Sustainable Competition Law Enforcement: Animal Rights

An Essay on Integrating Other Sentient Beings' Interests in the Work of a Competition Authority

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Chapter I
Introduction

The mandate of a competition authority is to enforce competition law. That is, to ensure that undertakings do not collude at the expense of the consumer, that dominant undertakings do not abuse their market strength against the interest of the consumer, or that free markets are undermined by mergers with anti-competitive effects. The public interest of free and open markets and an efficient allocation of resources[2] are competition authorities' core interest. Of course, this statement reveals a *view* of competition law's goal that is neither academically 'correct' nor universally accepted[3]. Other responsibilities, e.g. in regulation of markets in transition, may have been given to the competition authority; these are not considered here.

Other public interests are secondary to a competition authority's functioning. Traditionally, these other interests have sought expression as well, whether as part of the claims of parties in proceedings before the competition authority or in the feedback by government departments, parliaments or other 'stakeholders' on the functioning of competition authorities. An entire literature has developed on public interests. Sometimes, competition authorities themselves devoted attention to the issue. A case in point is the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit*, *NMa*) which included a chapter in its 2009 annual report

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[2] Art. 119 (1) and (2) of the Treaty on the Functioning of the European Union (TFEU), the task-setting provision in respect of Economic and Monetary Union (EMU), as well as Art. 127 (1) TFEU *in fine* (the mandate of the European Central Bank) make the EU's free markets objective explicit; these provisions were introduced in the E(E)C Treaty (as the TFEU was then known) by the Maastricht Treaty on European Union.

[3] For an extensive study of the goals of competition law, see G. Monti, *EC Competition Law*, 2007, who researches the history of various objectives pursued: market integration, economic freedom, economic efficiency.

devoted to public interests[4]. From an EU law perspective, free competition is embedded in the larger aims of the Union[5]. These aims are, foremost, peace, the Union's 'values' and the well-being of its people[6]. These aims include "the sustainable development of Europe based on balanced economic growth and price stability" and "a high level of protection and improvement of the quality of the environment", while they also refer to the safeguarding and enhancing of "Europe's cultural heritage"[7]. To an EU lawyer, the consistency and integration provisions of Articles 7-14 TFEU are also relevant in determining the mandate of a competition authority. It is submitted that national competition authorities (NCAs) are bound by these provisions, at least when applying EU antitrust law. NCAs and courts are to apply EU competition law to cases they deal with when there are cross-border effects[8]. Since NCAs are bound by the injunctions of the consistency provisions, their competition mandate[9] should be applied consistently with other EU objectives. These provisions call on the EU to take into account in its activities and policies: equality between men and women[10], adequate social protection, high levels of education and human health protection[11], combating discrimination[12], environmental protection[13], consumer protection[14] and animal welfare[15]. These provisions[16] do so in a variety of terms: 'aiming', 'taking into account', 'integrating', 'paying full regard' are the words used. Some objectives need to be heeded in all activities, most in all 'policies and activities', and animal welfare in six specifically mentioned policy areas, including the internal market. The internal market includes a system ensuring that competition is not distorted[17]. Thus, competition law enforcement is to pay 'full regard' to the welfare requirement of animals.

This essay offers some thoughts on the scope of the obligation to include animal welfare considerations in competition law enforcement, in the context of the wider injunction that the EU "shall work for the sustainable development of Europe (…)"[18] in antitrust enforcement. Because of the central place in this essay of the TFEU provision on animal welfare, its full text is given:

Article 13

4 *NMa en publieke belangen* (*NMa* and public interests), Annual report 2009, available at: www.acm.nl/nl/publicaties/publicatie/5344/NMa-Jaarverslag-2009-NMa-ziet-winst-voor-toezicht-in-bezuinigingsvoorstellen/.
5 As the reference to Art. 3 of the Treaty on European Union (TEU) in the afore-quoted Art. 119 TFEU makes clear.
6 Art. 3 (1) TEU.
7 Art. 3 (3) TEU.
8 Art. 3 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty, *Official Journal of the EC*, No. L 1/1, 4 January 2003.
9 The focus in this essay is on antitrust enforcement, merger review falling outside its scope.
10 Art. 8 TFEU.
11 Art. 9 TFEU.
12 Art. 10 TFEU.
13 Art. 11 TFEU.
14 Art. 12 TFEU.
15 Art. 13 TFEU.
16 Art. 14 calls for services of general economic interest to be able to fulfil their missions.
17 Protocol No. 27 on the internal market and competition.
18 Art. 3 (3), second sentence, TEU.

