Escaping the Clutches of EU Competition Law
Pathways to Assess Private Sustainability Initiatives

by

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Pathways to Assess Private Sustainability Initiatives

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Abstract
We review the recent attempts by the Netherlands to stimulate private sustainability initiatives. Early moves have been challenged as infringements of EU competition law, and the current plan looks as if it may not escape scrutiny under the EU competition rules or the internal market rules. A review of the ECJ’s case law, however, suggests that both the Dutch competition authority and the Commission take too narrow a view of the way in which private sustainability initiatives could be carried out. At the same time, the case law remains ambiguous and inconsistent. In the name of stimulating diverse approaches to achieve environmental goals across the EU, we argue for greater convergence of the way sustainability initiatives are assessed under EU competition law and internal market law.

Introduction
As part of a programme of so-called future-proof legislation, the Government in the Netherlands has stimulated economic sectors to initiate and develop plans to address environmental, social and animal welfare standards themselves. This institutional drive towards more self- and co-regulation has received significant push-back from the Dutch competition authority, the Authority Consumer and Markets (ACM), which has specifically intervened and published informal opinions regarding two recent high-profile sustainability initiatives and qualified them as infringements of EU competition law. Indeed, there are obvious problems that the formulation and pursuit of public policy objectives by private economic actors raise from a competition law perspective. First, agreeing on joint minimum (e.g. fair trade) standards may reduce competition because products that are produced under lower standards can no longer be offered on the market. Secondly, it may be considered that competing individually on standards may lead to more efficient outcomes that are closer aligned with consumer interests. Thirdly, some may suspect that private initiatives are more likely to be designed to favour the industry implementing them than to have any positive social welfare impact.¹

¹We are grateful to the Editor and to the anonymous referees for their helpful comments and suggestions. The usual disclaimer applies.

¹See by way of analogy the Opinion of AG Jacobs in Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (C-67/96) EU:C:1999:28; [2000] 4 C.M.L.R. 446 at [184]: “The rationale underlying the competition rules’ wide scope of applicability ratione materiae is simple. It can be presumed that private economic actors normally act in their own and not in the public interest when they conclude agreements between themselves. Thus, the
However, initiatives with wider welfare effects, such as sustainability initiatives, are costly and require investments that firms are often only willing to make if free-rider problems and first-mover disadvantages are resolved. The free-rider problem concerns the situation where a firm invests in sustainability—such as for example by virtue of a marketing campaign intended to inform consumers of the importance of fair trade—that may consequently benefit competitors which do not make such investments but nevertheless do benefit from consumers that are more willing to purchase sustainable goods. The first-mover disadvantage concerns a situation where a firm that decides not to offer certain unsustainable (often cheaper) products may lose a critical number of customers to its competitors who continue to sell the cheaper product. Such “co-ordination” problems, closely related to collective action problems, can be resolved if firms pursue sustainable initiatives collectively. Moreover, a key characteristic of contemporary regulation is to include civil society and economic actors in the pursuit of public interest objectives such as sustainability. This is the case particularly in the Netherlands. Accordingly, the Dutch Government has been looking hard for ways to introduce institutional forms that may resolve the potential conflict between competition restrictive plans from private economic operators that pursue sustainability objectives and EU competition law. This process catalysed after the ACM intervened with respect to the two mentioned high-profile initiatives that were subsequently disbanded.3

The Dutch attempt to reconcile private sustainability initiatives with competition law went through several stages and includes an interesting opinion from the European Commission on this matter. It has now resulted in an innovative legislative proposal that seeks to resolve the tension by introducing a framework that structures private decision-making procedures in such a way that they result in outcomes that genuinely serve the “public interest”. On this basis the Dutch Government has attempted to legislate the competition problem away. Based on a reflection of this saga in the Netherlands, we will revisit the avenues that have been created in the case law that enable and restrict the institutionalisation of non-State legislative structures in accordance with EU competition law and reflect on a rationalisation of this case law in light of the recent Dutch experiment.

The involvement of private actors in the legislative process in the Netherlands

Institutional background

Competition law in the Netherlands was introduced relatively late, in 1998. The competition law that was then introduced is based on and informed by the EU competition rules. The logic behind competition law

consequences of their agreements are not necessarily in the public interest.” It must be noted that this is not the general line of reasoning of the ECJ, which has not always followed a similar scepticism regarding the intentions of private economic operators. It ruled for example in Bosman that private parties are able to invoke public interest justifications for free movement restrictions: “There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.” See Union Royale Belge des Sociétés de Football Association v Bosman (C-415/93) EU:C:1995:463; [1996] 1 C.M.L.R. 645 at [86].


4 It is worth noting that in the past the Dutch competition authority appeared more sympathetic to these kinds of initiatives. For an account see S. Lavrijsen, “What Role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?” (2010) 35 E.L. Rev. 636. For example, a joint initiative of farmers to stop the practice of castrating pigs without using any form of anaesthesia through a temporary surcharge on meat sold to supermarkets was considered not to infringe art.101(1) because it did not concern a relevant competitive benchmark (informal opinion ACM in case 6456 (2008)).
sits oddly with the economic governance model of the Dutch. Historically, the Dutch system of social and economic policy-making is heavily consensus based, often referred to as the “polder” model. This is reflected in the plurality of advisory and consultative bodies that exist at all levels of policy-making. The polder model is best characterised by the co-operation between employers’ organisations, labour and the Government. This co-operation is institutionalised within the Social Economic Council (SER). The SER is the central forum to discuss labour issues and, again, completely consensus based. It is claimed to have defused labour conflicts and strikes. Another example of consensus based policy-making used to be reflected in so-called “product boards”, which would include all interested parties in a production chain within a public institutional framework that would be involved directly in the development of social and economic policy-making, relevant to the economic sector involved. As such, for example policy concerning livestock would involve the product board for livestock, meat and eggs as an intermediary between government and industry to ensure a smooth transition between politics and industry. Recently, as part of a government programme to reduce administrative control and tax cuts for industry, the product boards have been removed. However, consensus based policy-making remains a central feature of Dutch politics, which is reflected in the examples that we will discuss further below. The implication of this institutional background is that the Netherlands is characterised by a high degree of quasi public-private governance settings. One policy area where this has become particularly visible is in the area of sustainability objectives.

The first clash

The Dutch Competition Act specifically allows the Dutch minister of economic affairs to issue legislative instructions to the ACM. Among other things, the minister of economic affairs may instruct the ACM to apply the exemption criteria in a way that allows the inclusion of “other interests than merely economic interests”. Against a backdrop of the perceived increasing importance of the private sector’s contribution to sustainability initiatives, in particular within the agricultural sector, an instruction was issued in May 2014 regarding the inclusion of the positive societal welfare effects of sustainability objectives within the assessment of the exemption criteria. In concrete terms, the legislative instruction specified that the positive long-term effects of sustainability initiatives have to be taken into account in the assessment of the potential improvement of the production or distribution of goods and technical or economic progress. Moreover, the ACM was specifically instructed to consider the free-rider and first-mover problems that were highlighted above in the introduction. This legislative instruction was in force at the time that the ACM conducted its assessment in two high-profile cases: the closing of the coal plants and the so-called Chicken of Tomorrow. In its assessment the ACM looked into the long-term positive effects of the concerned initiatives by examining how far these effects could be monetised. Below we look closely at these two cases in order to illustrate the clash between the preferred Dutch model of economic governance and the European competition rules.

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6 Dutch Competition Act art.5.

The energy accord

The plan to close down coal plants was part of the Dutch Energy Agreement for Sustainable Growth (the Energy Accord). This Energy Accord involved more than 40 organisations in the definition of a more sustainable energy and climate policy for the Netherlands. In the negotiation of the Energy Accord, the Dutch Government organised “roundtables” with a wide array of organisations. These included regional and local government, employers’ associations and unions, nature conservation and environmental organisations, and civil society organisations and financial institutions. The roundtable negotiations and the outcomes were considered as “agreements” with and among the private sector regarding the pursuit and attainment of specific sustainability objectives. Specific commitments concerned inter alia energy saving in the built environment; energy saving in industry and agriculture; scaling-up renewable energy production; decentralised renewable energy generation; employment and training; and the commercialisation of new technologies for economic growth and export.

