Article

Sustainability initiatives and the cartel ban – whose move now?

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As part of this special issue of M&M on competition and sustainability, we examine the limited possibilities open under the cartel ban to enterprises wishing to make sustainability agreements when it comes to acquiring legal certainty as to whether such agreements are admissible. In this article, we discuss why the procedural instruments that can be applied within the current system do not offer sufficient scope for checks and balances, and therefore cannot lead to development of the law. We then make recommendations for how to utilise existing and new instruments so as to achieve additional legal certainty and/or to make development of the law possible, in order to facilitate such cooperation to the maximum extent possible.

Introduction

At the end of 2019, the European Commission (the "Commission") presented the European *Green Deal*, an ambitious plan aimed at reducing net greenhouse gas emissions to zero by 2050 and separating economic growth from the use of resources.[1] Besides fulfilling the ambitions at EU level for implementing the *Green Deal*, the Netherlands is required to undertake considerable efforts pursuant to the climate commitments[2] entered into at international level.[3] Introduction of legislation[4] and encouragement of initiatives by enterprises are both desirable in order to achieve the climate targets. Competition rules, and the cartel ban in particular, must therefore be prevented from discouraging enterprises from setting up cooperation initiatives to bring about sustainability and climate improvements (referred to below as "sustainability initiatives"). To that end, it is very important for the substantive rules and procedural instruments to (ultimately) provide sufficient legal certainty regarding the admissibility of such initiatives. In the words of Regulation (EC) No. 1/2003:[5] "Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment."[6]

In the current system – in which they must assess the admissibility of cooperation initiatives themselves (i.e. self-assessment) – enterprises wishing to implement sustainability initiatives have to carry out a complex weighing-up of the environmental and sustainability benefits of cooperation against the disadvantages for competition. This assessment is a difficult one, partly because there are few recent (positive) precedents that allow it to be carried out with sufficient certainty. Moreover, the existing frameworks and guidelines of the Commission and national competition authorities (NCAs) so far offer little scope for such initiatives. According to these policy frameworks, it is only direct benefits for users and

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1 https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#actions.

2 ACM, *Draft Sustainability Agreements Guidelines* [*Concept Leidraad Duurzaamheidsafspraken*] (hereinafter the "Guidelines"), 2020, marginal number 3.

3 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*); https://nos.nl/artikel/2320040-nederland-heeft-minste-duurzame-energie-van-hele-eu-dit-jaar-wel-versnelling.html.

4 See, for example, the introduction of the import levy on waste (Climate Agreement (Tax Measures) Act [*Wet fiscale maatregelen Klimaatakkoord*]) and CO_2 levies for industry (Parliamentary Bill amending the Environmental Taxes Act [*Wet belastingen op milieugrondslag*] and the Environmental Management Act [*Wet Milieubeheer*] for the introduction of a CO_2 levy for industry).

5 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003, L 1/1.

6 Recital 38 Regulation (EC) No. 1/2003.

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consumers of the cooperation agreement that are taken into account in the competition law assessment, and not indirect longer-term benefits for parties other than current users.[7]

With its new *Draft Sustainability Agreements Guidelines* (the "Guidelines"), the Netherlands Authority for Consumers and Markets (ACM) has taken the initiative to create greater clarity for enterprises.[8] Among other things, the ACM proposes welcome substantive innovations, thus showing a willingness to explore the limits of its powers.[9] In our view, however, additional legal certainty is desirable, particularly because the policy is not laid down in binding regulations and can hardly, if at all, be checked by the courts. As regards cooperation initiatives that fall not only under the national ban on cartels set out in Article 6 of the Dutch Competition Act (Mw) but also under Article 101 of the Treaty on the Functioning of the European Union (TFEU) (which will often be the case), coherent EU-wide application is an obvious option.

Sufficient legal certainty requires, on the one hand, sufficiently clear frameworks. These are usually created by precedents and ideally by legislation. On the other hand, checks and balances enable enterprises to take a negative assessment of their sustainability initiative to court, a step which allows for formation and development of the law. In a specific case and within the current factual and economic context, the court can weigh up the sustainability and competition interests against each other. An irrevocable court judgment sets a precedent that provides guidance and therefore (to a certain extent) legal certainty for third parties.

Decentralisation of the application and enforcement of Article 101 TFEU as of 1 May 2004 has meant that the weighing-up of interests must now also be carried out at the level of NCAs. The Commission no longer takes "paragraph 3 decisions", which – prior to decentralisation – contributed significantly to development of the law. This means that the Commission's current administrative practice provides little guidance for assessing planned sustainability initiatives. In the absence of rulings, there are also no direct appeals to the EU courts, meaning that there is hardly any development of the law through case law either. Development of the law can in theory take place through submission of requests for a preliminary ruling to the European Court of Justice (ECJ), but this hardly seems realistic in actual practice because the admissibility of sustainability initiatives under the cartel ban will not easily become the subject of national legal proceedings (see below). Another consequence of the absence of recent precedents is that sustainability initiatives are assessed against the Commission's policy, in which a strict interpretation of paragraph 3 prevails. There is little scope for judicial review against early European jurisprudence, older Commission decisions, or the current situation and hard climate commitments – which seem to offer greater scope. As a result, there seems to be (too) little scope under competition law for environmental and sustainability initiatives that can contribute to meeting Europe's climate commitments.[10]