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

As a committed competition lawyer and as an engaged Head of the Belgian Competition Authority, Jacques Steenbergen has played a prominent role in fostering debate about the application of competition law, also in 'difficult areas', such as sustainability initiatives. This reveals a preference for an agency-driven initiative, rather than the wait-and-see approach that might result in case law in which the policy choices before the judges are not clear-cut. Jacques' clarity of mind in discussing any subject, beyond competition law and EU law in general, and his ability 'to see the big picture' have been a source of inspiration to this author.

Chapter II
The Policy Debate

This essay is not the place to give an overview of the debate on public policy and competition law enforcement. Suffice it to say that among the many authors who have contributed, Giorgo Monti and Chris Townley deserve to be specifically mentioned. The former distinguishes between various objectives of competition law in his book *EC Competition Law* (2007). The latter devoted an entire book on the issue how to integrate other public policy goals in competition law enforcement: *Article 81 EC and Public Policy* (2009). Other authors engage in the on-going research on the interaction of public policy and competition law. For instance, research on the specific interplay between competition law and sustainability is currently carried out by Anna Gerbrandy at Utrecht University[19]. Hans Vedder wrote an early PhD thesis on environmental issues and competition law[20]. Many other authors contributed. Some even devoted their inaugural address to a call to competition authorities to include corporate social responsibility in their enforcement activities[21].

The policy debate is encouraged by the trend towards relying on private sector solutions to public policy problems. Governments in retreat have sought to engage the private sector in providing market-based solutions to problems that regulation and supervision could not solve, or not as efficiently as entrepreneurs were considered capable to address these issues. The advantage of this reliance is that governments retreat from the position that 'they know best'. This entailed a paternalistic vision and negated the potential of bottom-up approaches from the real experts:

[19] A. Gerbrandy, "Duurzaamheidsbelangen in het mededingingsrecht: de positie van ACM ten opzichte van het hof (Interests of sustainability in competition law: the position of ACM in relation to the [European, RS] Court)" in *Nederlands Tijdschrift voor Europees recht*, 9, 326-332 (2013).

[20] H. Vedder, *Competition Law and Environmental Protection in Europe*, 2003.

[21] See the closing paragraph of this essay.

the companies and consumers who care about societal issues. Innovation and effectiveness may result from grass-roots solutions. One of the disadvantages of this approach of relying on private initiatives to achieve public-policy goals is, first, a bureaucratic one: it places the onus of weeding out initiatives that are in conformity with free market rules on the private sector (self-assessment)[22] and on the enforcement authority. The latter is confronted with public-policy choices made by private parties, often at the behest of other government departments, in the interest of sustainability or another worthy goal in the public-policy realm. More importantly, these choices seldom reflect societal concerns only. This a more fundamental disadvantage of relying on self-regulation to cope with sustainability issues: can the corporate world help reach public-policy objectives without running the risk that its action will be, at least in part, self-serving at the expense of the consumer? Furthermore, there is the danger of 'green-washing' – 'selling' so-called sustainable initiatives that go only half-way, or not even as far as that, in addressing pressing issues, such as pollution (CO_2 emissions), contamination (sulphur emissions), public health (use of antibiotics in cattle raising, use of salt or sugar in food production) and animal welfare (over-fishing, caging and castration of animals). Consumers may be confronted with a limitation of choice that reflects the current stand-off between industry and associations that seek to foster public goods, or public awareness of such goods, rather than the optimal outcome. Two examples from Dutch practice may illustrate this.

