in order to promote public interests such as animal welfare and the environment (P-L).²⁹

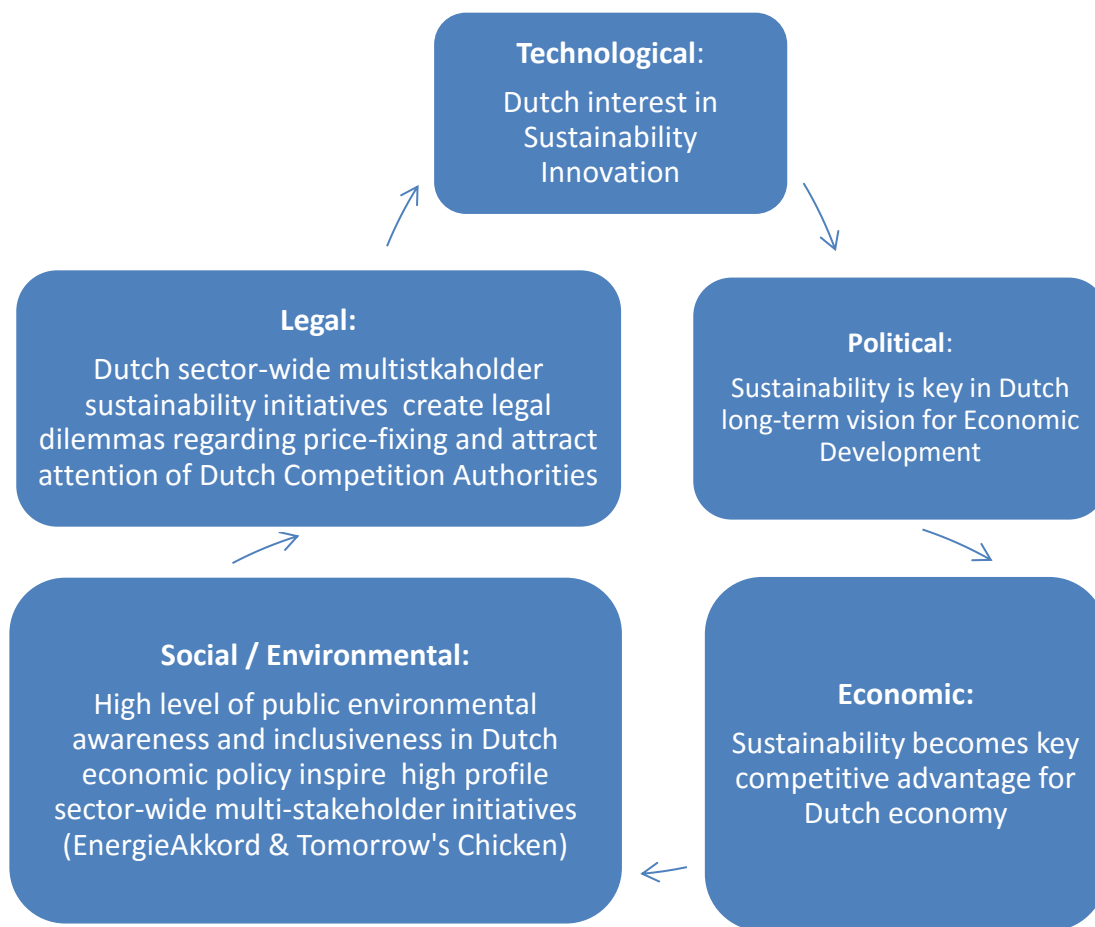


Figure 1 - PESTLE Analysis - ACM Vision Document

These two cases, their legal implications and the arising public discussions pressured ACM to provide further clarity as the conditions needed to be fulfilled by all sustainability-related multi-stakeholder initiatives claiming competition exemptions under Art 101(3) TFEU and its equivalent under Dutch law. The Vision Document therefore resulted out of a multifaceted consultation process that took place in 2012-2013, during which ACM collected the opinions of the corporate sector and of experts on the interpretation of the cartel prohibition in connection with sustainability initiatives. To this end ACM also assessed several legal cases forwarded by former Minister of Agriculture Henk Bleker to the House of Representatives. Additionally, ACM organized a roundtable discussion with representatives from the corporate sector in November 2011, and an expert meeting on sustainability and competition in January 2013. The final version of the Vision document was published in May 2014³⁰.

²⁹ ACM (2014) 'Vision Document on Competition and Sustainability', viewed on 18.02.2016, available from <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/>

³⁰ Idem 29

B. ACM's 'Vision Document Competition and Sustainability' – Principles and Content

The stated **purpose of the ACM's vision document is to provide clarity and legal certainty** on the recently arising questions about the applicability of Art 101(3) TFEU/6(3) Mededinging Wet (MW) **in order to encourage the realization of desired sustainability initiatives.**

The document is intended as a **self-assessment tool** for undertakings (meaning commercial entities) who would like to evaluate whether their sustainability initiatives could benefit from the above-mentioned exemptions. Should an investigation be launched on this matter, the burden of proof would remain with the initiators of the sustainability initiative.

Key principles of ACM Vision Document

One of the most remarkable aspects of the vision document is that **the ACM purposefully refrained from defining the term 'sustainability'**³¹ – which can encompass numerous topics (i.e. environmental protection, fair trade, animal welfare), as well as numerous product categories (i.e. organic, fair trade). The **ACM judges cases based on their substance and merits only**, using the same analytical framework that it would for any other cartel agreement, namely an assessment of (1) what interests are served by these arrangements and (2) the extent to which these offset the associated competition restrictions. This means that the determining factor for the relationship with competition rules is not the banner of sustainability itself.

Secondly, the ACM states that it uses a **broad welfare approach** in assessing the benefits to consumers. By this the competition authorities mean that it takes into consideration *the amount of subjective value consumers attach to certain product characteristics related to sustainability and the efficient use of potentially scarce natural resources*, especially since, from an economic point of view, such efficiency gains would also benefit welfare. The proof of benefits for the consumer used by ACM is the consumers' own willing to pay more for the realization of such ideals. At the same time, profit in itself cannot be considered an increase in efficiency. Benefits contributing to this broad welfare approach should be real and objective (when, what, where), meaning the initiative needs to demonstrate value creation for it to fulfil the exemption criteria.

Content of ACM Vision Document – Assessment of sustainability Initiatives

Arrangements between undertakings on **key competition parameters** such as **price** and **production volume** restrict competition in a market. The **overview of EU case law for exemptions to these key parameters** confirms that such arrangements are not permitted and only very rarely manage to fulfil the necessary criteria:

- (1) Regarding the selling price only very few exceptional cases exist which have fallen under the provisions of paragraph 3³²;
- (2) Regarding arrangements to only bring to the market products that are sustainable (in one or more respects), such agreements are most likely to be anti-competitive and also to a higher degree, if they:

³¹ The Ministry of Economic Affairs, too, refrained from including a definition of the term sustainability in its policy rule.