From a competition law perspective, a problematic part of the agreement concerned the closing down of coal-fuelled power plants built in the 1980s as part of an incentive path that would encourage the development of more sustainable energy sources. The trade association for the Dutch energy industry, Energie Nederland (EN), asked for an analysis from the Dutch Competition Authority (ACM) on whether the planned agreement on closing down of the coal power plants could be reconciled with art.101 TFEU (and its equivalent in art.6 of the Dutch Competition Act). Despite the fact that the agreement was part of the wider overarching objectives of the Energy Accord, the ACM qualified it simply as an agreement between undertakings within the meaning of the competition rules. The assessment of the ACM concluded that, first, the closing down of the coal power plants constituted an output restriction that would be caught under art.101(1) TFEU. By reducing production capacity, the undertakings involved would have less capacity to produce energy than they would have had without the agreement. Secondly, it could not be exempted on the basis of the exemption criteria of art.101(3) TFEU. For the latter analysis it conducted an extensive cost-benefit analysis in accordance with the more economic approach as set out by the European Commission. The value of the agreement’s benefits was determined on the basis of the costs of other (efficient) measures that, as a consequence, would not have to be taken (i.e. avoided costs). The ACM concluded that comparing the estimated price increase with the environmental benefits revealed that the agreement’s expected drawbacks to consumers in terms of price for electricity would be substantially higher than the estimated value of the positive effects in terms of avoided costs. This was caused in part by the fact that the main environmental benefits concerned reductions in carbon dioxide emitted by the concerned energy companies. Since this implied that the companies would consequently not use all of the allocated emission rights that they had been granted as part of the Emission Trading System, the ACM assumed that they would be likely to use these rights for other purposes or trade them. This therefore

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9 Interestingly, consumer interests were not represented.

10 The production capacity that is to be closed under the agreement represents approximately 10 per cent of total production capacity available in the Netherlands.

11 (1) the agreement contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress; (2) the agreement allows consumers a fair share of the resulting benefit; (3) no restrictions that are not indispensable are imposed on the undertaking involved; (4) competition is not eliminated in respect of a substantial part of the products or goods in question.

significantly limited the net environmental benefits. Consequently, the closing down of the coal-fuelled power plants was removed from the accord.

The ACM assessment can be critiqued from several angles. We highlight a few below and shall return to them in the course of the article. As far as the CO₂ emissions reductions were concerned, the ACM assessment greatly emphasised the so-called waterbed effect of the EU’s ETS: the extra emissions reduction in the Netherlands reduces demand for greenhouse gas allowances on the European market, thus lowering the price and allowing for an increase of emissions elsewhere in the EU. The net-effect of CO₂ reductions as a result of the closing of the coal plants was therefore considered negligible. This argument is often accepted, but fails to provide a convincing account of the actual state of the ETS. Under the EU ETS at present the vast majority of emissions reductions from additional actions will be permanently retained. This is due to both the effect of the current surplus and to the fact that over the long term the supply of allowances is not fixed, but responds to circumstances. Moreover, the assessment failed to take into account the dynamic effects of the closing down of the coal power plants, i.e. the potential incentive effects that the closing down of the coal power plants would have on the development of alternative forms of green energy. Additionally, the economic assessment is largely speculative with respect to the health effects that could be associated with the expected reductions of fine matter. The cost-savings that the ACM mapped in this respect were connected to the improved health and life expectancy of Dutch citizens. In other words, a price tag was calculated for the decreased chance of dying prematurely. One could debate to what extent this is a decision to be made by a technocratic entity such as the ACM. Finally, it is interesting to point to arguments raised by the parties to the agreement. They had argued that the closing down of the coal plants as part of a wider package of measures could not be reviewed in isolation. They argued, in other words, that the closing down of the plants was a necessary and inherent feature of the measures as a whole. The argument here would be that the Energy Accord brought together civil society actors from all levels of society in the formulation of a “climate agreement” that was intent on moving towards more sustainable energy sources. Such a society-wide agreement should surely not be derailed by concerns related to the “efficiency merits” of the closing down of a few coal plants? Isolating that aspect from the rest of the agreement would not do justice to the broader societal aims of the agreement, for which the closing down of the coal plants constituted an inherent part. It is understandable that the ACM would have difficulties in accommodating such arguments. Was this “grand societal narrative” perhaps not hijacked by a few energy companies to collectively restrict the output of an out-dated energy source—an energy source they would lose in the long term in any case and thereby solve a difficult co-ordination problem they would have otherwise faced in a situation of full competition? We return to some of these difficulties further below.

The Chicken of Tomorrow

In the beginning of 2013 the main branch organisation on foodstuffs in the Netherlands announced that “another chicken” would be introduced into the Dutch supermarkets. Most of the organisations from the poultry sector, the chicken meat producing industry and supermarkets, came together during a roundtable meeting to discuss a more sustainable production of chicken meat (the Chicken of Tomorrow). The aim of these negotiations was to introduce a sector-wide sustainability impulse on the basis of the introduction of a minimum standard. Dutch livestock holders responded to the increased attention within Dutch society


to animal welfare. These types of supply chain initiatives are stimulated by the Dutch Government and institutionalised on the basis of public-private forms of co-operation. As such, the initiative is an example of the new type of “hands off” governance that is promoted by the current government in the Netherlands. The Dutch Government had indicated that the policy in this area should be informed and guided on the basis of sector-wide and based initiatives. A sector-wide statement of intent was signed that committed the livestock sector, the meat producing industry and retailers to move towards a status quo where only sustainable produced meat would be sold in 2020. The Chicken of Tomorrow initiative took place within this context.

The minimum standards that were part of the Chicken of Tomorrow initiative concerned agreements on the keeping of a slower growing breed of chickens, more space for chickens on the basis of a reduction of the number of chickens in a set space, improved conditions within the enclosures, stricter controls on animal welfare standards, a more natural day–night rhythm, a lowering of the use of antibiotics, the use of 100 per cent sustainable soya food, and a number of other environmental measures. The initiative met with a lot of criticism; according to animal welfare organisations, it would improve the conditions of chickens only marginally. However, the initiative’s aim was mainly to introduce a sector-wide minimum standard from which to move upwards—that is to say, to introduce a standard of animal welfare below which trade in chicken meat would be considered unacceptable.

The ACM decided, autonomously, to investigate this agreement as a way to provide further informal guidance with respect to its stance vis-à-vis private sustainability initiatives. The assessment of the ACM concluded that the sustainability initiative qualified as a restriction of competition on the retail market for chicken meat because “regularly” produced chicken meat would no longer be for sale in Dutch supermarkets. Choice for consumers was limited since the initiative would seek to remove a competitive benchmark, namely chicken meat produced on the basis of lower standards. For the purpose of providing guidance, the ACM conducted a “willingness to pay” analysis. It considered that the first condition of art.101(3) TFEU, i.e. the contribution to the production or distribution of goods or to promoting technical or economic progress, would only be fulfilled if the measure eventually led to a higher consumer surplus, which was to be determined on the basis of the willingness of consumers to pay more for the “added” animal welfare. Consumer panels were asked to choose between different types of chicken meat that differed with regard to the level of animal welfare that was taken into account in the production of the meat. The economic analysis of the ACM concluded that the willingness to pay for the Chicken of Tomorrow was not enough

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21 The economic assessment of the ACM is accessible in Dutch on their website by searching “Economische effecten van “Kip van Morgen” – Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouderij”, [accessible on acm.nl].
to justify the increase in consumer price. On balance, according to the study, there would be a negative effect on consumer surplus of €0.64 per kilogram of chicken breast.22 Moreover, the ACM considered that it would be preferable if, instead of introducing a minimum standard, consumers were better informed about animal welfare on the basis of labels. This could then also become part of a broader commercial strategy of a supermarket to attract consumers who value these sustainable products. According to the ACM, it would therefore be more appropriate if sustainability initiatives were to focus on measures to improve animal welfare by educating consumers and stimulating consumer confidence in other types of production, as part of a competitive process.23