The *Verbond van Den Bosch* (Bois-le-Duc Covenant) agreement among all parties involved in the 'production' and sale of pig meat in the Netherlands seeks to exclude meat that is not subject to its newly agreed rules on antibiotics. The covenant relies on all supermarkets in the Netherlands agreeing not to buy pig meat that has been otherwise 'produced'[23]. Whether this will also outlaw excessive inoculation with antibiotics of pigs raised for export remains unclear. Thus, this seems to be a well-intended health and animal welfare initiative with a localised reach only. Under the *Kip van morgen* (Tomorrow's broiler) agreement, broilers raised for consumption in the Netherlands would get a tiny bit of extra cage space (19 instead of 21 animals in a square meter box: about the size of an iPhone extra room for each chicken), they would be allowed to grow a little slower and they would be given less antibiotics[24]. However, as the conclusion of this agreement among retailers and producers makes clear, there is no ban on production methods previously applied when chicken meat is exported: thus, the result would seem to be mediocre progress in terms of sustainability, including animal welfare, again for the Dutch market only. It is against the background of such Dutch initiatives, often encouraged by the government, that the Netherlands Competition Authority sought to give guidance to parties involved in sustainability initiatives.

[22] In accordance with the allocation of the burden of proof provided for in Art. 2 of Regulation 1/2003.

[23] Note the references to free rider behaviour – which the covenant seeks to ban – in the document setting out the policy of making pig meat sold in the Netherlands 'sustainable' by 2020, available at: www.innovatievarkensvleesketen.nl/media/19245/al_het_vlees_duurzaam.pdf.

[24] See the announcement at the site of the joint Dutch food retailers: www.cbl.nl/home/rss-feed/nieuws-detail/article/26-februari-2013-er-komt-een-andere-kip-in-de-nederlandse-supermarkten/.

Chapitre III
Consultation on a Draft Position Paper on Sustainability (2013)[25]

The Netherlands National Competition Authority (*NMa*, and subsequently, the Authority for Consumers & Markets (ACM, the successor to *NMa*) has taken the lead in transparency on the way it intends to apply competition law to agreements and practices that seek to promote sustainable development[26]. ACM takes a broad view of 'sustainability initiatives' as including initiatives relating to environmental protection, public health, fair trade production, animal welfare and other issues. In 2013, ACM organised a public consultation on a draft position paper on sustainability[27]. In a previous memorandum posted on the 'Knowledge Database on Sustainability', a separate window on *NMa*'s, later ACM's, website[28], the Authority indicated how sustainability initiatives have been approached in the past. This memorandum indicates the room for self-regulation with a view to sustainability under competition law. It states that price regulation is suspect and would almost never escape the prohibition of Article 101 TFEU or its domestic equivalent[29], but a wide range of other engagements by market parties to reduce the negative external effects of their products or distribution on the environment may be permitted. This needs to be established on a case-by-case basis. Initiatives may be 'harmless' and may thus not qualify as anticompetitive or, on balance, the advantages of the agreement may trump its anticompetitive effects in a weighing exercise. This analysis under paragraph 3 of Article 101 TFEU (or its domestic equivalent) assesses whether an agreement that is anti-competitive escapes the prohibition because it cumulatively fulfils the four criteria. The draft Position Paper outlines these as follows:

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

2. Consumers get a fair share of the resulting benefit;

3. The arrangement is necessary to achieve these benefits and does not go beyond what is necessary (also: proportionality test);

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[25] Disclaimer: the author has been involved in the preparations of the draft Position Paper, the consultation and the resulting reassessment of the draft Position Paper in the Fall of 2013 and the Winter of 2014. When ACM published its Vision Document Competition and Sustainability in the Spring of 2014, the author had left ACM.