³² An example of an exception is the VOTOB case: see the [1992 Competition Report of the European Commission](#) and '[Melkdubbeltje](#)' (Milk Tuppence) NMa case 2432 (2001)

- Concern a key competition parameter, as a result of which they may cause prices to rise, or to cause certain products with existing consumer demand to no longer be supplied;
- Concern a larger share of supply on the relevant market.³³

Regarding the actual process of assessment, in order to decide whether a sustainability initiative can be exempted from the cartel prohibition, the ACM recommends running a thorough analysis of both Articles 101 (1) and (3) TFEU and their equivalent Art 6 (1) and (3) MW according to the following criteria:

Regarding **Art 101 (1) FTEU/ Art 6 (1) MW**, it is important to mention that not all collective sustainability agreements fall under its provisions – for example because they concern an operational process with no consequences for competition. For those initiatives that do challenge key aspects of competition, two principles are considered in the analysis.

1. The first is the **appreciability of restriction competition**, measured as the percent of market share potentially affected by the sustainability initiative. This means that an initiative can fall outside of the scope of the cartel prohibition due to low combined market share of undertakings involved in the initiative.
2. The second is the **inherent restrictions to competition based on public interest**. While the ACM mentions that this principle has been invoked in previous ECJ case law³⁴, it also states that it did not apply this principle to the current version of the document, as it believes that the question has not been sufficiently answered in jurisprudence (this is related to the discussion in [Part I – iii](#)).

Regarding **Art 101 (3) FTEU/ Art 6 (3) MW**, the following four conditions need to be *concomitantly fulfilled* and also assessed *in relation to each other* in order to form an exemption to be admitted:

1. The arrangement contributes to improving the production or distribution of goods or to promoting technical or economic progress

The underlying principle here is that of *efficiency gains* (i.e. reduction in use of scarce natural resources) which *can occur in any market* and therefore do not need to be reaped by consumers themselves.

2. Consumers receive a fair share of the resulting benefit

For this criterion to be fulfilled, the sustainability initiative in question needs to be able to demonstrate that the *buyers of products covered by the agreement reap (at least to some extent) efficiency gains of the deal*, or, as a minimum requirement, are at least not worse off.

In terms of geographic scope of this provision, *the group of consumers affected by the restriction in competition and the one benefitting from the efficiency gains* needs to be the same and cannot be compensated by positive effects elsewhere³⁵.

Thirdly, recognising that some of the *benefits of sustainability initiatives might only become apparent on the long term*, the ACM sees room for considering these in its judgement of the exemption, also if they occur within a larger group than the current consumers of the relevant product. One important element in pleading for such benefits is the ability to substantiate and

³³ Guidelines on the application of Article [101] (3) of the Treaty, [Official Journal No C 101 of 27 April 2004, paragraphs 109-110](#).

³⁴ [Remia, 1985](#); [Metropole, 2001](#)

³⁵ [Guidelines on the application of Article 101 \(3\)](#), paragraph 84;

demonstrate the likelihood of their achievement. This is an area where governmental policy can provide more certainty.

Overall, if the substantiation of benefits associated with the sustainability initiative prove missing or insufficient, such an initiative cannot be exempted from the cartel prohibition but could be served through legislation or regulation.

3. The arrangement is necessary to achieve these benefits and does not go beyond what is necessary

The underlying principle here is the *necessity requirement*, whereby the relevant question is whether more efficiency improvements could be realized than if the arrangement were not in place or no alternatives exist to realizing the same goal. The commercial entities behind the sustainability initiative in question must therefore check if a restriction to competition is the least restrictive way to realize the intended benefits. In the example of overfishing, the commercial parties must be able to demonstrate with sufficiently solid and verifiable data that a fishing quota is necessary and that less far-reaching and price-affecting measures do not suffice.

4. The arrangement does not lead to competition being eliminated in a substantial part of the market. The arrangement must leave enough room for competition.

The *residual competition* requirement is probably the most difficult principle to be considered by sector-wide sustainability initiatives, as it requires the safe-guarding of dynamic efficiency needed for competition. In more concrete terms, this means that, while the ACM recognises that cooperation between market parties can bring efficiency gains (for example in product delivery) or eliminate the 'first mover disadvantage', it also requires that only limited numbers of product suppliers are allowed to join forces for the initiative to pass the cartel prohibition exemption. According to Competition Law, unsustainable options must still be allowed to exist on the market, or enough market-entry opportunities should remain for other economic actors.

One important mention made by ACM regarding the *assessment of these four conditions is that they should be applied against an economic background*. Therefore, while market coordination might indeed be needed to achieve sustainability goals, **the application of the economic principle remains that welfare decreases (through higher product costs) must be lower than the welfare increases (the benefits)**. This in turn implies that **market-wide agreements may be made only under exceptional circumstances** and need to be substantiated through a focused analysis of this principle, involving a detailed cost-benefit analysis showing the offsetting of prices.

ACM's positioning

In a document outlining some of the conclusions of its consultation process with various stakeholders, ACM stated that the background and drafting of the Policy Rule by the Ministry of Economic Affairs differs from the publishing of the vision document. It is the Minister of Economic Affairs who sets policies, and that ACM carries out statutory tasks. This means that the vision as outlined by ACM is a reflection of its interpretation as a regulator of how it will apply competition rules to sustainability initiatives. In its interpretation, ACM states that it follows the relevant European and Dutch regulations and laws, including the policy rule of the Minister of Economic Affairs.

ACM's is also of the opinion that the vision document stays within the boundaries of the relevant European Commission's guidelines. These give an outline of the boundaries within which the authorities in the European Competition Network (ECN) are to apply the TFEU's antitrust provisions. As ACM explicitly gives its opinion about sustainability initiatives, while these do not, hardly or no longer appear in the Commission's guidelines, one could get the impression that ACM is running ahead of the developments at an ECN level. ACM states that this is not the case.

Conclusion

According to the Vision document published by ACM, even where the competitive process would be affected by market-based sustainability agreements, ACM sees possibilities for such initiatives to exist in cases where sustainable production benefits current and/or future consumers. Cases where the sustainability arrangements have market-wide coverage may still fulfil the conditions of this article if negative effects are outweighed by the benefits offered to consumers.

ACM's 2014 vision document has implications for the goal of FTAO and the MFF coalition of obtaining higher prices for sustainably-produced food commodities produced both in the EU and outside of the EU. As an example, if such an arrangement would involve a significant proportion of the Dutch market for that particular product, the coalition would be expected to prepare a thorough cost-benefit analysis. For the arrangement to be successful, it would need to demonstrate that a high proportion of benefits could be derived for consumers in EU markets. Even so, based on the recent rulings of ACM on cases related to the vision document, the chances of the initiative succeeding seem to be low. This will further be discussed in [Part IV](#).