This assessment of the ACM can again be critiqued on the basis of several considerations. First, the position of the ACM regarding “the better way” to achieve sustainability in the production of chicken meat is highly contentious. The use of eco-labels is assigned a very questionable role in securing sustainability goals.24 More fundamentally, the willingness to pay assessment of the ACM is a questionable approach to the issue of animal welfare. This is strikingly illustrated on the basis of the example of a consumer who does not buy chicken at all. All possible considerations of why consumers may not have bought chicken are reduced in the analysis of the ACM to a lack of willingness to pay for sustainable produced chicken. The narrow framework of assessment values a multiplicity of intentions and social interests in terms of a monetary interest—importantly, because there has been research suggesting that it is unlikely for the average consumer to consistently and consciously consider animal welfare in the actual purchase decision.25 Secondly, there may be no real choice for consumers for whom the more expensive free-range chicken is not affordable but who think that animal welfare is important. The crucial point is that the analysis of the ACM is, explicitly, published as guidance material for undertakings to pursue these objectives in their self-assessments under the competition rules. On this point there is therefore an explicit and inherently limited valuation with respect to what matters and how things matter in society on the basis of a narrow monetised perspective. Therefore, from a broader societal perspective several questions can be and have been raised on the approach to animal welfare that the ACM supports in this assessment. The ACM, however, would argue that this is simply either a competition problem or not. The Government can decide on this issue and prioritise animal welfare through legislation should it so desire. Thus the issue would be taken outside the sphere of competition and it would be resolved within a democratically legitimate framework. Where it is a competition matter, the (self-interpreted) mandate of the ACM is limited to considering monetised, quantifiable consumer interests.

The second clash

The outcome in the two cases led to renewed calls from civil society actors and the economic sectors concerned for a reconsideration of the constraints of competition law with respect to sustainability initiatives. Importantly, the Dutch Government considered the way the competition law framework was applied as an obstruction to its ambition to involve non-State actors in the formulation of socio-economic policy. Subsequently, the Ministry of Economic Affairs was tasked with the challenge of resolving this tension. This resulted in another (draft) instruction document that set out some amended conditions for the ACM to take into account in its assessment. The main changes concerned, first, the fact that the positive long-term effects of initiatives would have to be considered with respect to the agreement, insofar as it was part of

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a wider package of measures, as a whole. Secondly, the potential positive effects would not only have to take into account the long-term (future) users but also the positive effects for society as a whole."  

The purpose of these changes was to force a reconsideration of the approach taken by the ACM: if the Energy Accord had been considered as a whole (without isolating the agreement to shut down the plants), the outcome of the assessment might have been different. For instance, the ACM might have taken the view that the closing down of the coal plants was an inherent part of a wider agreement, concerned with bringing together various societal actors with the intention of creating co-responsibility for the objective of a sustainable environment. In competition law jargon, the ACM might have seen the agreement to close coal plants as ancillary to the main agreement. With respect to the Chicken of Tomorrow, the willingness to pay assessment conducted by the ACM would have to be considered insufficient since the potential positive benefits for society as a whole would also have to be considered, and not just those of consumers.  

When the draft instruction was put up for a so-called internet consultation, where interested parties could provide comments on the draft proposal, the European Commission stepped in. The Commission objected to the new criteria: it emphasised that it considered the assessments of the ACM with respect to the two cases to be fully in accordance with EU competition law. With regard to the new instruction, first the Commission considered that it is not possible to consider the potential positive effects for society as a whole. This would be contrary to the text of art.101(3) TFEU, which explicitly refers to the positive advantages for the "users" of the products or services:

“If certain policy goals are considered valuable for society as a whole, while not by the consumers in the relevant market, regulation is the right tool to safeguard them and not competition law. In other words, competition law does not stand in the way of regulation to achieve these goals, but cannot substitute for the absence of such regulation.”

As such the Commission adopted a traditional command-and-control “State-centred” perspective with respect to State–market–society relationships. Secondly, the Commission considered that the requirement to take into account the agreement as a whole was potentially confusing. The Commission acknowledged that it might be necessary to assess an entire package of agreements, but posited that this is already part of the third condition of art.101(3), which deals with the indispensability of the restrictions. Where an agreement that restricts competition is necessary for the benefits accrued by other parts of a package of an agreement, it may fulfil the “indispensability” condition of art.101(3). Thus, the Commission considered the requirement in the draft Instruction to be confusing to the extent that it would potentially undermine the exemption criteria. Therefore, the Commission urged the Government not to adopt the legislative innovation and instead keep the old instruction in place, which the Commission considered to be in congruence with the European competition rules.

Setting up a third clash  

On the basis of the Commission’s robust response, the minister decided to disband the proposal and develop an arguably more radical alternative. The proposal that has since then been developed and now

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26 Policy Instruction of 5 October 2016 (Official documents Stcr. 2016, 52945).
27 Letter attached to official government letter to Parliament regarding competition and sustainability: Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid d.d. 23 juni 2016 (Kamerstukken II 2015/16, 30196, 463).
28 Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid d.d. 23 juni 2016 (Kamerstukken II 2015/16, 30196, 463) (emphasis added).
29 See the official government communication to Parliament from the Minister of Economic Affairs to Parliament: Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid d.d. 24 oktober 2016 (Kamerstukken II 2016/17, 30196, 480, pp.1–6).

(2017) 42 E.L. Rev. October © 2017 Thomson Reuters and Contributors
exists as draft legislation creates an option for a declaration of general effect with respect to private sustainability initiatives that meet certain criteria. Private initiatives that pursue sustainability objectives can, on this basis, be turned into legislation. The explanatory memorandum accompanying the draft law notes that the potential EU competition law obstacles can thus be circumvented and resolved. The underlying rationale of the new proposal is comparable with the Dutch system of collective labour negotiations that operate on the basis of a similar process of declarations of general effect.  

The starting condition for the eligibility of a declaration of general effect is that the private initiative pursues a sustainability objective. Subsequently, the draft law seeks to incorporate mechanisms which ensure that, eventually, the Government and Parliament can weigh the involved interests and decide whether or not to provide an initiative with general binding effect. On this basis the proposal seeks to resolve the tension with competition law by introducing a framework that seeks to structure private decision-making procedures in such a way that they will result in outcomes that serve the public interest and can subsequently be turned into legislation. To do so the draft law mainly incorporates mechanisms that ensure that the submitting parties have incorporated sufficient deliberation and consideration with and for those who are primarily affected by the new initiative. The following mechanisms are to be incorporated in the draft legislation:

**Demonstrate support:**

Parties to the submission of the request must demonstrate that there is support for the proposal from consumers and relevant civic society organisations. In addition, companies in the sector where the measure will apply should “largely agree” with the measure. Moreover, the parties must be able to demonstrate an awareness of the potential objections from the parties that do not participate.

**Substantiation:**

The submission of a request for general validity of an initiative will have to be accompanied with a substantiation of the expected effects on sustainability, the price of products involved and other consumer interests.

The explanatory memorandum with respect to the draft law notes that this construction will resolve tensions with the EU competition law framework—contrary to some of the other options that were identified in the legislative process leading up to the draft law. There indeed exist avenues within the so-called “useful effect” case law to employ legislation as a way to exclude EU competition law with respect to agreements that would otherwise infringe art.101(1) TFEU. We will discuss this case law in more detail below, and suggest that this “escape” is certainly not as clear as suggested in the legislative text. Moreover, a declaration of general effect will also be problematic in light of the free movement rules. Thus, a third clash is imminent.

In the next sections we will revisit these three clashes by exploring the case law of the ECJ and the General Court. We do this to discuss how far the restrictive approach favoured by the Commission and the ACM offer a better rendering of the law than the expansive instruction that the Dutch State wished to send to the ACM. We also examine the most recent legislative proposal and the wider context of EU internal market law.