Enterprises can request informal guidance from NCAs and the Commission as to the admissibility of their cooperation initiative, but they then have little choice but to abide by an informal negative opinion.[11] It is currently difficult to estimate the extent to which (potential) cooperation initiatives will actually benefit from the informal guidance announced by the ACM and the Commission.[12] We believe, however, that it is preferable to provide greater clarity in the form of binding rules, but that judicial review should in any case be possible so as to provide additional legal certainty for enterprises and to allow for development of the law through court rulings.

In this article, we first discuss our basic assumptions regarding the necessary legal certainty and the possibility for development of the law. We then explain in what respects the procedural instruments that are currently applied still fail to sufficiently meet the need for legal certainty and development of the law as regards the admissibility of sustainability initiatives. Finally, we make three recommendations, based on those assumptions, for how to utilise existing and new instruments so as to achieve greater legal certainty and development of the law and thus to encourage sustainability initiatives to the maximum extent possible.

Basic assumptions for greater legal certainty and development of the law

The Treaty provisions regarding the EU's environmental policy allow for environmental and sustainability objectives to be taken into account when applying the rules on competition.[13] In particular, these

7 Letter from the Commission dated 26 February 2016, annex to the letter from the Minister of Economic Affairs dated 23 June 2016, *Parliamentary Documents* [*Kamerstukken*] 2015/16, 30196, No. 463; ACM *Analyse ACM van duurzaamheidsafspraken "De Kip van Morgen"*, 2014.

8 ACM, *Draft Sustainability Agreements Guidelines* 2020.

9 The policy submitted for consultation offers greater scope than the current framework in several respects. That scope lies, in particular, in a broader interpretation of paragraph 3 and in guidelines for quantifying the paragraph 3 analysis. As regards Article 101 TFEU, the powers of the ACM are shared with the Commission. The powers of the ACM with regard to Article 101 TFEU are more limited than with regard to Article 6 Mw (see below).

10 O. Brook, "Struggling with article 101(3) TFEU: diverging approaches of the Commission, EU courts, and five competition authorities", *CMLR* 2019/1, p. 128.

11 ACM, "*Notitie ACM over de sluiting van 5 kolencentrales in het SER Energieakkoord*", 2013; ACM, "*Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen'*", 2014.

12 The Commission, in the person of Director-General Olivier Guersent, recently announced its readiness to also issue comfort letters on the admissibility of cooperation initiatives in the field of the digital and green transition during the phase of economic recovery from the COVID-19 crisis.

13 Article 3 of the Treaty on European Union (TEU) refers to the Union's objective of promoting the well-being of its peoples (paragraph 1) and,

provisions offer scope for weighing up sustainability and competition interests when applying the ban on cartels. Additional legal certainty for enterprises requires more specific balancing of the two interests, as regards both applicability of the cartel ban to sustainability initiatives (paragraph 1) and the scope and conditions for exemption from that ban (paragraph 3). That specific balancing can be achieved in various different ways.

Because application of the relationship between environmental and competition provisions is a policy (and therefore political) issue, the (EU) legislature is the most appropriate body to create legal certainty by means of a more specific interpretation of the environmental provisions in the Treaties. This may comprise specific procedures and/or substantive rules regarding the desirability and design of cooperation initiatives that contribute to achieving environmental and climate objectives.[14] After all, when assessing sustainability initiatives, a court will not itself interpret the environmental provisions of the Treaties in policy terms, but will take account of the relevant existing legal frameworks and the intention of the (EU) legislature in creating those frameworks.

The NCAs and the Commission, as regulatory and implementing bodies, are also not the appropriate bodies to interpret environmental provisions in policy terms. Nor do the fundamental policy trade-offs between the competition law provisions of the Treaty and environmental provisions correspond with the role of the regulators. The Commission's position must be differentiated from that of the NCAs, because the Commission – in addition to monitoring the competition rules, but also given its exclusive right of initiative – also acts as a driving force with regard to proposals for new policies.[15]

As regards the creation of legal certainty as such, general solutions laid down in (environmental) legislation are preferable. Legal "safe havens" at EU level set by the legislature (such as *de minimis* thresholds and block exemptions) are best suited for that purpose. Ideally, these safe havens should apply to sustainability initiatives in all relevant sectors and should provide coherent rules for cooperation initiatives right across the EU. We are also aware, however, that the instrument of legislation is a weighty one that may not be proportionate to the number of sustainability initiatives that benefit from this legal certainty. Moreover, it also offers only very limited scope for development of the law. In fact, provision should be made for the option of applying for a ruling subject to appeal, including for a "negative" ruling, i.e. a ruling that finds, pursuant to Article 6(1) or (3) Mw and/or Article 101 TFEU, that on the basis of the facts set out in the application there is no infringement. Rejection of such a ruling should be subject to national or European appeal so that the judgments rendered by courts can contribute to development of the law with regard to the admissibility of sustainability initiatives under competition law. If the policy framework is enshrined in law, a court will also be able to carry out a more substantive assessment of the contribution of the cooperation initiative to the objectives laid down within that framework.