C. Initial Follow-up to ACM's 'Vision Document Competition and Sustainability Exemptions'

The vision document was published on the ACM website on May 9th 2014. At the same time, the Minister of Economic Affairs of the Netherlands published an official Policy Rule regarding Competition and Sustainability³⁶.

While the formal clarification was a welcomed step by all actors involved in the discussion, a practical application of these principles was expected through the 'Chicken of Tomorrow' case. The major question was whether aspects such as animal welfare (which could be a benefit to which consumers attach value) could justify the conclusion of market-wide arrangements according to the provisions of the ACM Vision Document.

At the time of the publishing of this vision document the ACM had not taken any positions on this case. As will be discussed in [Part III-iii](#), the results of the ACM ruling on the 'Chicken of Tomorrow' were met with substantial criticism from the side of the government, the industry and civil society, prompting further debates about the application of Art 101(3) FTEU/ 6(3) MW. Conclusions as to the final implications of the current debate on the goals of FTAO and the MFF coalition will be discussed [in Part IV](#).

³⁶ Idem 29

III. Part III – The ‘Chicken of Tomorrow’ Case

A. ‘Chicken of Tomorrow’ – Content of the agreement

The ‘Chicken of Tomorrow’ is the name for sustainability arrangements made between the Dutch producers organization for poultry, meat and eggs and the representatives of retailers (CBL) with the goal of completely phasing-out regularly-produced broiler chicken meat from supermarket shelves by 2020 and replacing it with a better version of the product.

More specifically, the organizations involved in the ‘Chicken of Tomorrow’ initiative agreed on the following 9 main measures³⁷ to improve the sustainability of the chicken industry, as well as the welfare of the animals themselves:

- (1) Introducing slower-growing chicken breeds;
- (2) Fewer chickens per sq. meter in barns;
- (3) Sustainable ‘bedding’ materials;
- (4) Strict compliance with animal welfare standards;
- (5) Longer sleeping hours for chicken;
- (6) Reduction in the use of antibiotics;
- (7) 100% use of soy grown in accordance with the standards of the Roundtable for Responsible Soy;
- (8) Various measures to reduce emissions, CO2 footprint and increasing use of sustainable energy;
- (9) The ‘Chicken of Tomorrow’ becomes the new *minimum* standard, alongside other animal welfare certifications;

| Characteristics | Broiler Chicken | ‘Chicken of Tomorrow’ |
|----------------------|--------------------------------|--------------------------------|
| Life-span of chicken | 40 days | 45 days |
| Space for movement | 21 chicken / m ² | 19 chicken / m ² |
| ‘Bedding’ material | None | Straws |
| Lighting | Min. 4h uninterrupted darkness | Min. 6h uninterrupted darkness |

Table 2 - Improvements in animal welfare - Broiler chicken vs. Chicken of Tomorrow

These arrangements would be implemented by the supermarket chains involved in the ‘Chicken of Tomorrow’, who would adjust their buying conditions to these criteria in a coordinated manner. This means they would buy and sell chicken meat products that meet at least these features. The abovementioned criteria are applied in such a way that, according to

³⁷ For a more detailed list, please see ACM's (2015) ‘Analysis of the sustainability arrangements concerning the Chicken of Tomorrow’, p3, viewed on 18.02.2016, available from <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>

the organizations involved, it continues to be possible to have a profitable production method in the poultry industry.

The arrangements would not apply to the production of chicken meat sold by butchers, poulterers and market traders. In addition, chicken meat that is exported (approximately 70 percent of national production) does not fall under the proposed criteria. The sustainability arrangements concerning the 'Chicken of Tomorrow' go further than the statutory minimum requirements that apply to commercial poultry farming in the Netherlands.

A. 'Chicken of Tomorrow' - PESTLE Analysis

(S)ocial

Growing awareness in the Netherlands about animal welfare issues, as well as the increasing consumption of meat in the country (4-fold '80s-'10 according to NRC) prompted the interest of media, lawmakers and consumers to investigate the methods of meat production in the Netherlands. The very visible public campaign organized by Wakker dier to eliminate broiler chicken from the supermarket ('Stop de plofkip!') can be seen as a reaction to this growing awareness.

(E)conomic

The Dutch cattle breeding industry indicated it wished to change production methods, signing a declaration of intent in 2012 (also called the 'The Treaty of Den Bosch') in which the selling of 'only sustainably produced meat' was defined as a goal. This was further detailed by the initiative 'Different Meat 2020' (Ander Vlees 2020), from which the 'Chicken of Tomorrow' agreement sprouted during in 2012.

(P)olitical

Given the national momentum for sector-wide sustainability initiatives discussed in [Part II – I](#), as well as the fact that agriculture is one of the priority economic sectors of the Netherlands, the 'Chicken of tomorrow' case quickly gained the support of parliament members such as Jaco Geurts. The Christian-democrat prompted the Ministry of Economics to demand further clarity from the ACM on the possibility of creating such agreements within the bounds of competition law.

The supermarkets' representatives branch CBL also contributed to the 'Chicken of Tomorrow' movement with several visible public adds to promote the idea of sustainable chicken amongst the public.