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30 Although the nature of the declaration differs. In effect the general effect declaration for collective labour agreements declares the private agreements negotiated between the employers and employees organisations.

31 These are defined on the basis of the 1987 United Nations Brundtland Commission’s report as “development which meets the needs of current generations without compromising the ability of future generations to meet their own needs”. See World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

32 See Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid d.d. 24 oktober 2016 (Kamerstukken II 2016/17, 30196, 480, pp.1–6).
The avenues within the case law of the European Courts

The ECJ at various times and ways has shown responsiveness to the fact that the objectives and logic of EU competition law may clash with objectives or (private) social structures that are of overriding importance. It has done so for example with respect to the exclusion of collective labour agreements and social security solidarity mechanisms from the scope of art.101(1) TFEU. These are, however, not avenues that would appear to be applicable to the Dutch sustainability initiatives. The avenues that are available are four. First, the initiatives may not infringe art.101(1) TFEU in the first place because there is no restrictive effect on competition. Secondly, art.101 TFEU may not be applicable because the restrictions are inherent for the pursuit of a legitimate objective. Thirdly, the initiatives may be exempted within an art.101(3) TFEU assessment. Fourthly, initiatives that have been turned into legislation may not undermine the effective functioning of the EU competition rules and can be justified in the context of EU free movement law. Below we explore each of these avenues by taking a close look at the sparse case law, and we then use this exercise to look back at the Dutch experience and suggest that the stance taken by the Dutch State on how competition law should be applied has support, even if more guidance from the ECJ would be beneficial to explore the precise contours of the law.

No restriction of competition under Article 101(1)

Not all agreements that try to improve ecological sustainability restrict competition. Indeed, the kind of analysis carried out by the ACM in the cases discussed above might well be also used in determining whether an agreement has a restrictive effect in the first place. What would happen, for instance, if the farmers who implement the Chicken of Tomorrow strategy are able to show that consumers are willing to pay considerably more for a marginally healthier chicken, such that the exit from the market of chicken produced with less animal friendly methods is not perceived as a loss to consumers? The difficulty in marshalling this kind of argument is that it requires a sort of balancing exercise: while some consumers might benefit from knowing they can buy chickens that had been better treated in life, other consumers who are indifferent to the chicken’s lifestyle may suffer because the price has gone up. In these circumstances the Court is generally reluctant to balance the harms and the benefits under art.101(1). When the Court of First Instance (as it then was) was confronted with this issue directly, its reply was that such balancing should take place within the framework of art.101(3) because otherwise “Article [101(3)] of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty”. However, in reaching this conclusion the Court was somewhat uneasy for it had to acknowledge that the ECJ had sometimes vacillated towards carrying out a more comprehensive assessment under art.101(1).

Indeed the Court of First Instance did so a few years later in its O2 (Germany) judgment. In brief, the Commission found a roaming agreement between O2 and T-Mobile, whereby the former was able to enter the German market more quickly, to be restrictive of competition (for it delayed T-Mobile’s construction of its own network), but then exempted it on the basis that it would overall improve competition (by offering consumers more choice and possibly reducing retail prices). The Court quashed this decision because the Commission had failed in its analysis of what the impact would have been of there being no

33 See for example, for the labour exception, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (C-67/96) EU:C:1999:430; [2000] 4 C.M.L.R. 446; for the solidarity exception see Poucet v Assurances Generales de France (AGF) et Caisse Mutuelle Regionale du Languedoc-Roussillon (C159/91) EU:C:1993:63.
agreement between the two, and found that it was not likely that O2 would have entered the German market as quickly and as effectively without the agreement. As one commentator has noted, the implication of this is that the Commission is called upon to assess the “net” effect of an agreement under art.101(1).\(^{37}\) Unfortunately the higher court has yet to grasp this nettle, and the precise boundaries between the assessment under the first and the third paragraph of art.101 remain unclear.

Establishing a solution on what analytical steps belong to art.101(1) and what belongs to art.101(3) is not difficult as a matter of practice. For example, the ECJ could suggest that under art.101(1) the Commission should test whether the agreement reduces the competitive process such that it is foreseeable that consumers may suffer, while under art.101(3) the Commission could examine how far the agreement delivers other kinds of benefits, such as innovation, productive efficiency or animal welfare. Many alternative suggestions have been made in the literature, but the Court appears unwilling to make this difficult policy choice.\(^{38}\)

It is not surprising that the approach favoured by the ACM in the two cases discussed above was to avoid confronting this ambiguity and to find an infringement of competition law by ruling that the agreements affected at least one parameter of competition (e.g. the restriction of output capacity leading to likely price increases in the energy accord) leaving any trade-offs for a second part of the analysis.

**Non-application of Article 101(1) TFEU**

The Court appears to have fashioned a pathway by which anti-competitive agreements may be justified, building on the *Wouters* judgment, without invoking art.101(3).\(^{39}\)

Originally, the *Wouters* judgment appeared to be an aberration: the Court held that art.101 would not be applicable to a decision of an association of undertakings (the Dutch Bar Association) when the restriction of competition (banning multi-disciplinary practices) was necessary for the proper practice of the legal profession. Had the association notified its rules to the Commission, the assessment of the reasonableness of the restraint would probably have been carried out under art.101(3). Perhaps faced with the wish to solve the matter expeditiously, the Court drew upon its jurisprudence on internal market law and held that there was an alternative route to the exemption to justify this restrictive practice.\(^{40}\) It held that art.101(1) did not apply to the rules in question.

Since then the Court has had occasion to return to the approach it established in this judgment so that we may treat the principle that was first established in this case as the basis of a general rule excluding the application of art.101 to certain restrictive practices.\(^{41}\) Below we consider three questions: first, on what grounds can one apply the *Wouters* rule? Secondly, what are the precise criteria to be applied? And finally, what is the relationship between this rule and art.101(3)?

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\(^{38}\) In this it is not alone; even US antitrust judgments may be found where there is a similar ambiguity about what factors are relevant to test restrictive practices. See R. Haw Allensworth, “The Commensurability Myth in Antitrust” (2016) 69 Vanderbilt Law Review 1.


\(^{40}\) In what is perhaps an unfortunate linguistic coincidence, scholars of EU internal market law call this approach a “rule of reason”. See e.g. D. Heremans, *Professional Services in the EU Internal Market* (Oxford; Hart Publishing, 2012), p.165. This usage was picked up in *Brasserie nationale v Commission* (T-49/02) EU:T:2005:298; [2006] 4 C.M.L.R. 8 at [85]. However, this has little to do with what scholars of competition law understand by a rule of reason.

\(^{41}\) See also J. Nowag, “Wouters, When the Condemned Live Longer: a Comment on OTOC and CNG” (2015) 36 E.C.L.R. 39, noting that the more recent case law suggests an expansive reading of the rule.
The Court has held that art. 101 is not applicable for restrictive practices that: ensure the proper practice of the legal/pharmaceutical profession (Wouters/Ordre national des pharmaciens),\(^2\) safeguard the integrity of sports (anti-doping rules in Meca-Medina),\(^3\) ensure the quality of accountancy services (restrictions on entry in the market for professional training in OTOC),\(^4\) provide guarantees to consumers about the services they receive (price control by an association of geologists in Consiglio nazionale dei geologi).\(^5\)

It is not easy to generalise from these instances. The Court’s general approach is to discuss whether there is a “legitimate objective” being pursued,\(^6\) but it gives little clue as to the benchmarks by which one judges legitimacy. AG Mazak in Pierre Fabre suggested that the legitimate objective should be,

> “of a public law nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products”.\(^7\)

If one were to follow this, then it seems plausible to suggest that agreements that reduce carbon emissions or enhance animal welfare may well fall within the scope of the rule.\(^8\)

The second puzzle is what criteria are required in addition to the pursuit of a legitimate objective. It is clear that a proportionality standard must be satisfied. The ECJ requires a fairly searching assessment by the national court: it must establish if the restriction is reasonably necessary to safeguard the legitimate interest.\(^9\) In OTOC the ECJ went as far as to suggest less restrictive alternatives to ensure that quality training was provided (a monitoring system for third-party service providers as opposed to an outright ban on such providers). It remains to be seen how far the existence of a legislative framework that sustains the defendant is a necessary feature. In the case law to date, one finds that the associations whose conduct is assessed are empowered by the State to safeguard the public goods that their members generate. In fact, when the State has already regulated the profession, then the association is prevented from imposing further restrictions of competition in the name of the public interest.\(^10\) It is arguable that, when the notion of the legitimate objective is so loosely defined, an elegant way of narrowing down the scope of the Wouters rule could be to delimit it to situations where the objective may be traced to a legislative instrument, and where the State leaves it to the undertaking to determine how to best safeguard the interest in question.\(^11\)

The possible weakness with this suggestion is that then the Wouters rule is subsumed into the State action defence (discussed below) while it does not appear that the Court sees it in that light. Thus the better view is that the legislative context is relevant, but not always determinative. At the same time, the Dutch approach discussed above shows that the reason for the initiatives in the energy case and the Chicken of Tomorrow.