Application of current instruments

General context and history

In the light of Regulation (EC) No. 1/2003, the Commission shares its power to apply Article 101(3) TFEU with NCAs and national courts.[16] Prior to adoption of that Regulation, the Commission had a "monopoly of exemptions" pursuant to Regulation 17.[17] It was only the Commission that had the power to declare Article 101(1) TFEU inapplicable pursuant to paragraph 3.[18] NCAs were only competent to grant an exemption from the national cartel ban (to the extent that competition rules had been introduced).

Prior to modernisation, the Commission in fact issued not only exemption decisions but also negative statements and comfort letters.[19] This practice led to Commission precedents regarding the application of paragraph 3 to specific sustainability initiatives.[20] Given that the decisions issued were open to appeal, this

to that end, working for the sustainable development of Europe (paragraph 3) and of the Earth and fair trade (paragraph 5). Articles 7, 9 and 11 TFEU require the Union to ensure consistency between its various policies and activities, taking into account all its objectives, and to take into account, *inter alia*, the protection of public health, with the requirements of environmental protection being integrated into its policies. The objectives of environmental policy are laid down in Title XX TFEU. Article 37 of the EU Charter of Fundamental Rights also requires that a high level of environmental protection and improvement of the quality of the environment be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. See also S. Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement* 2020/2, p. 354-405.

14 Cf. the interpretation of agricultural policy laid down in Articles 39-42 TFEU in Regulation (EU) No. 1308/2013. See also ECJ 14 November 2017, Case C-671/15, ECLI:EU:C:2017:860 (*APVE*) for the relationship between competition rules and the interpretation of agriculture objectives in policy terms. Although it follows from Article 42 TFEU that the agricultural provisions take precedence over the competition rules, we believe that the environmental provisions offer the Union legislature the possibility to lay down rules – if necessary in conjunction with Article 103 TFEU – on how environmental policy is to be taken into account when applying the competition rules.

15 Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* 2019, p. 12,

16 Article 3 Regulation (EC) No. 1/2003, Art. 88 Dutch Competition Act.

17 Regulation (EEC) No. 17/62: First Regulation implementing Articles 85 and 86 of the Treaty, *OJ* 1962, L 13/204.

18 F.O.W. Vogelaar, "*De nieuwe Raadsverordening (EG) 1/2003 betreffende de uitvoering van de mededingingsregels van de artikelen 81 en 82 van het Verdrag: Een eerste verkennend overzicht*", *M&M* 2003, No. 1, p. 21; Article 9(1) Regulation (EEC) No. 17/62; K. Cseres, "Relationship between EU competition law and national competition laws", in: I. Lianos and C. Genakos, *Handbook on European Competition Law: Enforcement and Procedure*, Cheltenham: Edward Elgar 2013, p. 541; with the exception of the transitional agreements provided for in Article 23 of Regulation (EEC) No. 17/62.

19 Article 2 in conjunction with Article 6 Regulation (EEC) No. 17/62.

20 For example: Commission Decision of 24 January 1999 in Case No. IV.F.1/36.718 (*Ceced*); Commission Decision of 18 May 1994 in Case No. IV/33.640 (*Exxon/Shell*).

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arrangement also produced European case law.[21] In the period from introduction of the Competition Act up to and including 2003, the ACM (at that time the Netherlands Competition Authority (NMa)) also granted similar national exemptions from Article 6.1 Mw on the basis of the then Article 17 Mw.[22] This system of exemptions was discontinued in both the Netherlands and the EU, mainly because of the enormous workload involved and the resulting backlogs.[23]

Since 2003, assessment of cooperation between competitors has been left entirely to the enterprises themselves (i.e. self-assessment). Although the workload of the competition authorities has indeed been reduced, the current system also entails a reduction in legal certainty and development of the law.

Enforcement of the cartel ban by NCAs and the Commission

Since Regulation (EC) 1/2003 took effect, enforcement by NCAs and the Commission within the decentralised system has focused in particular on sanctioning and putting an end to cartel infringements. That regulation empowers NCAs to enforce Article 101 TFEU in individual cases.[24] They may (1) require that an infringement be brought to an end, (2) order interim measures, (3) accept commitments, and (4) impose fines, periodic penalty payments, or other penalties. The Commission has similar powers, but can also rule that Article 101 TFEU does not apply in a specific case.[25] The NCAs are explicitly prohibited from doing this.[26] The "negative" powers are vested solely in the Commission.