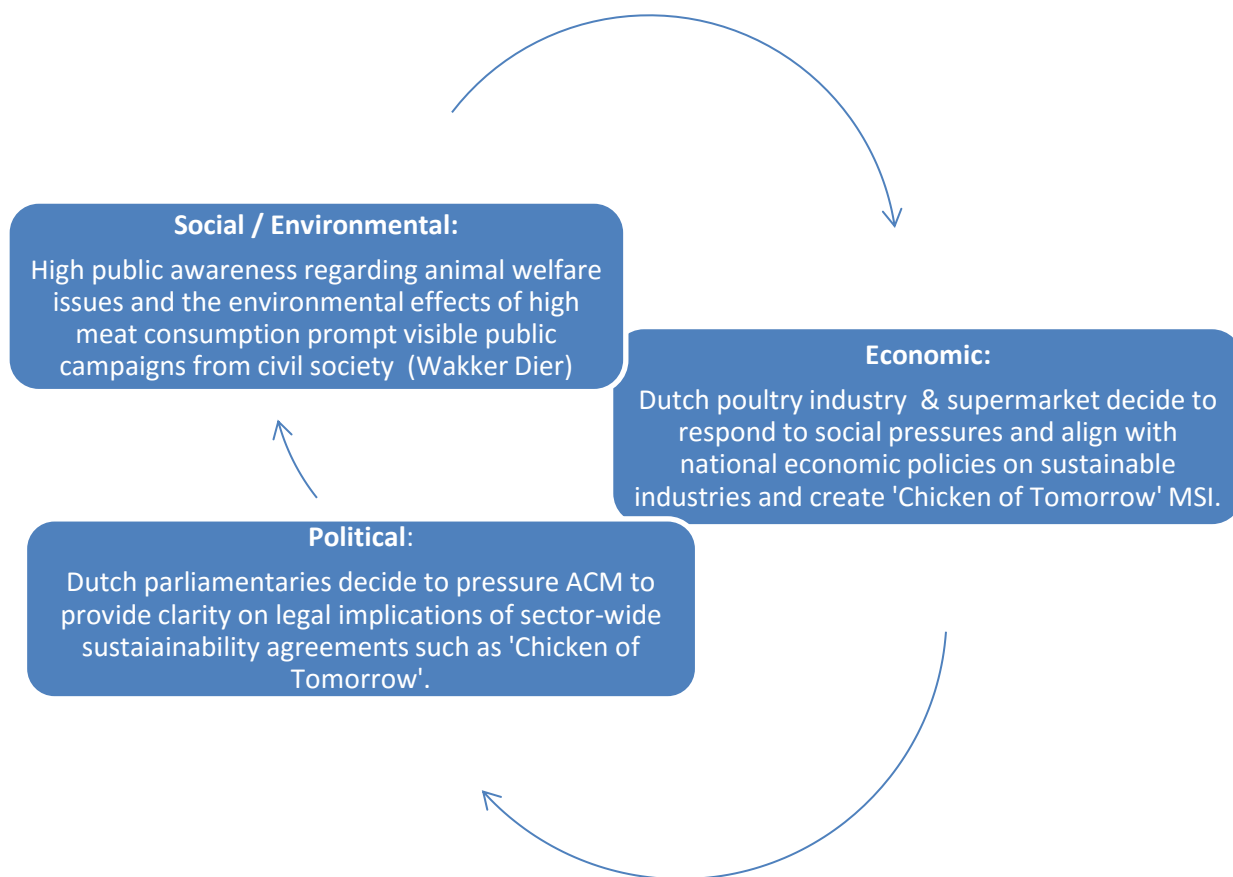


Figure 3 - PESTLE Analysis - 'Chicken of Tomorrow' Case

B. 'Chicken of Tomorrow' - The ACM ruling explained

On January 26th 2015 the ACM published an assessment of whether the sustainability arrangements made under the 'Chicken of Tomorrow' case are in line with the interpretation guidelines published in the Vision Document. *This was done in order to give businesses a first example of what a competition-law assessment of sustainability arrangements entails.* In principle businesses are expected to carry out such an assessment themselves.

The following paragraphs outline the reasoning of the ACM according to Art 6(1) and (3) in Dutch Competition Law (MW):

Regarding **Art 6 (1) MW**, ACM found that **the 'Chicken of tomorrow' case violates the prohibition on cartels** because consumer freedom of choice is considerably restricted by the agreement. This is especially true since all major Dutch supermarkets were intended to be part of the agreement and would together control 95% of the chicken sold to consumers in the Netherlands. Furthermore, such an agreement would also violate the provisions of EU Competition Law Art 101 (1) TFEU since Dutch supermarkets also import chicken from suppliers in other EU member states, who might not be able to meet these criteria and would effectively be excluded from the market.

Regarding **Art 6(3) MW**, ACM provided a separate analysis of each of the four conditions for sustainability exemptions:

(1) In order to assess the **improvement of production, distribution or the promotion of technical/economic progress** as a result of the 'Chicken of Tomorrow' agreement, ACM tasked its Economics Department to work together with the CentERData Dept. of the University of Tilburg to conduct a benefit analysis. The data was collected from the participating organizations as well as animal welfare experts, among others.³⁸ Given the broad welfare approach, ACM chose a 'willingness to pay' method of assessing the value consumers attach to the improvements to animal welfare, environmental and public health benefits that could result out of the agreement³⁹. These benefits usually have no well-established "market price" (see Annex VI for more details about the study). These benefits were later compared with the costs assessment for the primary sector, logistics companies and slaughterhouses conducted by Wageningen University LEI Institute⁴⁰

Table 2 below shows that the costs incurred by consumers would be greater than the benefits they would derive from the 'Chicken of Tomorrow' agreement. **ACM therefore concluded that the initiative does not fulfil this criterion.** Additionally, ACM mentioned that the fact that these benefits are not guaranteed for consumers also played a role in its decision.

Table 3 - Results ACM Economische Effecten van Kip van Morgen Study - Consumer Willingness to pay vs Consumer Costs

| Area of Benefit | Consumer Benefit - Willingness to Pay | < | Consumer Cost |
|-----------------------|---|---|---|
| Animal Welfare | 68 eurocents /kg 'Chicken of Tomorrow' | | € 1.46 /kg 'Chicken of Tomorrow' |
| Environment | 14 eurocents /kg 'Chicken of Tomorrow' | | |
| Public Health | 0 | | |
| Total Benefits | 82 eurocents /kg 'Chicken of Tomorrow' | | |

(2) Since the second criterion of **consumers receiving a fair-share of the benefits derived from the initiative** depends on the positive assessments made under the first criterion, ACM concluded that this **was also not met by the 'Chicken of Tomorrow' agreement.**

(3) Given the fact that the initiative does not meet conditions (1) and (2), the third criterion on whether **the arrangements under study are necessary and proportional to the attainment of the benefits** also becomes problematic. Since ACM's economic study showed that consumers are willing to pay up to €12/kg of certified chicken (under the Beter Leven animal welfare label) but not for the 'Chicken of Tomorrow' agreement, the results of the willingness to pay survey initiative indicate a problem in communicating its benefits to consumers. **The conclusion ACM drew was therefore that certifications should be a sufficient means to**

³⁸ Machiel Mulder, Sigourney Zomer (ACM) & Tim Benning en Jorna Leenheer (CentERdata) (2014) 'Economische effecten van de Kip van Morgen', ACM Office of the Chief Economist, Viewed on 12.02.2016, available from <https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen/>

³⁹ The study focused on assessing consumer surplus

⁴⁰ Van Horne (2013) 'Meerprijs duurzaam pluimveevlees: 'kip van morgen' in Machiel Mulder, Sigourney Zomer (ACM) & Tim Benning en Jorna Leenheer (CentERdata) (2014) 'Economische effecten van de Kip van Morgen', ACM Office of the Chief Economist, Viewed on 12.02.2016, available from <https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen/>

achieve the goals of the ‘Chicken of Tomorrow’ initiative, provided that some improvements in marketing and the reliability of certifications systems are made.