[26] In its capacity as energy sector regulator, ACM has also contributed to transparency on sustainability in this sector; see its Vision Document Sustainability and Energy Regulation (*Visiedocument Duurzaamheid in energietoezicht*) of 9 April 2014, adopted after a public consultation in the Fall of 2013, available at: file:///C:/Documents%20and%20Settings/Ren%C3%A9/Mijn%20documenten/Downloads/visiedocument-duurzaamheid-in-energietoezicht-2014-03-26.pdf.

[27] The interplay between the consultation on the draft Position Paper and the consultation, during the summer of 2013, on a Government policy guideline to ACM on how to assess sustainability initiatives https://www.internetconsultatie.nl/mededinging_en_duurzame_ontwikkeling is outside the scope of this essay. Suffice it to say that the Government's parallel public consultation resulted from a parliamentary initiative to provide for policy rules for *NMa* (ACM) that would instruct the authority to give room to agreements in the agricultural-nutrition chain concerning public interests such as animal welfare and environmental concerns. See: www.tweedekamer.nl/kamerstukken/detail.jsp?id=2013Z01293&did=2013D02819.

[28] The assessment of restrictions of competition resulting from sustainability initiatives in practice; see: https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/kennisbank-duurzaamheid/.

[29] Section 6 of the Dutch Competition Act.

4. The arrangement does not lead to competition being eliminated in a substantial part of the market. The arrangement must leave enough room for competition (also: residual competition requirement)."

As the memorandum on past enforcement practice in respect of sustainability initiatives published on ACM's website makes clear, sustainability agreements may more easily be acceptable when they concern competition parameters of minor importance and when they leave ample scope for consumer choice. But even market-wide sustainability arrangements may be acceptable according to ACM's provisional approach, "particularly if a negative external effect is eliminated in such a way that current and future consumers will benefit"[30]. The possibility that sustainability initiatives may escape the prohibition of anti-competitive restraints on the basis of an 'inherent restrictions' doctrine is mentioned but not yet embraced in the draft Position Paper[31] or in the ultimate Vision Document.

The draft Position Paper was followed up by a Vision Document on Competition & Sustainability[32], published on Europe Day 2014. Like the draft Position Paper[33], the Vision Document does not make a general exception for sustainability initiatives, which it rightly considers subject to ordinary antitrust rules[34]. The Vision Document[35], like the ministerial policy guidelines[36], places competition law enforcement squarely within the confines of the Commission's decisional practice and its Guidelines[37]. The question whether there is room for experimentation in the approach

[30] Quote from the draft Position Paper.

[31] Under the *Wouters* (concerning the Dutch Bar) and *OTOC* (*Ordem dos Técnicos Oficiais de Contas*, or Portuguese Chartered Accountants Board) Case law, the European Court of Justice concluded that the legitimate interests served by the arrangements subject to review may allow them to escape Art.101 altogether. The relevant arrangement escaped the prohibition in Case C309/99 (*Wouters and Others*, 2002, ECR I-1577) and was considered not to be exempt in Case C-1/12 (*OTOC*), judgment of 28 February 2013, nyr. The Vision Document also mentions other Case law, including Case C-136/12 (*Consiglio nazionale dei geologi* [the Italian Council of Geologists] *v. Autorità garante della concorrenza e del mercato* [the Italian NCA]), judgment of 18 July 2013, nyr. In this judgment, the question was whether the recommended scale of professional fees for geologists were at variance with Art. 101 TFEU. The CJEU found that the decision of the regulatory body of the profession would not have to be considered contrary to the prohibition of anticompetitive conduct if its rules were inherent in pursuing guarantees for the users of the services of the professionals, and the resulting restriction in respect of pricing of the geologists' services proportionate to this legitimate objective.