An NCA may not therefore rule that a particular complex of facts does not constitute an infringement of Article 101(1) TFEU. Nor may an NCA conclude that the prohibition does not apply because the exemption conditions of paragraph 3 have been met.[27] An NCA may at most rule that there are "no grounds for action", for example where, on the basis of the information available, there appears to be no (manifest) infringement of Article 101(1) TFEU or where the conditions of paragraph 3 appear to have been met.[28] For example, within the framework of its prioritisation policy the ACM does render rulings (which may be subject to objection or appeal), but it does not thereby make any substantive assessment because that would require an investigation, which is precisely what it considers inopportune. It also follows from this division of roles that an NCA cannot arouse legitimate expectations that certain conduct does not constitute an infringement of Article 101 TFEU.[29] Although NCAs do (of course) have powers to render a negative ruling as regards the national cartel ban, it is precisely the most impactful cooperation between enterprises that will generally be in a position to affect trade between Member States, meaning that Article 101 TFEU will also apply.[30]

Because an NCA has only "positive" powers, a cartel investigation will only lead to a penalty ruling that is subject to appeal if an NCA considers that it has sufficient evidence to substantiate a cartel infringement having taken place.[31] In practice, an NCA will often opt for "promising" cartel investigations with sufficient evidence and a clear ("hardcore") infringement. If, in the course of its investigation, an NCA encounters a defence that it considers plausible pursuant to paragraph 3, it may either discontinue the investigation or rule that there are no grounds for taking action. In that case, there will be no ruling involving a final judgment, whereas such a decision could in fact set a valuable precedent and/or contribute to development of the law.

It follows from the above that the enforcement powers of the NCAs are not designed to carry out a "negative paragraph 1 or 3 assessment" of the relationship between sustainability objectives and the cartel ban and to record that assessment in a ruling open to appeal. Market parties are also unwilling in practice to launch a sustainability initiative and to consciously risk a penalty ruling in order to gain access to justice. The Commission has in fact been assigned the aforementioned power to carry out a "negative paragraph 1 or paragraph 3 assessment" by Article 10 of Regulation 1/2003, but it has so far not made use of it.[32] We therefore consider that the current powers of NCAs and the Commission to render penalty rulings and the use of those powers cannot provide full legal certainty or contribute to the desired development of the law.

21 For example: ECJ 25 October 1977, Case C-26/76, ECLI:EU:C:1977:167 (*Metro I*); Court of First Instance 11 July 1996, Case T-528/93, ECLI:EU:T:1996:99 (*Métropole télévision*); Court of First Instance 15 September 1998, Case T-374/94, ECLI:EU:T:1998:198 (*European Night Services*).

22 For example: Decision of the NMa of 10 December 2003 in Case No. 3007 (*Stichting papier recycling Nederland*); Decision of the NMa of 9 July 1999 in Case No. 492 (*Vereniging bloemenveilingen in Nederland*), Decision of the NMa of 18 December 1998, Case No. 51 (*Stibat*).

23 Commission, *White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty*, 1999, marginal numbers 43 and 44; A. Ortega Gonzalez, *The enforcement of EU Competition Law in cartel cases: seeking effectiveness in divergence*, Antwerp: University of Antwerp, p. 122.

24 Article 5 Regulation (EC) No. 1/2003.

25 Articles 7-9 in conjunction with Articles 23-24 Regulation (EC) No. 1/2003.

26 ECJ 3 May 2011, Case C-357/09, ECLI:EU2011:270 (*Tele2/Polska*), Ground 22.

27 W.P.J. Wils, "Independence of Competition Authorities: The Example of the EU and Its Member States", *World Competition* 2019, p. 150; Brook 2019, p. 139.

28 Brook 2019, p. 139.

29 ECJ 18 June 2014, Case C-681/11, ECLI:EU:C:2013:404 (*Schenker & Co et al.*), Ground 42.

30 *Schenker & Co et al.*, Ground 42; Article 3(1) Regulation (EC) No. 1/2003.

31 In certain cases, enterprises can appeal against the ACM's refusal to render a ruling on a penalty following a complaint (or enforcement request). We do not believe that a complaints procedure is a realistic procedural option in the case of sustainability agreements. Enterprises will not complain about their own agreements or request enforcement so as to obtain legal certainty about their admissibility. The risks involved are too great.

32 Holmes 2020, p. 403.

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Informal statements of view and informal non-binding opinion

It is possible in certain cases[33] to request an informal statement of view [*zienswijze*] from the ACM or an informal non-binding opinion (a "guidance letter" [*adviesbrief*])[34] from the Commission on the admissibility of a (proposed) cooperation. The ACM regularly issues informal statements of view but, as far as is known, the Commission has not yet issued any guidance letters.[35] However, with the Temporary Framework following the COVID-19 outbreak, the Commission has reintroduced the possibility of requesting "comfort letters" so that enterprises can informally request its view on the admissibility of cooperation, aimed at responding to the consequences of the crisis.[36] As noted above, the Commission has indicated that comfort letters can also be requested regarding the assessment of cooperation aimed at recovery and specifically the digital and green transition. In our view, "exchanging views" [*gedachten wisselen*] with enterprises (as suggested by the ACM in the Guidelines) is in individual cases an option similar to an informal statement of view.[37]