(4) As already mentioned under the assessment of the Art 6 (1) MW, the fact that all major supermarkets were intended to participate in the ‘Chicken of Tomorrow’ initiative meant that, after 2020 consumers who would want to buy broiler chicken would only be able to do so from butchers, poultries and traders. These are the only Dutch supply chain actors that were not part of the agreement and they would constitute only 5% of the market. **ACM nevertheless concluded that some residual competition would still exist on the market** on the basis of higher welfare standards (above the minimum bar established by ‘Tomorrow’s chicken’) and price differentials.

To sum up, **ACM’s assessment shows that the ‘Chicken of Tomorrow’ agreement restricts competition in the market of broiler chicken both within the Netherlands and the EU**. Furthermore, not all the four requirements under Art 101(3) FTEU/6(3) MW were met, but the main issue was that the initiative did not generate *any* (paraphrasing) benefit for consumers. Furthermore, ACM believes that less far-reaching measures are possible that may also lead to making the chicken meat offered in supermarkets more sustainable - such as improved consumer education about the options with regard to sustainable chicken meat.

Following from the above, ACM advised the organizations behind the ‘Chicken of Tomorrow’ to adjust their sustainability arrangements so that they can comply with both EU and NL competition law.

C. ‘Chicken of Tomorrow’ – Responses and Reactions

January 2015

Given the growing momentum for sector-wide sustainability agreements in the Netherlands, the publishing of the results of the ACM assessment of the ‘Chicken of Tomorrow’ case on January 26th 2015 reverberated strongly in the Dutch media. Campaigning organization Wakker dier had already voiced concerns that the improvements in animal welfare proposed through the industry agreement were not substantially improving living conditions for chicken⁴¹; now the media officially called the initiative a failure⁴².

The representative organization of supermarkets - CBL, as well as that of small and medium enterprises - FNLI, called the decision of ACM a ‘spoke in the wheel’ of an important sustainability initiative, as well as those to come. In their press-release⁴³, the two industry organizations asked the ACM to consider whether promoting unworkable agreements and waiting until all consumers demand sustainability is more valuable than allowing the market collaborations to already take the necessary steps towards systemic change. They mentioned that companies need a united response from the government in order to succeed, and not a situation in which one institution (ACM) goes against the actions of another (Ministry of

⁴¹ Compared to its proposed solution of using the Beter Leven certification system as a benchmark, see NRC (2015) ‘Een kip van drie dagen ouder is nog geen duurzame kip’, viewed on 19.02.2016, available from <http://www.nrc.nl/next/2015/01/28/een-kip-van-drie-dagen-ouder-is-nog-geen-duurzame-1460737>

⁴² NRC (2015) ‘De kip van morgen wordt nu wel echt een flopkip’, viewed on 19.02.2016, available from <http://www.nrc.nl/nieuws/2015/01/26/de-kip-van-morgen-wordt-nu-wel-echt-een-flopkip>

⁴³ CBL (2015) ‘Reactie CBL, FNLI en LTO op publicatie ACM over Kip van Morgen’, viewed on 19.02.2016, available from <http://www.cbl.nl/pers/persberichten/persbericht/article/reactie-cbl-fnli-en-lto-op-publicatie-acm-over-kip-van-morgen/>

Economics). Lastly, CBL and FNLI expressed serious concerns regarding the methodological sturdiness of the economic research conducted by ACM.

June-July 2015

On June 11th the MVO platform (the centre of excellence for Dutch companies supporting CSR) sent a joint letter⁴⁴ to the Minister of Economics stating that the ACM assessments in the cases of the Energieakkoord and that of the 'Chicken of Tomorrow show that not enough space is available for sustainability agreements within competition policy.

They mentioned that the ACM documents do not make clear whether companies can make agreements to prevent child labour or to promote living wages in developing countries under Art 6(3) MW – Condition 1, or whether these improvements would be judged from the perspective of society or of the consumer only. Sustainability agreements can create benefits for society overall, benefits that are cannot be enjoyed by individual consumers. These are currently not being taken into consideration because ACM chose for a 'willingness to pay' approach to assessing benefits.

Those undersigning the letter therefore request the ministry to eliminate these doubts and assure that maximum room within the law exists for industry-wide sustainability agreements by:

1. **Entering in discussions with market experts, academics, civil society organizations, ACM and the European Commission** to create a comprehensive analysis regarding the room available for non-monetary aspects and sustainability effects to taken into account, regardless of where in the world the benefits would be gained.
2. **To empower ACM to give advice to entrepreneurs seeking to create such sustainability agreements**, instead of placing the burden of proof on the proponents themselves. In this respect, a positive demonstration with concrete examples of how the principles stated by ACM in vision document could be applied towards the successful exemption of sustainability initiatives under Art 6 (1) and (3) MW would be helpful.
3. **Starting a fundamental debate within the EU regarding the dilemmas that competition law poses for creating a sustainable economy.** A careful and profound analysis was requested, whereby not only competition lawyers but also other experts from the field of sustainability and CSR would be consulted. The Dutch presidency of the EU in 2016 was therefore seen as an opportunity to be explored. In addition to this, these questions can also be brought in discussions in international forums such as the OECD. The societal and economic dimensions of sustainability agreements also need to be discussed at a societal level, alongside considerations of benefits for individual consumers.

The letter was sent to members of the permanent commission for Economic Affairs of the Dutch House of Representatives (Tweede Kamer), as well as the ACM. Its intention was to inform the discussion session planned for June 18th 2015 regarding market and competition.

⁴⁴ MVO (2015) 'Brief aan Minister Kamp 'Meer ruimte voor duurzaamheidsafspraken', viewed on 18.02.2016, available from <http://mvonederland.nl/publicatie/brief-aan-minister-kamp-meer-ruimte-voor-duurzaamheidsafspraken> ; Letter sent by MVO (the main Dutch governance body advocating for public policies related to CSR and mediating between the voices of civil society and the government) and undersigned by several other civil society organizations and representative bodies, namely De Groene Zaak, VNO-NCW, MKB Nederland and Natuur en Milieu.

On July 13th 2015 the Dutch Minister of Economic Affairs (Kamp) sent a letter to the president of the House of Representatives (Tweede Kamer) taking forward the points from the MVO letter⁴⁵. He stated that he supported the publishing of the Policy Rule on 'Competition and Sustainability' and of the ACM vision document with the goal of encouraging sustainability agreements within the market.

In his view, recent case studies such as the 'Chicken of Tomorrow', discussions of collaborations between textile producers to bring about living wages in production countries or the EnergieAkkord bring into question whether the Policy Rule mentioned above is actually contributing towards the achievement of these goals⁴⁶. Through this letter he announces the chamber regarding the steps he planned to undertake in order to eliminate some of the arising tensions. While the clarifications provided by ACM were welcomed, it was also suggested that the balancing of sustainability and market interests is not only a task of the ACM; government regulations also need to change in order to upgrade sustainability norms.