[32] *Visiedocument Mededinging & Duurzaamheid*, ACM 9 May 2014, available at: https://www.acm.nl/nl/publicaties/publicatie/12930/Visie-mededinging-en-duurzaamheid/. Just days earlier, the minister of Economic Affairs had issued his Policy Guidelines on Competition and Sustainability (*Besluit van de minister van Economische Zaken van 6 mei 2014, nr. WJZ / 14052830, houdende beleidsregel inzake de toepassing door de Autoriteit Consument en Markt van artikel 6, derde lid, van de Mededingingswet bij mededingingsbeperkende afspraken die zijn gemaakt ten behoeve van duurzaamheid*, or Decree of the minister of Economic Affairs adopting policy guidelines concerning the application by the Authority Consumers & Markets of section 6 (3) of the [Netherlands] Competition Act in respect of anti-competitive agreements serving the interest of sustainability), *Staatscourant* (Netherlands Government Gazette), No. 13375, 8 May 2014. As the ministerial policy guidelines became effective the day after publication, the ACM Vision Document and the ministerial decree will have had effect as of the same day. The Vision Document states that it indicates the way in which ACM will implement the ministerial policy guidelines.

[33] This essay is not the place for an exhaustive analysis of the two documents, or of the ministerial guidelines.

[34] As ACM's website makes clear: "Sustainability initiatives have no special status under competition law." And: "There is no more room for sustainability initiatives to deviate from the cartel prohibition than for other forms of cooperation."

[35] Paragraph 3.5 *in fine*.

[36] In paragraph 1.5 ('European law background') of the explanatory notes to the policy guidelines.

[37] Notably, the Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, *O.J.C.*, 11/1, 14 January 2011, and the Guidelines on the application of Art. 81(3) of the Treaty, *O.J.C.*, 101/97, 27 April 2004.

to EU competition law at NCA level[38] is not even raised, let alone answered[39]. In its summary of the consultation responses (in which respondents argued that a Dutch approach to sustainability initiatives would have to be widened to the European level), ACM recognises the importance of a unified approach of sustainability initiatives in Europe and would welcome a joint clarification of the competition authorities' approach in the context of the European Competition Network[40].

Chapter IV
A Critique

ACM's Vision Document should be welcomed as a statement reflecting the authority' open mind to long-term benefits of sustainability initiatives for consumers, even for consumers at a later age, or future generations of consumers, and to the necessity of agreements being concluded among undertakings to remedy negative external effects. Its open mentioning of the 'first mover disadvantage' is a sign that the authority sees the difficulties facing market participants that wish to act in the interest of sustainability[41]. Unsurprisingly, as the documents have been aligned, the minister of Economic Affairs takes a similarly view in his policy guidelines. Together, the Vision Document, the policy guideline and the first memorandum published by *NMa* with an overview of how sustainability initiatives have been approached in the past, contain quite a few examples, thus making clear the likely assessment of new initiatives in the context of competition law enforcement in the Netherlands.

However, ACM's approach[42] may not do justice to animal rights or animal welfare considerations. If animal rights are taken seriously, relying on the actual or stated preferences of consumers is inadequate: consumers will not take these into account in sufficient measure. A quote from draft Position Paper makes ACM's approach clear[43]:

"When arrangements simultaneously lead to a reduction of supply – for example, by taking animal-unfriendly products off the market – it is necessary that it can be

[38] For a British exercise in finding the limits of EU competition law, see the UK Office of Fair Trading's discussion paper on benefits under Art. 101 (3) TFEU and the subsequent discussion (2010), available at: www.oft.gov.uk/news-and-updates/events/roundtable-article101(3)/#.U2vE20F_vA8.

[39] Chris Townley argues that NCAs have limited scope for diversity in applying EU competition law. See his *Co-ordinated Diversity: Revolutionary Suggestions for EU competition law (and for EU Law too)* in (2014) 33 Yearbook of European Law.

[40] See: file:///C:/Users/Rene/Downloads/consultatie-visiedocument-mededinging-en-duurzaamheid-2014-05-09.pdf.

[41] Taking the first mover disadvantage into account is mandated by the policy guidelines (section 2 (c)) when ACM assesses the proportionality of the sustainability initiative's restriction of competition. Long-term advantages are mandated to be taken into account when ACM weighs the benefits of the sustainability initiative (section 2 (a)) and whether they benefit consumers (section 2 (b)). The ministerial decree (section 2 (d)) instructs ACM to look whether sufficient competition on the basis of other competition parameters remains possible in its assessment of the fourth element of paragraph 3 of section 6 of the Competition Act (the domestic equivalent of Art. 101 (3) TFEU).