An informal statement of view or informal non-binding opinion can be useful in understanding the authority's (enforcement) policy. This applies not only to the enterprises concerned but also, through publication, to other enterprises. However, an informal statement of view or informal non-binding opinion provides only limited legal certainty. The ACM notes: "The informal statement of view does not prevent the ACM from commencing an investigation at a later stage or issuing a (different) ruling."[38] The above also applies to the Commission.[39] An informal statement of view is therefore non-binding, but will in practice often put paid to a planned sustainability agreement, because basically no legal remedy is available to the parties involved. That was the case in both the *Kolencentrales* and *Kip van Morgen* cases.[40]

In the Netherlands, however, a remedy under civil law is in principle available against the restrictive policy of the ACM in the form of an application for a declaratory ruling [*verklaring voor recht*]. An example of this is the *FNV Kiem/State of the Netherlands* case, in which a declaratory ruling was sought to the effect that a policy position adopted by the ACM regarding collective labour agreements was contrary to the applicable (EU) competition legislation. That case even led to requests for a preliminary ruling being submitted, and thus to the development of EU law.[41] In our opinion, therefore, this is an interesting option, although little use has so far been made of it in competition law. Requesting a declaratory ruling seems promising only if the ACM – with too strict a policy or prohibition of a sustainability agreement – deviates significantly (and clearly) from the current frameworks of Article 101 TFEU. There must also be a sufficient legal interest. It is therefore questionable whether this is the most appropriate means.

ACM policy rules and guidelines

With the Guidelines (and the current policy rules), the ACM is the only competition authority in the EU that has published its policy on sustainability agreements and the cartel ban.[42] In our view, however, the question is whether ACM policy alone offers sufficient additional legal certainty. As already noted above, the ACM, as a regulator, is not the most appropriate entity to make the fundamental policy trade-off between environmental and sustainability objectives and the objectives of competition policy. Although the ACM policy is partly based on old Commission precedents, the Commission and other NCAs can still impose a penalty, even if the Guidelines have been followed in good faith. Nor can the possibility be ruled out that a (EU) court would reach a different conclusion. The priority of EU law and the Commission's leadership in the enforcement of EU competition law mean that there will only really be legal certainty if the Commission sets out clearly its assessment framework with regard to sustainability initiatives. The ACM's undertaking not to impose penalties if it does not identify any problems or if the Guidelines and any instructions issued by the ACM have been followed in good faith only provides legal certainty as regards enforcement by the ACM.[43]

We expect that enterprises will generally seek informal coordination with the ACM so as to verify that the conditions set out in the Guidelines have been met. It is expected that if this results in a negative signal, the parties will in most cases comply and either adapt their initiative or cancel it. We therefore do not consider it likely that the ACM will take – or need to take –

33 The ACM applies a number of criteria for qualification for an informal statement of view. One of those conditions is that there are new or unresolved questions of law. As a rule, sustainability agreements would appear to meet that criterion; ACM, "*Werkwijze informele zienswijzen*", *Government Gazette* [*Stcrt.*] . 2019, 11177.

34 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters).

35 Guidance letters must be distinguished from the "comfort letters" that were regularly issued before the introduction of Regulation 1/2003. See also DG Competition, "Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004", *Competition News Letter*, 2004/2 (https://ec.europa.eu/competition/publications/cpn/2004_2_1.pdf).

36 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, *OJ* 2020, C 116 I/02). See the published comfort letter dated 8 April 2020 that was issued to Medicines for Europe in connection with COVID-19, https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.

37 Guidelines, marginal number 61.

38 ACM, "*Werkwijze informele zienswijzen*", *Stcrt.* 2019, 11177.

39 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), marginal number 11.

40 ACM, "*Notitie ACM over de sluiting van 5 kolencentrales in het SER Energieakkoord*", 2013; ACM, "*Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen'*", 2014.

41 ECJ 4 December 2014, Case C-413/13, ECLI:EU:C:2014:2411 (*FNV Kunsten Informatie en Media/Staat der Nederlanden*), Ground 10-13.

42 The Greek competition authority recently published a *Staff Discussion Paper* on sustainability and competition; this is not (yet) official policy, however. See www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html.

43 Guidelines, marginal number 62.

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enforcement action and decide to impose a penalty for launching sustainability initiatives that are in breach of these conditions. A negative side-effect of this is that the policy laid down in the Guidelines will not quickly be tested in administrative law proceedings. In theory, it is not inconceivable that a civil court will have to deal with this policy if one of the parties invokes the nullity of a contract because of an infringement of competition law. In such proceedings, the ACM, but also the Commission, could intervene as *amicus curiae* and, in principle, requests for a preliminary ruling could also be submitted to the ECJ.[44] It does not seem realistic that enterprises would voluntarily engage in such costly and risky proceedings in order to acquire legal certainty as to the admissibility of their cooperation initiative.

Although the ACM's policy rules and guidelines, as set out in the Guidelines, provide guidance that is useful and very welcome as regards actual practice, they can provide only limited legal certainty and can make only a limited contribution to development of the law. The legal position of enterprises that do not comply with this guidance or that fail to reach agreement with the ACM also remains unclear.