The two actions he plans to undertake are to:

1. **Adapt the Policy Rule published in May 2014** so that it becomes even clearer which interests can be taken forward. The Minister announced he would do this through consultations with the market and other relevant stakeholders so that it is also applicable in practice.
2. **Enter into discussions with the European Commissioner on Competition Law** Vestager regarding the interpretation of competition rules for sustainability, together with the Minister of Foreign Trade and Development. De Kamp said he would provide further insights into the conclusions of the discussions once these are concluded.

December 2015

Between December 23rd and 31st 2015 the Ministry of Economic Affairs de Kamp launched an open online public consultation on the new draft for Policy Rule on 'Sustainability and Competition'. The new version is intended to replace the 2014 version of the document in relation to the discussions that took place in June-July 2015.

The main changes in the document refer to:

- A broader basis for the parties which can experience both benefits and costs as a result of sustainability initiatives, meaning not only users and consumers but also society as a whole
- The assessment of total package of agreements proposed by initiatives
- More clarity regarding which information proponents can use to substantiate their self-assessment
- Actualized examples

⁴⁵ Minister Kamp (2015) 'Kamerbrief over de werking Beleidsregel mededinging en duurzaamheid', viewed on 19.02.2016, available from <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/07/13/kamerbrief-over-de-werking-beleidsregel-mededinging-en-duurzaamheid>

⁴⁶ Kamerstukken II 2014/15, 31 532, nr. 139 in Minister Kamp (2015) 'Kamerbrief over de werking Beleidsregel mededinging en duurzaamheid', viewed on 19.02.2016, available from <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/07/13/kamerbrief-over-de-werking-beleidsregel-mededinging-en-duurzaamheid>

Seventeen market, civil society and legal experts provided comments to the draft document⁴⁷ on four requested areas of feedback:

1. **Does the updated Policy Rule provide more clarity and tools to give form to sustainability initiatives within the frame of competition law and to support the process of self-assessment?** If not, respondents are requested to provide insights as to how the document could be improved.
2. **Should the updated Policy Rule be based on Art 6(1) MW in order to make use of the ‘inherent restrictions to completion based on public interest’? What would be the pro’s and con’s of such an approach?** If respondents agree that this legal precedent should also be used, they are requested to explain how these could be given concrete shape in practice.
3. **What would be the needs and desires that exist for stakeholders with regards to receiving support on creating sustainability agreements?** For example, would stakeholders require informal meetings with the ACM or practical support under the form of tools and checklists? Respondents are requested to highlight the pro’s and con’s of their views.
4. **Which alternatives or possibilities exist, besides the changing of the Policy Rule, to make sustainability agreements possible?** Respondents are requested to highlight the pro’s and con’s of their views.

At the date of writing the report (March 2015), the conclusions drawn by the Ministry of Economic Affairs on the basis of the feedback received have not yet been made public. Further research would need to be conducted into the content of the 17 feedback documents and of the draft Policy Rule opened for debate in order to gain more insights into the interests at play in this matter.

January 2016

On the market side of the discussion, three big Dutch supermarkets, namely Albert Heijn, Jumbo and Lidl announced that they will stop selling broiler chicken in 2016⁴⁸. Wakker dier, the organization campaigning for this change since 2012, called this step “a breakthrough” and promised to thank the companies through a positive publicity campaign. All three supermarkets would come forth with a new type of chicken, grown with better living conditions than broiler chicken, but still not enough to be able to granted the one-star rating provided by the Beter Leven animal welfare certification proposed by Wakker dier. While there is still much room for improvement in this respect, Wakker dier mentioned it was pleased to see incremental steps taken in the right direction. Another point of critique on the improvements brought forward in animal welfare is that these changes increase the environmental footprint of chicken production.

Given the failures of the ‘Chicken of Tomorrow’ initiative in 2015, the three supermarkets can be seen as having taken steps in the right direction at their own initiative, but with an eye on

⁴⁷ The 17 organizations that responded are: CBL, Circular Future, Eneco, Energie Nederland, FNLI, LTO, Milieufederatie Noordholland, MVO, NAV, Nederland Order Advocaten, SER, SOMO, Perenboom, Prof. Schiekkel (Univ. of Amsterdam), Van Doorne Law Group and VEMW, for more information please visit <https://www.internetconsultatie.nl/mededingingenduurzaamheid>

⁴⁸ NRC (2015) ‘AH, Jumbo en Lidl stoppen in 2016 met verkoop plofkip’, viewed on 18.02.2016, available from <http://www.nrc.nl/nieuws/2015/12/29/ah-jumbo-en-lidl-stoppen-in-2016-met-verkoop-plofkip>

their competition⁴⁹. This explains why they have implemented the changes at the same time. Given that the 'Chicken of Tomorrow' agreement was meant to phase of broiler chicken by 2020, the steps taken by the three supermarkets show progress ahead of time.

Regarding the distribution of costs, the poultry producers supplying these supermarkets are taking on their share of the costs incurred though a lower rate of chicken production but with higher nutritional needs. These additional costs will in principle be supported by consumers, for whom 1kg of supermarket chicken will now become €1 more expensive (10% increase in price). Supermarkets say nevertheless that they are also taking on a part of the costs, without specifying the exact amount.

⁴⁹ NRC (2016) 'Vaarwel plofkip – in Nederland dan', viewed on 18.02.2016, available from <http://www.nrc.nl/handelsblad/2016/01/02/vaarwel-plofkip-in-nederland-dan-1575536>

IV. Part IV – Implications for FTAO/MFF and potential for EU Action

Conclusion as to the status of discussion in the Netherlands

In spite of legal clarity provided by ACM through the vision document published in 2014 as to the possibility of industry-wide sustainability agreements, the test cases discussed by ACM have so far been ultimately unsuccessful in passing the test of the exemption criteria for cartels mentioned in Article 101 (1) and (3) of TFEU (and their equivalent Art 6 (1) and (3) in Dutch MW).