\(^{4}\) Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência (C-1/12) EU:C:2013:127; [2013] C.M.L.R. 20 at [94]–[95].

\(^{5}\) In Consiglio nazionale dei geologi v Autorita Garante della Concorrenza e del Mercato (C-136/12) EU:C:2013:489; [2013] 5 C.M.L.R. 40.

\(^{6}\) Cf. CNOP (T-23/09) EU:T:2014:1049; [2013] 4 C.M.L.R. 27 at [38], where reference is made to “reasons of general interest”.


\(^{8}\) Cf. C. Jansen and E. Kloosterhuis, “The Wouters Case Law, Special for a Different Reason?” (2016) 37 E.C.L.R. 335, who take the view that two kinds of public interest are covered: first, the protection of consumers from the informational disadvantages they suffer at the hands of professionals, and secondly any public interest provided that this has been articulated by the legislature. As discussed below, we agree with their approach to the second category.

\(^{9}\) Consiglio nazionale dei geologi (C-136/12) EU:C:2013:489; [2013] 5 C.M.L.R. 40 at [56].


was that the State had encouraged the players to identify a solution to safeguard a public interest, thus lending some plausibility that the Wouters rule could apply to these agreements.

Finally, a reflection on the relationship between this approach and art.101(3) is necessary. The most significant difference from art.101(3) is that Wouters does not require that consumers secure a share of the benefits: it may allow a practice which eliminates competition, and there is no balancing of negative and positive effects. If this is so, however, then it becomes imperative that the scope of application of the Wouters defence does not overlap with the scope of application of art.101(3). In this sense the ECJ in OTOC and the French Court in Pierre Fabre erred in considering the decision under both tests. They should be applicable to different scenarios. An early suggestion, which appears to remain valid, was that the Wouters defence is applicable when the public interest in question is based on national policy considerations. This is in line with the source of inspiration for this doctrine (internal market law), and with the State’s formal or informal support for self-regulation.

A procedural matter is also worthy of discussion. It is important to consider how an NCA is to incorporate the Wouters rule within its decisional practice given the fact that the Court has decided in the Tele2 Polska case that NCAs are not authorised to declare that art.102, and by implication art.101, is inapplicable. This would imply that if NCAs are of the opinion that the Wouters avenue is applicable, they can only provide an informal opinion regarding the matter or simply decide not to not pursue a case. That means that NCAs are able to use Wouters for reviewing whether art.101(1) applies but not allowed to formally (negatively) declare art.101(1) to be inapplicable. Whether they can decide that a certain practice falls outside of the scope of art.101(1) is debatable. This may be an additional reason for the unwillingness of the ACM to incorporate the Wouters avenue in its decisional practice.

Regardless of the procedural limitations to declare art.101(1) inapplicable, it remains slightly puzzling that the ACM did not attempt to use this line of case law to determine the legality of the arrangements in the two cases discussed above. It is perhaps understandable in light of the opacity of the guidance that emerge from the ECJ on the precise scope of the rule established in Wouters, but it is all the more disappointing because, as we suggest below, it is in fact the most feasible way for the ACM to consider agreements to be compatible with competition law.

**Exemption under Article 101(3) TFEU**

It may be worth recalling that this provision gives the Commission and national courts the power to declare that art.101(1) is not infringed if five conditions are met. Four of these conditions are provided in the article itself: the agreement must contribute to “improving the production or distribution of goods or to promoting technical or economic progress”; it must afford “consumers a fair share of the resulting benefit”; it shall not impose restrictions that are not indispensable to achieve the first two objectives, and must not eliminate competition in the relevant market. The fifth condition was added by the ECJ early on, requiring that the benefits that the agreement yields be greater than its costs.

It is well known that before 2004 the Commission took a fairly broad view of the kinds of factors that may be considered under the first condition. For instance in CECED the Commission exempted an agreement that phased out energy-inefficient washing machines on the grounds that this contributed to reducing energy consumption and thus reduced the environmental impact of the products. Of particular

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52 Sadly in a case like OTOC, where the issue was presented, the ECJ decided not to avail itself of an AG Opinion.
54 Obviously what the State wishes to achieve may well overlap with the ambitions of the Union (e.g. sustainability and animal welfare are also goals of the EU; see respectively arts 11 and 13 TFEU).

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salience for present purposes is that the Commission considered the collective environmental benefits that would result from the agreement in terms of reduced energy usage.\textsuperscript{57} However, in 2004 the Commission issued a set of Guidelines that narrowed down the approach taken previously. Of particular significance for this discussion is its interpretation of the first condition, where only efficiencies count as a factor to be considered. Non-economic considerations are relevant only insofar as they may be “subsumed” within the notion of efficiency.\textsuperscript{58} In large part the justification for “shrinking” the scope of art.101(3) in the ways just described was that with decentralised enforcement there would be a risk that NCAs would diverge in their approach to exemption and that less independent NCAs might use this route as the basis for authorising protectionist ventures.\textsuperscript{59} The worry has, however, been rendered moot by the ECJ holding that NCAs have no competence to issue a decision declaring that art.101 is not infringed; they may only issue a decision that finds an infringement.\textsuperscript{60} This is not the place to discuss the merits of this approach; suffice it to say that the most an NCA may do is to unofficially state its view on the compatibility of a practice with art.101(3) in a statement ceasing an inquiry. This is suboptimal for the purposes of the firms as there remains the risk of private enforcement or of intervention by another NCA. Seasoned lawyers will recall that similar uncertainty had been generated by the Commission’s use of comfort letters: we have yet to find an optimal procedure to vet conduct which merits exemption. This is exacerbated by the Commission not having issued a single non-infringement decision under art.10 or Regulation 1/2003.\textsuperscript{61} Notwithstanding the procedural concerns, it still matters for one to understand the scope of art.101(3). The older case law has been the subject of several detailed accounts.\textsuperscript{62} Here we focus on the guidance that emerges post-2004: the case law is scant but certain intriguing messages emerge, which suggest that the Commission’s current restrictive interpretation has not been followed by the Courts entirely, making its aggressive reaction to the Dutch plan uncalled for.