Scope for Sustainability Initiatives Act

The Scope for Sustainability Initiatives Act [*Wet ruimte voor duurzaamheidsinitiatieven*] has been in preparation for some considerable time.[45] The legislative proposal allows enterprises to have planned cooperation converted into generally binding rules (in the form of a general administrative order [*algemene maatregel van bestuur*] or a ministerial regulation [*ministeriële regeling*]).[46] This avoids the risks inherent in the cartel ban. The proposed act would appear able to provide a significant degree of legal certainty for sustainability agreements that enjoy market-wide support. It does not apply, however, to less widely supported initiatives and only to sustainability initiatives that fall solely under the national cartel ban. Moreover, it is not possible[47] to object to or appeal against a request (i.e. rejection thereof), so that further development of the law through case law cannot take place either.

Three options for greater legal certainty and development of the law

Based on the assumptions we set out above, we see three options as regards the creation of greater legal certainty for sustainability initiatives. However, the extent varies to which these options make it possible to introduce greater legal certainty and checks and balances. The option that offers the greatest legal certainty and the possibility of development of the law involves a new *ex ante* statutory exemption system specifically for sustainability initiatives, similar to the exemption system that existed prior to modernisation of the competition rules. Secondly, a new general statutory exemption from the cartel ban specifically for sustainability agreements could contribute significantly to legal certainty but would not quickly lead to the formation of law. Finally, we discuss how and to what extent the Commission, on the basis of its current powers, can offer additional legal certainty.

A new *ex ante* exemption system specifically for sustainability agreements

The option which, in our opinion, makes the best contribution to legal certainty and an opportunity for development of the law through case law involves the reintroduction of a system of *ex ante* exemptions and negative statements such as that in force at the time of Regulation (EEC) No. 17/62,[48] but only for agreements aimed at promoting sustainability objectives. The procedural option of requesting an exemption or negative statement from the Commission should be open to all enterprises that desire greater legal certainty regarding the compatibility of their sustainability initiative with Article 101(1) and (3) TFEU. The existence of a positive or negative ruling by the Commission on the application for exemption safeguards the legal position of interested parties and leaves scope for checks and balances in rendering a ruling and review of that ruling by the (EU) court. We expect that this option will set useful precedents for actual practice and also lead to development of the law through case law.

However, we do not expect the Commission to be quickly prepared to reintroduce the practice of exemptions because of the reasons which led it at the time to propose abandoning the centralist system of exemptions.[49] In our view, the fact that the exemption arrangement would apply only to sustainability initiatives will not alter this. In order to prevent a high

44 See Article 15 Regulation (EC) No. 1/2003.

45 Parliamentary Bill on Scope for Sustainability Initiatives, *Parliamentary Documents II* 2018/19, 35247, No. 2; the Act was submitted for consultation as early as 2017 and in July 2019 the final legislative proposal was submitted to the Dutch House of Representatives (after amendments due to criticism by the Council of State). The significance of this delay is unclear – at any rate this legislation does not seem to enjoy high priority within the government coalition. The ACM does refer to this bill, however, in its *Draft Sustainability Agreements Guidelines.*

46 Explanatory Memorandum accompanying Parliamentary Bill on Scope for Sustainability Initiatives, *Parliamentary Documents II* 2018/19, 35247, No. 3, para. 4.1.2.

47 Explanatory Memorandum accompanying Parliamentary Bill on Scope for Sustainability Initiatives, *Parliamentary Documents* II 2018/19, 35247, No. 3, para. 8.2.4.

48 Regulation (EEC) No. 17/62: First Regulation implementing Articles 85 and 86 of the Treaty.

49 Vogelaar 2003, p. 21.

workload and backlog, the system of self-assessment supported by comfort letters could basically be maintained and enterprises should only be able to apply for an exemption with a view to acquiring additional legal certainty if the application were subject to certain conditions (to be specified). A policy could also be drawn up for cases in which qualitative analysis by the Commission would suffice (after the example of the ACM's Guidelines).[50]

In order to allow for this option, it will in any case be necessary to amend Regulation (EC) No. 1/2003. It will also be necessary to clarify the preconditions for submission, and the content of the assessment. A more far-reaching option would be to also extend this power regarding the national cartel ban as well as Article 101 TFEU to NCAs. Enterprises could then (also) register their initiatives with an NCA. This entails the risk of inconsistent application of Article 101 TFEU.[51] That risk can be mitigated by the Commission defining a clear policy, and by coordination of application of the NCAs' exemption possibility within the framework of the European Competition Network (ECN). It can also be mitigated if the Commission makes active use of its power to exercise supervision of the draft rulings of the NCAs concerned.[52]

New statutory exemption from the cartel ban

A statutory exemption is in practice the option that – based on the assumptions explained above – provides the greatest legal certainty. We envisage two options for such an exemption. It can be based, on the one hand, on the competition law provisions of the Treaty as a supplement to the existing block exemptions. On the other, it can (also) be based on the environmental provisions in the EU Treaties[53] and included in specific EU environmental legislation.