Nevertheless, the discussion arising as a result of these initiatives within the Netherlands have brought about some points of progress, many of which also open opportunities for FTAO and the MFF coalition.

| Wins of ‘Competition and Sustainability’ Discussion | Opportunities for FTAO and MFF |
|---|---|
| <p>There is a high level of awareness amongst Dutch market, governmental, legal and civil society bodies regarding the limitations that competition law is currently position to the realization of sustainability goals (including living wages) through industry agreements in both national and international production chains.</p> | <p><i>The interest of FTAO/MFF in the status of the ‘Competition and Sustainability’ discussions comes at a good moment as the Dutch EU presidency in 2016 opens new opportunities to intervene in the discussion and form coalitions with Dutch civil society organizations.</i></p> |
| <p>The results of the ACM assessments have activated an official consultation procedure with the relevant European Commissioners on Competition regarding enlarging the space for sustainability agreements to exist. This was achieved partly due to the high level importance of sustainability goals for the Ministry of Economic Affairs, as well as the good standing that organizations such as MVO, CBL and FNLI have with the minister regarding CSR improvements.</p> | <p><i>Part of the high level lobbying work with the European Commission is already taking place, so further pressures and discussion opportunities from Brussels based lobby groups could contribute to the process</i></p> |
| <p>In the consultant’s opinion, there is a very good technical discussion taking place regarding the measuring of benefits for consumers. Creating high quality cost and benefit analyses⁵⁰, through more complex assessment methods could further help highlight the high amount of benefits that could be derived to society overall (Art 6(3) -1 MW) as a result of such sustainability agreements.</p> | <p><i>Resources permitting, this offers FTAO/MFF a good opportunity to provide concrete cost-benefit analyses on key campaigning commodities to support the shift in ACM’s way of thinking</i></p> |

⁵⁰ In the Netherlands these are usually conducted by the valuation/economics/consultancy research departments of universities, such as LEI (Wageningen University) or CentERData (Tilburg University).

In spite of all the hurdles, the recent decision of 3 Dutch supermarkets to stop sourcing broiler chicken shows that very visible public campaigns on topics that capture public interest can bring about incremental sustainability upgrades.

Considering maintaining the pressure on supermarkets is still of value, especially if initiatives have high visibility

The coming year(s) will provide more clarity as to whether the interests of the Ministry of Economic Affairs, the Dutch market and civil society actors will be able to overturn the current way of thinking of the ACM and (potentially) of the European Commission – DG Competition.

It seems like the current debate in the Netherlands is being shaped as a blockade between the legislature and the government. While the Dutch debate gives a lot of room for hope for similar cases being brought up in other EU member states, it remains to be seen whether Dutch interests in the topic will be able to overrule legislation that also impacts market dynamics in other EU member states.

Action Steps to be considered by FTAO

- 1. Decide whether the current framing of the sustainability exemptions discussion in the Netherlands could be a useful for the purposes of FTAO and MFF's goal of achieving higher prices for producers in both EU and non-EU member states.**

As the TOR provided by FTAO and MFF did not provide a clear example as to the exact commodity for which an increase in prices would be desirable, it is difficult for the consultant to assess the extent to which the coalition would be able to use sustainability exemptions to competition law as a mechanism.

Since the debate in the Netherlands is ongoing, the decision of FTAO and MFF to pursue the discussion should take into consideration two scenarios:

- Should the ACM stand by its original vision document and its current interpretation of competition law, the possibility of realizing market-wide sustainability agreements to increase prices remains slim.
- Should the Ministry of Economic Affairs, the Dutch market and civil society be successful in their advocacy or should successful cases of market agreements for sustainability pass the exemption test in the Netherlands, this would open up great opportunities for FTAO and MFF to:
 - o Consider encouraging Dutch market parties to submit a case on the desired commodity to the ACM or other EU NCAs.
 - o Promote such agreements as an example of good practice in other EU Member states or requesting the European Commission to create a European Guideline on this matter.

- 2. Assuming that FTAO and MFF are interested in being part of the discussion on sustainability exemptions to competition policy, the consultant recommends:**

- **Finding ways to get involved and contribute to the political process taking place in the Netherlands** by finding a civil society partner who could help FTAO and MFF monitor the debate, contribute with suggestions, signing letters and participating in relevant debates. Conducting a Stakeholder Analysis and Power Map of Dutch civil society stakeholders would therefore be recommended.

- Since the status of the **discussion between the Dutch Minister of Economic Affairs and the European Commissioner** is still unclear at the time of drafting the current report, proposing concrete lobby actions is not possible at this point. Nevertheless, **the consultant is of the opinion that this is an area where FTAO could play a significant role. The MFF coalition could help provide concrete evidence** to substantiate the need for broader societal considerations of benefits and other methods of assessing benefits besides 'willingness to pay' ([see points raised by the Minister of Economic Affairs](#) in his letter and consultation)
- More investigations are also needed as to the actual level of agreement between ACM, the European Commission and the European Competition Network. ACM stated during the consultations that it would welcome a joint clarification at ECN level of the application of the competition rules to sustainability initiatives. The consultant is of the opinion that this is an area where **FTAO could play a role in engaging with the European Competition Network** in order to request further clarity and promote the importance of sustainability exemptions to competition law at an EU level.
- As mentioned in the MVO letter (June 2015), another important strategy for the coming period is that of **starting a fundamental debate within the EU regarding the dilemmas that competition law poses for creating a sustainable economy**. Besides the usual public arena in which such issues are discussed, **FTAO could also engage with international organizations such as OECD and UNCTAD** in order to increase the profile of the debate. UNCTAD published in 2015 a working paper on 'The role of competition policy in promoting sustainable and inclusive growth'⁵¹ which might be used as a starting point for discussing the impact of competition policy outside of the EU.
- **National Competition Authorities (NCAs) in EU Member States also have a role to play in the field of advocacy** and in promoting further innovation through case law rulings on competition policy. **Encouraging partners in EU Member states to conduct a meta-legal analysis of relevant sustainability-related case law submitted to their NCAs, potential new cases that could be submitted and to engage with them** might also be of value.
- Last but not least, the classical way of advancing innovation in European law is of course through case law. In this respect the **European Court of Justice could contribute to the process** by issuing new judgements on Article 101(3) FTEU. The consultant is not sure however what role FTAO could play in this respect.

A few other points to consider for future research and consideration:

- Investigate the **differences between Policy Rule currently being revised by the Dutch Ministry of Economic Affairs and the ACM Vision Document**
- Investigate the **CECED case** which was the only documented precedent for the inclusion of public policy sustainability benefits in the calculation of consumer surplus
- Creating a **strong argumentation of why the classical certification approach would not be sufficient to create sustainable market transformation**, as opposed to sector-wide agreements

⁵¹ Viewed on 1.02.2016, available from http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d6_en.pdf

- **Reframing ACM's current definition for a 'broad welfare approach'**, including arguments involving the valuation of indirect benefits enjoyed by consumers through sustainability improvements (i.e. cleaner air, lower health costs, lower risk of cancer due to pesticides etc)

V. Annexes:

A. Treaty Establishment European Union

Source: <http://ec.europa.eu/competition/antitrust/legislation/articles.html>

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and **which have as their object or effect the prevention, restriction or distortion of competition within the internal market**, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

B. List of Experts and Contacts relevant for the topic

Centraal Bureau Levensmiddelen (CBL)