It is useful to start with the General Court’s decision in \textit{Stim} (concerning agreements among collecting societies). After making reference to art.167(1) TFEU, which provides that the EU shall take cultural aspects into account when acting under other provisions of the Treaty, the Court held:

\begin{footnotesize}
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  \item \textsuperscript{57} CECED (IV.F.1/36.718) [2000] OJ L187/47 at [55]–[57].
  \item \textsuperscript{58} Commission, “Guidelines on the application of Article 81(3) of the Treaty” [2004] OJ C101/97, para.42. At the same time the Commission’s “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” [2011] OJ C11/1–72 no longer have a dedicated section on environmental agreements. The Commission explains this by noting that the relevant discussion is found in other parts of the guidelines (see n.14 of the 2011 Guidelines), the earlier guidelines appeared more accommodating, e.g. placing environmental agreements within the context of the EU’s environmental policy. See Notice—Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/2, paras 179–181.
  \item \textsuperscript{60} Tele 2 Polska (C-375/09) EU:C:2011:270; [2011] 5 C.M.L.R. 2.
  \item \textsuperscript{61} The Commission has limited itself to an amicus brief in an Irish case (\textit{Competition Authority v Beef Industry Development Society}, but the case was subsequently dropped). The brief is available at \url{http://ec.europa.eu/competition/court/amicus_curiae_2010_bids_en.pdf} [Accessed 17 August 2017] and it has also issued a commitment decision where the approach suggests that it considered the agreement as benefitting from art.101(3) but without so deciding: \textit{Continental/United/Lufthansa/Air Canada} (AT.39595) [2013] OJ C201/8.
\end{itemize}
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“Accordingly, in the application of Article [101 TFEU], the Commission is required to take into consideration the objective of respecting and promoting cultural diversity, in particular where the application of that article concerns an activity linked to culture.”

For the purposes of interpreting art.101(3), this statement suggests that a single-minded focus on efficiency is not called for when the Treaty requires the integration of other interests. On the facts of the case, the point was rather easy to resolve because the cultural policy advocated by the parties (making it easy for authors of less popular music to license their work and receive remuneration) was not going to be threatened by the Commission’s decision that the exclusivity clauses in the agreements among collecting societies harmed competition. In art.101(3) parlance, the restriction of competition was not necessary to achieve the policy aim of cultural diversity. However, the law remains that policy goals can be pleaded under art.101(3) provided that the policy is one that the decision-maker is bound to respect by virtue of the Treaties.

Furthermore, in the market of financial services the ECJ has held that an agreement to exchange information about consumers’ credit-worthiness could be exempted if it was found to be restrictive of competition if it would prevent over-indebtedness of certain consumers and at the same time increase the availability of credit. More recently the ECJ did not disagree that an agreement among banks which prevents illegal operations may satisfy the first condition in art.101(3). This suggests that the kinds of considerations which may be pleaded are fairly wide and go beyond those noted in the Treaties. However, they are not unlimited. For instance the Court has held that an agreement cannot be justified when the parties use it to escape a legal or regulatory framework they dislike.

Moreover, some of the case law shows that the beneficial effects need not be in the same market where the harm occurs. This point was discussed in the context of GlaxoSmithKline’s agreements to restrict parallel trade in medicines. The point of principle that the General Court and the ECJ recognised here is that dynamic efficiencies (in this context the promotion of innovation) may count as relevant benefits for the purposes of art.101(3). This is important, for it recognises that the benefits of an agreement need not happen in the same market where the harmful effects manifest themselves. Thus, in the context of agreements for sustainability, it is perfectly plausible to plead that the higher prices faced by consumers today may be traded off with longer-term benefits to society.

However, when a similar point arose in discussions of the Multilateral Interchange Fees (MIFs) set by Mastercard, the ECJ’s reasoning was different. In this two-sided market it was held that in assessing the benefits pleaded under art.101(3) one must,

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63 Föreningen Svenska Tonsättares Internationella Musikbyrå upa (Stim) v Commission (T-451/08) EU:T:2013:189; [2013] 5 C.M.L.R. 16 at [73]; an intriguing prospect which the Court introduced here is that cultural policy should also colour the interpretation of art.101(1) TFEU. We leave this discussion for another day.

64 ASNEF-EQUIFAX Servicios de Informacion sobre Solvencia y Credito SL v Asociacion de Usuarios de Servicios Bancarios (AUSBANC) (C-238/05) EU:C:2006:734; [2007] 4 C.M.L.R. 6 at [67]. Later in the Guidelines on the applicability of art.101 TFEU to horizontal co-operation agreements [2011] OJ C11/1, para.97, the Commission suggested that the efficiency in this kind of setting comes from creating an incentive for consumers to limit their risk exposure.

65 However, the Court held that the restriction was not indispensable since it would have been possible to refer the matter to the competent authorities: Protinonopolný úrad Slovenskej republiky v Slovenská spordeňa AS (C-68/12) EU:C:2013:71; [2013] 4 C.M.L.R. 16 at [33] and [35].


67 The point was discussed in more detail by the CFI, but the ECJ affirmed; see GlaxoSmithKline Services Unlimited v Commission (C-501/06 P) EU:C:2009:610; [2010] 4 C.M.L.R. 2 at [95]. The same defence was pleaded, unsuccessfully, in the pay for delay litigation: see H. Lundbeck A/S and Lundbeck Ltd v Commission (T-472/13) EU:T:2016:449; [2016] 5 C.M.L.R. 18 at [709]–[720].
“take into account all the objective advantages flowing from the MIF, not only on the relevant market, namely the acquiring market, but also on the separate but connected issuing market”.

This would be consistent with GlaxoSmithKline; however, the ECJ went on to say that if the restriction of competition is found on one side of the market, then at least some of the advantages have to also fall on the customers on that side of the market. Thus an agreement that harms competition on the acquiring market cannot be justified if the benefits are all only on the issuing side of the market. This sits oddly with the General Court in GlaxoSmithKline agreeing that a restriction in the market for today’s pharmaceuticals might be excused if it is shown that this leads to more innovation for tomorrow’s medicines.

The key takeaway of this discussion is that, notwithstanding the Commission’s wishes, the signals that come from the European Courts since 2004 suggest that the scope for applying the exemption in art.101(3) remains wide, in two senses: first, the kinds of interests that are considered go beyond the narrow confines of what one may label as efficiency; secondly, procedurally there is no requirement for a cost-benefit analysis; thirdly, the beneficiaries of such agreements are a wider set than direct purchasers. These points are interrelated: as the interests catered for may at times defy precise calculation, it is preferable for decisions to be taken on the basis of a wider range of methods than arithmetical balancing. In this respect the decisions of the ACM appear unnecessarily timid in their approach to exemption. This is not to suggest that the energy agreement and the Chicken of Tomorrow would merit an exemption, but that the parameters for assessment should have been different if the case law had been followed. In particular the draft instructions that the Commission criticised so severely were, in part, in line with the case law, in particular the importance of a holistic analysis of an agreement and the relevance of the wider impact of an agreement.

**Competition law and the first two clashes between Dutch policy and EU competition law**

The case law reveals that the Court is hesitant in taking a stance on certain key issues: in addition to the historically problematic relationship between art.101(1) and 101(3) we now can add the difficulty in untangling the rule in Wouters from the analysis under art.101(3). Thus, there are many pathways by which agreements that are not patently anti-competitive might be evaluated, but the precise contours of each have yet to be defined properly. It is submitted that the ACM could have been more courageous against the Commission’s resistance, for the case law supports a more generous treatment of private sustainability agreements.

It is suggested that the approach stemming from Wouters should have been applied to the Energy Accord and the Chicken of Tomorrow cases. The aims pursued in both could be qualified as legitimate, and the ACM could have reviewed whether the consequent restrictions on competition would have been necessary for the implementation of those objectives. Nevertheless, the ACM considered the application of the Wouters doctrine to be too uncertain, vague and clouded in misconceptions. This remained unspecified, so we are left guessing what is exactly unclear. The most likely point of confusion, however, lies in the fact that the Court has left it largely unclear what it considers to be a legitimate objective. However, an objective that finds its basis in a public law framework would with near certainly qualify as such, and the case law discussed above lends credence to this conclusion. The dismissal of this avenue can therefore be better explained because of the pervasive institutional preference at the side of the European Commission to avoid any form of balancing within art.101(1) TFEU.

At the same time, however, the preference of the Commission (and the ACM) for a cost-benefit type analysis under art.101(3) is not always a suitable means of assessing the legality of an agreement. For

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69 MasterCard Inc v Commission (C-382/12 P) at [242]–[243].
instance, it is not straightforward to monetise an objective such as the “integrity of the legal profession” within the exemption criteria of art.101(3) TFEU. One could turn to consumers and ask them about their willingness to pay, as in the Chicken of Tomorrow welfare case, but rules such as these are crafted precisely to address, for example, issues of information asymmetry. In other words, the consumers are not necessarily best placed to decide on these matters. Moreover, the Court’s approach to art.101(3) suggests that judges have remained constant in their view that a wider range of public interest arguments may be raised to justify a restrictive agreement, such that the case law is open to self-regulation initiatives such as those presented to the ACM in the two cases discussed here.