As far as the first option is concerned, the Commission, in addition to the current two horizontal block exemptions,[54] could issue a third block exemption specifically for horizontal sustainability agreements. Such a specific block exemption requires an additional enabling regulation of the Council, given that current enabling regulations do not extend to exempting sustainability agreements.[55] Pursuant to Article 103 TFEU, the Council – in response to a proposal from the Commission and after consulting the European Parliament – may adopt such a regulation.

The second option would consist of an exemption from Article 101 TFEU in EU environmental legislation in the form of a stand-alone regulation based, *inter alia*, on environmental principles. In the final analysis, this option does not differ substantially from a block exemption based on competition law. Both instruments are intended to provide for an exemption, subject to specific conditions, from the provisions of Article 101(1) TFEU, and they will be based (implicitly or explicitly) on weighing up the environmental interests laid down in environmental provisions in the Union Treaties on the one hand and the interests of operation of the market on the other. Including an exemption in environmental legislation may well serve to emphasise, more than a specific block exemption, that the exemption is inspired by environmental policy. The specific exemptions from the cartel ban such as those for cooperation between farmers and agricultural cooperatives included in Regulation (EU) No. 1308/2013[56] can serve as an example. Articles 209 and 210 of that Regulation provide for specific exemptions from the ban on cartels. In addition, Article 209(2) of that Regulation provides for the possibility for market parties to ask the Commission for advice on the admissibility of cooperation in the light of the agricultural objectives laid down in Article 39 TFEU. These "agricultural exemptions" are not entirely comparable to an exemption in environmental legislation. After all, where environmental policy is concerned, the TFEU does not contain any "primacy provision" comparable to that contained in Article 42 TFEU with regard to agricultural policy. Pursuant to that provision, competition rules only apply in the domain of agriculture to the extent that they have been declared applicable by the EU legislature in accordance with the agricultural objectives set out in Article 39 TFEU.[57] Such a hierarchy in the area of EU environmental legislation would require a Treaty amendment. Nevertheless, Articles 7, 9 and 11 TFEU and Article 37 of the EU's Charter of Fundamental Rights contain the explicit obligation to also integrate environmental policy into competition rules.[58]

Specific environmental legislation could clarify that integration, and its significance for application of Article 101 TFEU. This is an obvious approach if an exemption is provided for only one or more very specific situations, for example reducing CO_2 emissions in specific areas, such as energy consumption or the recycling of waste.

Using the instrument of legislation for the purpose of an exemption may be too severe and inflexible an approach, and will ultimately need to be based on the number of (potential) sustainability initiatives that cannot be exempted under the current framework. There is also a certain risk that the

50 Guidelines, marginal number 45 *et seq.*
51 Article 5 Regulation (EC) No. 1/2003; *Tele2/Polska*, Ground 22.
52 Article 11(4) Regulation (EC) No. 1/2003.
53 Article 3 TEU, Articles 7, 9, 11 and Title XX TFEU, and Article 37 EU Charter of Fundamental Rights.
54 Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, *OJ* 2010, L 335/3, and Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, *OJ* 2010, L 335/43.
55 Council Regulation 2821/71/EEC of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, *OJ* 1971, L 285/46, (for research and development and specialisation agreements), and Regulation No. 19/65/EEC of 2 March 1965 of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, *OJ* 1965, L 36/533 (for vertical agreements).
56 Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, *OJ* 2013, L 347/67.
57 Cf. Article 206 Regulation (EU) No. 1308/2013.
58 See also footnote 13. See also Holmes 2020, p. 358-365.

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Commission will create a bureaucratic and inflexible straitjacket, with the necessary "safety valves", which will ultimately leave little room for manoeuvre. In addition, a specific statutory exemption does not provide any direct opportunity for development of the law, something that is particularly relevant if the exemption condition is not met. However, the instrument of legislation will ensure that the exemption is updated by means of periodic reviews and where necessary adapted to relevant developments regarding climate and sustainability.

The Commission's use of its current powers

After the EU legislature, the Commission is the most obvious party to take the lead in putting forward proposals for renewal of competition policy. With the *Green Deal*, the Commission has set an ambitious policy agenda which will also lead to a review of how the competition rules are applied. As part of the review of the two horizontal block exemptions and the Horizontal Cooperation Guidelines, the Commission has announced that it will also take sustainability into account, viewing it as implementation of the European *Green Deal*.[59] New Commission policy would appear to be the most promising option, given that it can be implemented relatively quickly and no new legislation is required. Commission policy, more than NCA policy, will ensure coherent application of substantive law by the Member States and by the Commission itself. New Commission policy, for example in the form of specific guidelines for sustainability initiatives, creates additional legal certainty because Commission policy is an authoritative source for interpretation and uniform application of Article 101(1) and (3) TFEU. If the Commission's policy is clear, national courts and NCAs are not likely to be able to prohibit any sustainability agreements that fall within the scope of Article 101 TFEU.[60]

The need for development of the law through case law remains, however, because (definitive) interpretation of the competition rules is reserved to the EU courts. The Commission must therefore also issue actually substantiated "negative" rulings in order to enable development of the law by the European courts. In the absence of appealable Commission rulings, development of the law will be only very limited, given that it can only take place through the civil courts of the Member States in the event of disputes between cooperating parties or through appeal proceedings against penalty decisions taken by the Commission or NCAs.