Marc Jansen - Directeur

Federatie Nederlandse Levensmiddelen Industrie (FNLI)

Murk Boerstra - Deputy Director

Margot Feith – Public Affairs

Nederlandse Akkerbouw Vakbond (NAV)

Keimpe van der Heide - Board member

Aleid Dik

Land en Tuinbouw Organisatie Nederland (LTO)

Klaas Johan Osinga - Coordinator of the Copa-Cogeca Economic Analysis Network

Economische Statische Berichten (SER)

Nikolai Bloem - Secretaris bij de SER

DG Competition

Margrethe Vestager - EU Commissioner for Competition

Dutch Ministry of Economic Affairs (MINEZ)

Henk Riphagen - Agri-economists desk

Johan Gatsonides

Elsbeth Visser

MVO Nederland

Shirley Justice - Sr. Project Manager – Sustainable living and governments

MVO Platform

Suzan van der Meij – Coordinator

SOMO

Joseph Wilde – Senior Researcher

C. Reading List

General Legal Theory on Competition Law and Sustainability

S.R.W de Hees (2013) 'A sustainable competition policy for Europe'

<http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/SRW-van-Hees-Master-Thesis-A-sustainable-Competition-Policy-for-Europe-final-version2.pdf>

English Versions – ACM Documents

ACM's Vision Document on Competition and Sustainability

<https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>

ACM's Analysis of Arrangements concerning the 'Chicken of Tomorrow' case

<https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>

ACM's Sustainability Knowledge Bank

Includes papers on waste management, the LEI cost assessment for the 'Chicken of Tomorrow' and SER strategy for sustainable growth & sustainability

<https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/kennisbank-duurzaamheid/>

ACM's Collection of Relevant EC and NCA decisions and cases on sustainability

<https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/relevante-besluiten-rondom-duurzaamheid-en-mededinging-van-de-ec-en-de-nma/>

D. Examples of other EU sustainability policies for competition law

The consultant conducted a search through the policy documents of several NCAs from western European Member States who seemed most likely to have developed policies for judging cases on sustainability and competition law, with the following results:

Nordic Competition Authorities – Competition Policy and Green Growth (2010)

<http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>

The document was developed in response to the 2009 OECD Ministerial Council meeting on developing a Green Growth Strategy and identifying the policies that currently serve as barriers for this. The report explores this, as well as several policy governmental instruments and market practices applied by companies in the environmental sphere. One of the chapter highlights the important role that national competition authorities can play in highlighting the potential arising conflicts between competition policy and green growth.

In spite of the promising assessment on competition and sustainability published in 2010, the 2020 strategy⁵² does not specifically focus on identifying the fault lines between competition and sustainability. Instead the 2020 vision discusses public procurement, including innovation procurement; the development and implementation of systems of choice in the public sector; and to ensure that public and private businesses compete on equal terms.

The internet research did not bring about any cases where sector-wide sustainability agreements have been discussed in Nordic countries.

While the NCAs other EU member states (Germany) have judged big merger cases in the sustainable energy industry, no specific consideration seemed to have been given to pricing and cartel issues.

⁵² <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>

E. Study Methodology – Assessing consumer benefit/surplus for ‘Chicken of Tomorrow’ case

In order to assess the benefits deducted from buying more sustainable chicken, ACM and CentERData (University of Tilburg) used a ‘Willingness to Pay’ assessment method, based on the Hicksonian compensation variation method for determining changes in consumer surplus. There are two main methods of assessment for this method:

- ‘Contingent valuation method’ – Whereby respondents are asked directly about the amount they are willing to pay extra in order to enjoy the desired benefits; the method is known to have higher bias rates.
- ‘Choice-based Conjoint’ – Whereby respondents are indirectly asked about the amount they are willing to pay for desired benefits by being presented with products at different price ranges from which to choose (similar to a real supermarket shopping experience); this method is known to have a smaller amount of bias compared to the former.

The researchers chose to rely heavily on ‘Choice-based Conjoint’ method, but also used ‘Contingent Valuation methods’ for triangulation purposes.

In order to assure that respondents were aware of the current of the importance of increasing animal welfare and the environmental sustainability of the chicken industry and for them to be able to place fair value on these industry improvements, the researchers informed them at the beginning of the study about:

- Animal welfare and environmental issues in the chicken production industry
- Regular chicken, ‘Chicken of Tomorrow’, certified chicken (Beter Leven – 1 star, biological chicken) growth conditions

The information was structured in 7 comparable categories, such as life span, movement possibilities etc. Furthermore, respondents were informed about chicken consumption trends, sector-wide agreements and prices per 500g of chicken.

On the basis of such attributes a survey of 90 questions was created, divided in 6 sections of 15 questions. Per question, the respondent could choose between two types of chicken or choose not to purchase anything. In answering the questions, the respondents were reminded to consider their daily shopping budget.

The analysis of the choice experiment was based on the ‘random utility theory’ (McFadden, 1974). Both the choice experiment and the Contingent Valuation Method were sent to a panel of 2000 households consisting of around 3000 people. 1603 people participated in the survey.

Below the example of a question asked during the survey:

<< The price for regular chicken in the supermarket is €4 per 500g. We are curious how much you would be prepared to pay for the other three types of chicken, namely ‘Chicken of Tomorrow’, ‘1-star Beter Leven certified chicken’ and ‘biological chicken’. We therefore ask you the amount of € that you are willing to pay for the three types of chicken during your daily shopping.

In considering this question, please consider your personal budget. Paying more for meat influences your monthly living costs, depending on how much meat you usually purchase.

Question 1: The maximum price that I prepared to pay for the 'Chicken of Tomorrow' is XX per 500g.

Question 2: The maximum price that I prepared to pay for '1-star Beter Leven certified chicken' is XX per 500g.

Question 3: The maximum price that I prepared to pay for 'biological chicken' is XX per 500g.

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About the commissioning party:

The Fair Trade Advocacy Office (FTAO) speaks out for Fair Trade and Trade Justice with the aim to improve the livelihoods of marginalised producers and workers in the South. The FTAO is a joint initiative of Fairtrade International, the World Fair Trade Organization-Global and the World Fair Trade Organization-Europe. More information under: www.fairtrade-advocacy.org

Acknowledgements:

The Fair Trade Advocacy Office would like to thank the European Commission and the Esmée Fairbairn Foundation for the financial support provided to make the research study possible.

How to quote this paper:

Irina Toma, *Competition Law and Sustainability in the Netherlands. Sustainability Exemptions to Competition Law as Role Model for Europe?* In: Fair Trade Advocacy Office Briefing – June 2016, Brussels



This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of the Fair Trade Advocacy Office and can under no circumstances be regarded as reflecting the position of the European Union.