State-supported sustainability initiatives

As discussed above, having failed to manage a way to allow private regulation in the public interest, the Dutch State has embarked on an approach that purports to exclude the application of competition law by proposing that a private sustainability initiative that meets certain conditions is then considered by the Government, which can ratify it. This raises two questions: first, how far the proposed approach indeed serves to exclude the application of EU competition law to the actions of the undertakings and the State; and secondly, how far this approach leaves open a challenge on the basis of internal market law. We set out the key elements of the EU provisions first before analysing the Dutch initiative.

The State action doctrine and the procedural defence

In the 1970s and 1980s the Court of Justice crafted a doctrine whereby undertakings taking anti-competitive action when this is required by the State fall outside the competition rules, but in such circumstances Member States are subject to the competition rules, by dint of an infringement of their duty of loyal co-operation (art.4(3) TEU) read jointly with arts 101 or 102. The case law has several strands: in briefest outline, the undertakings and the State may be jointly responsible for a competition law infringement if the State merely encourages anti-competitive conduct, while the State remains solely responsible when it requires anti-competitive conduct by the undertakings. The key aim of this case law is that Member States may not revert to legislative measures merely to exempt private arrangements from the scope of EU competition law. Doing so would undermine the effective functioning of EU competition law.

However, this case law also provides for exceptions. Of particular relevance for present purposes is the strand of case law which indicates that competition law rules do not apply when the Member State delegates regulatory authority to a private body. Here the private body and the Member State both escape sanction if the procedures in place are deemed satisfactory. An example may help: suppose a State delegates the task of setting environmental standards to an association, and suppose this association takes care to establish a procedure whereby there is extensive consultation of consumers, NGOs and producers, and the decision-making procedure is one where all interests are represented, then there is no infringement of the competition rules. This has been described as a procedural public interest test, for the focus is not on whether the measure is likely to yield a beneficial result but whether the process is legitimately designed.

70 See on this also B. Scharffs, “Adjudication and the Problems of Incommensurability” (2001) 42 Wm. & Mary L. Rev. 1367.
72 An intriguing issue that the Court has not yet elucidated is how far conduct by the State that is found to infringe EU competition law may also benefit from the kinds of exemptions we discussed above. We see no reason why this should not be so, but it is beyond the scope of this article to consider this; plus our suggestions for convergence of standards below render this issue moot.
Under this test, the Court assesses whether the private decision-making procedures are structured in a way that they will result in “public interest” measures and do not serve private interests. In Reiff, the Court held that a transport tariff board escaped classification as a cartel because its members were to act as “independent experts” that were not bound by orders or instructions from the undertakings or associations which proposed them for appointment to the Minister of Transport, and were called on by law to fix the tariffs “on the basis of considerations of public interest”. Therefore, in the Reiff case the delegation did not provide discretionary regulatory powers because it was “ensure[d] that the boards fix their tariffs by reference to considerations of the public interest”. It must be ensured that private actors are to conduct themselves “like an arm of the State working in the public interest”.

A second option to escape sanction under art.101 concerns the situation where a contested measure has never lost its character of state legislation. In other words, private actors are asked for input which will be considered in a subsequent legislative process that is separate and autonomous. In the Mauri case, the Court held that the involvement of the State in such proceedings can take place in several ways but, in any case, at key moments, should be potentially decisive within a process that shapes the measures. As far as the measures will only be binding after the State has approved, then the measure retains the character of a government measure, provided that such approval is not just a formal stamp but has actually involved a substantive engagement in the formation of the measures.

The latest attempt by the Dutch State is to ensure that these two strands of case law are made applicable so that the steps taken by the undertakings and the role of the State fall within the approach in Reiff, thus excluding the application of EU competition law. The explanatory memorandum to the draft law notes that the conditions that have been developed in this line of case law are fulfilled owing to the fact that the law forces parties to deliberate and to incorporate awareness of the interests that are affected by the proposed measures. Moreover, it is considered that, owing to the role of the minister and the involvement of Parliament, the initiative shall “retain” its governmental character. It is worthy of note that while under art.101(3) TFEU one considers whether the agreement can credibly yield some benefit (one looks for output legitimacy), under the approach discussed here the criterion is the legitimacy of the procedure by which the public interest is defended (input legitimacy). We return to this difference in our conclusions.

For present purposes, it is important to highlight that, because these cases involve national regulation or some form of governmental validation, there is a connection to free movement law. The successful application of the procedural defence to State action does not mean that the measure in question goes unchallenged: it merely shifts responsibility to the Member State under the internal market rules. The existence of the State action doctrine might be explained by the rather timid approach that was taken early on in applying internal market rules, but now that these have been read more widely, the need for the State action doctrine is less pressing. In this context, the latest attempt by the Dutch Government serves merely to shift the legal basis upon which the measure is challenged, and does not eliminate the need to render national measures EU-compatible. This leads us to discuss how a sustainability initiative that is declared generally applicable is likely to be evaluated within the confines of the free movement rules, in particular the free movement of goods.

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75 Reiff (C185/91) at [39].
76 Reiff (C185/91) at [41].
78 Mauri v Ministero della Giustizia (C250/03 R) at [33]–[36].

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Internal market law justifications

Without doubt, a sustainability initiative that is declared generally applicable is (irrespective of the application of EU competition law) likely to impose restrictions on the free movement of goods. A minimum standard with respect to animal welfare, for example, will lead to barriers for the import of animal products that are developed in other Member States that have not adopted the same standards. Considering the wide market restrictions test that the Court has established with respect to the free movement of goods, the Dutch Government will have to provide justifications for the restrictions on the basis of the general interest objectives that are mentioned in art.36 TFEU or on the basis of the so-called mandatory requirements as developed by the Court (Cassis de Dijon). That assessment will then boil down to the question whether there is a legitimate justification for the restriction and whether the restriction can be considered proportionate with regard to its legitimate objectives. It has been confirmed in the case law of the Court that sustainability-related objectives such as animal welfare and environmental protection can be considered as legitimate justifications. The crux of the matter would therefore be whether the proportionality assessment can be fulfilled. Although this can of course only be determined on a case-by-case basis, there are a few general points that can be emphasised in this regard. Generally, the proportionality assessment of the Court is applied by assessing whether the contested measures pursue the objectives on the basis of the “least restrictive” way possible and whether they can be considered to do so on the basis of “a consistent and systematic manner”. These requirements are often interpreted quite strictly by the Court. A good example is Commission v Austria, in which the Court ruled on the proportionality of an environmental measure in Austria that prohibited large trucks from using an important highway on the border between Austria and Italy. Although environmental protection was considered to constitute a legitimate objective the Court considered that, “it has not been conclusively established in this case that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement …”.

Next to this strict assessment, the Court has developed a specific test to determine whether the measures are an appropriate means to achieve the said objectives. It has increasingly done so by establishing whether the measures are pursued in a coherent and systematic manner. One way in which this test has been applied in practice by the Court is to assess to what extent a State monopoly on games of chance compares to the more general level of consumer protection within a Member State. The trade restriction could only be considered an appropriate measure if the Member State pursues a high level of consumer protection in

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85 See Commission v Austria (C320/03) EU:C:2005:684; [2006] 2 C.M.L.R. 12 at [89].
other comparable areas of governance as well. This requirement could be problematic where private initiatives are turned into legislation as they would have to ensure consistency of the measure in light of the wider systems of governance in place within the Member State. In sum, a restrictive measure must: (1) pursue a justified interest; (2) be capable of achieving it; (3) be part of a coherent and systematic system of governance; (4) be the least restrictive option that could have reasonably be identified.