Pursuant to Article 10 of Regulation 1/2003, the Commission already has exclusive competence in "exceptional cases" to issue declaratory rulings stating that Article 101(1) TFEU is not applicable to a particular case or that the case concerned fulfils the conditions of Article 101(3) TFEU. The purpose of such a ruling is to clarify rules of law and to ensure the consistent application of rules of law across the EU. This power was created in particular to provide legal certainty with regard to new types of agreements and practices.[61] Although the Commission has not previously utilised this power,[62] the corresponding procedure has in fact been laid down in its *Antitrust Manual of Procedures*.[63] Commissioner Vestager also expressly announced early this year that the Commission intended to utilise this power in order to provide maximum encouragement for sustainability initiatives.[64]

Issuing declaratory rulings can compensate for the lack of "negative" rulings described above. With such rulings, the Commission would provide clarity and legal certainty for both enterprises and NCAs. If the reasons given for the rulings also provide a basis for similar forms of cooperation, the Commission's workload can be prevented from increasing excessively. In addition, use of this power can be complemented by comfort letters. Given that the ruling is an ex officio declaratory ruling, it leaves only limited scope for development of the law via the European courts. If the cooperation concerned does not qualify for a positive declaratory ruling, this instrument will therefore fail to offer a solution to the lack of legal certainty and development of the law.

Conclusion

The impossibility for enterprises to apply for a ruling assessing the compatibility of sustainability initiatives with the competition rules has an inhibiting effect on development of the law in respect of such initiatives. Although more (informal) guidance will in future be provided – thus already to a large extent meeting the need for legal certainty – the possibility of requesting a ruling by a court is essential specifically for (potential) sustainability initiatives that are not permitted according to that guidance.

The EU legislature could increase legal certainty by means of new legislation providing for a specific exemption based on a clear (policy) trade-off between environmental and competition objectives. Given what is – probably – only a limited number of cooperation initiatives that cannot acquire sufficient legal certainty via informal guidance, a "statutory"

59 Commission, "Statement on ACM public consultation on sustainability guidelines", 2020, https://ec.europa.eu/competition/antitrust/news.html.
60 Article 3(2) Regulation (EC) No. 1/2003.
61 Recital 14 Regulation (EC) No. 1/2003; Commission, *Antitrust Manual of Procedures*, November 2019, p. 239; see also *Tele2/Polska*, Ground 24 and 25.
62 R. Whish and D. Bailey, *Competition Law: Ninth Edition*, Oxford: Oxford University Press 2018, p. 175.
63 Commission, *Antitrust Manual of Procedures*, November 2019, p. 208 *et seq.*
64 Commissioner Vestager, "Keeping the EU competitive in a green and digital world", speech in Bruges, 2 March 2020 (https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en).

exemption is a disproportionately weighty and inflexible instrument; moreover, it only provides to a limited extent for the desired possibility of development of the law.

Active use of the Commission's existing power to issue ex officio declaratory "negative" rulings, pursuant to Article 10 of Regulation 1/2003, declaring that Article 101 TFEU does not apply to certain cases is, in our view, the quickest solution to the lack of legal certainty. But although such a ruling makes a significant contribution to legal certainty, it does not provide scope for judicial scrutiny and development of the law regarding sustainability initiatives for which a negative ruling cannot be issued. Nevertheless, having guidelines specifically tailored to sustainability initiatives would appear to be the most realistic option because this allows for a balance between legal certainty and flexibility, and can be implemented relatively quickly without the need to amend legislation. With this option, however, just as in the current situation, the possibilities for development of the law through case law remain limited.

We believe that a better alternative would be to introduce an *ex ante* exemption possibility specifically for sustainability initiatives. That option would, on the one hand, provide legal certainty for enterprises by allowing them to obtain a binding ruling before commencing their sustainability initiative. On the other, it offers scope for development of the law through case law, something that is largely absent in the current system. Largely maintaining the current system of self-assessment by opening up this possibility to enterprises only subject to certain conditions could reduce the workload for the Commission or NCAs and prevent backlogs.

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The actual practice of self-assessment since the decentralisation of competition law has led to the main work of interpreting competition policy with regard to the admissibility of cooperation initiatives being shifted to the Commission, with the scope for checks and balances – and hence the possibility of development of the law – being extremely limited. Reintroducing appealable rulings (both positive and negative) on sustainability initiatives could restore the balance to some extent by enabling judicial scrutiny of the policies pursued by the Commission (and the NCAs). We believe that the possibility of such scrutiny is crucial in order to provide additional legal certainty for enterprises and for future-proof application of the cartel ban as regards sustainability initiatives.

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