[42] The same holds true for the ministerial policy guidelines, as the Vision Document and the policy guidelines have been closely aligned. At the time of writing neither document had been translated. Quotes in English are either from the draft Position Paper (which was available in English), or are the author's translations.

[43] The Vision Document contains the same language but replaces the term 'animal-unfriendly products' by: 'environment-unfriendly', thus skipping the issue of animal welfare. Since the Vision Document, and the ministerial policy guidelines apply to all initiatives serving 'sustainability', defined as including animal welfare, the change is not material for the approach taken by ACM and the Netherlands minister of Economic Affairs.

demonstrated that the (new) supply really is an improvement in terms of quality, or that it is at least perceived as such by consumers. The latter may be demonstrated by the willingness of a substantial share of consumers to possibly pay more for these products."

This means relying on consumers' preferences and on their spending behaviour. This is a logical conclusion when one places oneself within the framework of competition law enforcement as it is[44]. But is this sufficient? Let us confine ourselves to the question whether this is legally sufficient. The question whether it is morally adequate is beyond the scope of this essay. The unacceptability of the way animals are often treated in food production is there for all to see[45].

ACM's view is correct that the best solution would be for consumers to reject animal suffering which is inherent in industrial production of meat, fish, milk, eggs and leather. By not buying these products, the demand for them would diminish or disappear. It is not inconceivable that demand for products previously considered acceptable goods or services will ultimately die. History is rife with cultural changes in the approach of humans to what is acceptable and what is not. For such a sea change to occur, information asymmetries need to be addressed. Only when making the public aware of the circumstances of the 'production' of its food is there any chance of it changing its purchasing behaviour. Of course, the real circumstances of food production are not widely known and are mostly shielded from the public eye[46]. Uneven distribution of information, i.e. information asymmetry, between producers and consumers is a source of current consumer preferences. Commercials do not show the 'production' methods of animal products; consumers do not inquire about these methods by watching disturbing videos or reading about animal husbandry on the internet before they go to the supermarket or the butcher shop.

More fundamentally, should consumers forego products that are the result of animal suffering, they make a moral choice resulting from a realisation that previous practices may no longer have a place in the current circumstances (if ever they had in the past).

A collective judgment in the form of political choices that respect animal rights would be preferable. But the decades-long tendency towards self-regulation with a retreating government relegating decisions to the private sector (but sometimes sitting in on their meetings to achieve the desired results, thereby almost amounting to 'co-regulation') does not make this a likely outcome. Also, the lobby of the industries behind current methods of food production may not allow this to happen. Waiting for public regulation may not be realistic[47].

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44 Especially, the compensation principle will be a hindrance for the acceptance of sustainability initiatives fostering animal welfare. This principle entails that consumers should be at least compensated for the restrictions resulting from an agreement by this agreements' benefits. See the Vision Document, paragraph 3.5.2, with references to the Commission's 101 (3) Guidelines (see footnote 37 above).

45 See, e.g., the websites of the American Animal Welfare Institute (https://awionline.org/) and the Eurogroup for Animals (http://eurogroupforanimals.org/), or of Compassion over Killing (www.cok.net/), or Jonathan Saffran Foer's book *Eating Animals* (2009).

46 Animal rights groups have had to resort to underground filming in order to expose cruel practices.

47 As the Vision Document (paragraph 3.5.3 *in fine*) states in the context of the assessment of a sustainability initiatives' benefits for consumers (paragraph 3-analysis), if these benefits do not result in a favourable outcome for a given initiative, "the relevant sustainability objective can be served through legislation and regulation".