Assessing the Dutch scheme

The Dutch attempt to legislate in such a way as to remove the competition problem faces two challenges. First, it is not clear that under its present design one can escape the clutches of EU competition law. Secondly, irrespective of this, the Dutch State may also be challenged on the basis that its regulation harms the internal market.

Turning to the first point, we saw that, in determining whether competition law applies to the State, the Court assesses whether private decision-making procedures are structured in a way that they will result in “public interest” measures and do not serve the private interest involved. The Court has considered this to be the case in situations where individuals involved in the development of the measures were to act as “independent experts” not bound by orders or instructions from the concerned undertakings, or where they are clearly instructed to only make decisions “on the basis of considerations of public interest”. It is clear from the Dutch legislative proposal that an important facet concerns the wish of the Government that sustainability initiatives are developed by the private sector. The expectation behind this is that such initiatives will be aligned with actual societal needs. The State is acting on the basis of private action. The crucial question then becomes whether, despite the fact that sustainability initiatives can be developed by the companies themselves, the procedural and or substantive requirements of the new law will be capable to ensure “with reasonable probability” that, when developing the sustainability initiatives, the concerned parties will conduct themselves “like an arm of the State working in the public interest”. There are clear reasons to interpret this requirement in the case law restrictively and, therefore, not all too easily allow private parties to pick up the “the arm of the State” as a way to circumvent EU competition law.

It remains questionable whether the criteria that the draft law currently envisages are “sufficiently precise” to ensure that parties will not act in their own self-interest. Most importantly, it is difficult to test the genuine intentions of the involved parties in order to make sure that proposed agreements are not disguised means to pursue private interests. Moreover, we do not expect that it can be argued that a sustainability initiative that is declared to be generally applicable has “never lost its character of state legislation”. Although many boxes of the case law are ticked on the basis of the role of the minister and the involvement of Parliament, the sustainability initiatives under the draft law will never truly have had the character of state legislation to begin with. Since the whole intention of the draft law is to leave the initiative with the economic sectors, it cannot convincingly be argued that these measures then subsequently have never lost the qualification of State legislation.

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88 This could be different where the public law framework has clearly listed and defined the objectives that can be pursued as part of a process of a declaration of general applicability. Then, perhaps, the pursuit of these objectives within the context and criteria of the proposed law could be considered never to have left the domain of the State.
situations where the private sector was asked for specific input in a legislative process. Hence, an extension of the existing case law would be needed for it to apply to this proposed model of governance.

Turning to the possible challenges the Dutch might face for regulations that may hamper the internal market, we have seen that not many restrictive measures survive when the Court decides to apply its proportionality assessment in a strict manner. With regard to the Chicken of Tomorrow case, it could for example be difficult to maintain that no less restrictive measures are available. The Court could simply reason along the same lines of the ACM and hold that, for example, sustainability labelling could provide for means to pursue the objectives without the need to restrict complete access to the market. An example is the recent reasoning of AG Bot, who considered, with respect to the instalment of a minimum price for alcohol in Scotland, whether taxation could not be used as a “more effective and less trade restrictive measure”. AG Bot considered that on the basis of the principle of “free formation of prices” an objective such as,

“increased taxation that is less restrictive of trade while enabling the objective pursued to be attained must be preferred to a measure fixing a minimum price, which gives rise to a greater obstacle”.

The Court followed this reasoning in its judgment as well. With this approach it is difficult to imagine how the introduction of minimum fair trade standards would ever be able to pass the proportionality assessment of the Court. Moreover, the policy coherence requirements may not be easily met. Again, consider the Chicken of Tomorrow case. What would justify a high level of animal welfare for chickens whereas, for example, pigs lack such high animal welfare standards? As discussed, the requirements established by the Court may assess such policy divergences within a Member State. When important policy considerations are transferred to the private sector, the governance framework will have to ensure that coherence in policy is maintained. Eventually, the test can be considered to boil down to the question whether the concerned undertakings have used “specific data or other means” and acted “in accordance with transparent and objective criteria ... with a view to attaining, in a coherent and systematic manner, the objectives pursued ... throughout the territory concerned”. On the basis of these criteria the private sector will have to behave like a transparent and coherent organ of the State.

Conclusion

The Dutch case study illustrates the difficulties of devising sustainability schemes: on the one hand the ACM (and the Commission) espouse too narrow an approach to competition law exceptions so that private sustainability initiatives struggle to secure acceptance, while the case law of the ECJ suggests greater tolerance of these efforts. On the other hand, the Dutch draft law which purports to embed sustainability initiatives in national legislation risks being challenged both under EU competition law as anti-competitive state action and internal market law as a measure that hampers free movement.

The difficulty at present is that the case law of the ECJ presents perhaps too many pathways to justify sustainability initiatives, but without having any internal coherence among the options available, rendering the task of States and competition authorities tricky. Rationalising these multiple pathways would require the ECJ’s guidance, and in this respect it is a matter of regret that the ACM and the Dutch State have not (yet) tried to generate the conflict needed for a reference for a preliminary ruling such as to give the Court the option to confront the policy space available for self-regulatory initiatives.

89 Opinion of AG Bot in Scotch Whisky Association v Lord Advocate (C-333/14) EU:C:2015:527 at [146].
90 Opinion of AG Bot in Scotch Whisky Association (C-333/14) at [148].
These two observations allow us to conclude with a more general reflection: some Member States may choose to provide for the public good through State regulation; others may prefer affording space for self-regulation. EU law should be sufficiently supple to allow both of these variations and also assess them under a convergent standard. Here we trace some points for convergence.

First, it is worth noting how the internal market case law increasingly requires national courts to pay close attention to impact assessments to examine the appropriateness and proportionality of national legislation in addressing a market failure. This is analogous to the ACM’s attempts to monetise the gains from restrictive practices. At the same time, the internal market case law also stresses the right of the State to make policy choices under uncertainty, and to assess these within the coherence of the wider governance context of a chosen policy direction.92

Secondly, a further means of securing convergence may be that, when private initiatives are assessed under competition law, the Court borrows from the State action case law and searches for a degree of input legitimacy, by ensuring wide participation in the efforts firms undertake to regulate themselves. Procedurally, in light of the NCA’s unwillingness to apply art.101(3) in a broad manner, it may make sense for the ECJ to develop the Wouters case law incrementally to secure such convergence. At the same time, that would require a clarification on the exact leeway for NCAs to adopt the Wouters avenue within a formal decision, without acting contrary to the principle established in the Tele2/Polska case.

In sum, a potential route towards a converged application of the EU competition rules and free movement would be for the Court to construct its reasoning more cohesively around a framework that considers the input and output legitimacy of competition restrictive measures. This would be part of an overarching internal market test without taking recourse to the “static” categories that have mostly been developed around conventional state centred understandings of dominium and imperium.93 The input legitimacy part would, based on the State action doctrine and the free movement model of justifications, consider the extent to which a public law framework sufficiently enables and embeds private actors to pursue objectives in the public interest.94 Concomitantly, it would be considered whether the private actors concerned pursue the objectives in a coherent and systematic fashion. As part of the output legitimacy test, it would then consider whether the restrictions on competition are proportionate and necessary to achieve the objectives concerned. In doing so the Court would be able to normatively influence and contribute to experimentalist governance, such as in the Netherlands, and set the basic conditions for input and output legitimacy within new governance processes.95 Such an approach could potentially enable instead of hamper the introduction of innovative non-State structures of governance that are committed to standards of transparency, accountability and reasoned decision-making processes.96

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92 See for example Stoß (C-316/07) EU:C:2010:504; [2011] 1 C.M.L.R. 20 at [79]–[83].
94 Regarding input legitimacy, we point to the guidance of the Commission in the horizontal guidelines: Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” [2011] OJ C11/1–72, which instruct industries on how to ensure that the process of selecting standards is competitive and that, once the standard is adopted, access is given on “fair, reasonable and non-discriminatory” basis (FRAND guidelines). Where such processes have been followed and the standard is non-compulsory, they are unlikely to fall within the reach of art.101(1) TFEU. As such, considerations that can be considered as input legitimacy related are present in the policy guidance of the European Commission.