But, barring the unlikely outcome of a collective change of mind of consumers in favour of animal-welfare, an NCA[48] cannot shrink from its responsibility: as an authority[49], it should heed the injunction of Article 13 TFEU and "pay full regard to the welfare requirements of animals" because – as the provision states – they are sentient beings, just like humans. 'Speciesism'[50], or the tendency to exclude others from our perspective and equal compassion because they are 'different', may prevent us from seeing or feeling this fully. Of course, a competition authority is not equipped to make judgments on animal welfare standards[51]. Expert opinions may have to be requested when it comes to issues of animal welfare. Or the NCA may have to advocate government regulation when it is clear that sentient beings' welfare is made subject to consumers' preferences for food at affordable prices. If such an 'advocacy' role is too far-fetched for antitrust agencies, they should at least be very alert when initiatives are put before them under the false pretence of reducing or abolishing animal welfare. This would be a suitable follow-up to the courage the Dutch NCA[52] showed with its public consultation on sustainability initiatives and the resulting Vision Document. And it would be in line with Tom Ottervanger's call, in his inaugural address as professor of competition law at Leiden University in 2010, for the Dutch competition authorities to include corporate social responsibility (CSR) principles in enforcing competition law[53]. Also, NCAs should have the courage to accept, in short-form opinions[54] or in the outcome of their priority-setting (if permitted to engage therein) initiatives that really reduce or, preferably, end animal suffering.

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48 The same line of reasoning applies to the European Commission, of course: applying EU competition law, DG COMP is immediately covered by the Treaty provisions on the environment and animal welfare.

49 Note that this injunction is directly addressed to Member States as well as the Union. NCAs, as authorities designated pursuant to Art. 35 of Regulation 1/2003, are – even though independent in the exercise of their enforcement powers – agencies of the State and can be considered addressed directly in Art. 13 TFEU. This does not imply that they are to heed the injunction to pay full regard to animal welfare in their domestic functions, as well: the Treaty provision relates to the exercise of the EU's internal market policy (which includes its competition policy). Only an indirect effect of Art. 13 TFEU on domestic competences may be assumed.

50 This is the term the animal rights philosopher Daniel DeGrazie uses in *Regarding the Last Frontier of Bigotry*, 2005, at: www.logosjournal.com/issue_4.2/degrazia.htm. See, also, his philosophical approach to human conduct vis-à-vis animals in *Animal rights – A Very Short Introduction*, 2002.

51 And a word of caution is in place. Animal rights may be invoked for partial (or political party-bound) interests. A case in point is an Animal Welfare Party wish to abolish 'ritual slaughter', i.e. means of slaughter prescribed by the holy books of Judaism and Islam as (at that time) the least harmful means of killing animals, whereas the majority meat industry would be unaffected by the proposed abolition of 'ritual slaghter'. Note that Art. 13 TFEU requires respect for customs, including religious rites and cultural traditions. Of course, these rites and traditions may develop.

52 In its summary of responses to the consultation on the draft Position Paper, ACM places animal welfare in the context of a widening of consumers' choice and consumer preferences. It continues as follows: "One may question whether the animal welfare factor (*sic*) can justify the conclusion of agreements covering the entire relevant market. Thus far, ACM has not yet taken a standpoint in actual cases." So, there is hope….

53 *Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld* (Competition in line with corporate social responsibility: competition law in a changing world), inaugural lecture, 10 March 2010, available at: http://media.leidenuniv.nl/legacy/oratie-ottervanger.pdf.

54 *NMa*'s acceptance of an agreement to phase out castration of boars without anaesthesia was also based on the consideration that there would be no foreclosure of meat from pigs that have been castrated without anaesthetics. Slaughterhouses and, ultimately, consumers had the option of buying cheaper meat from different sources as the arrangement did not cover the entire market. This consideration seems unnecessary for the positive outcome or even immoral but surely conflicts with the treatment of animals as sentient beings. See *informele zienswijze* (short-form opinion) in case 6455 (2008), available at:
——https://www.acm.nl/nl/publicaties/publicatie/6811/Informele-zienswijze-verdoofd-castreren-van-varkens/.