Market regulation between economic and ecological values: Regulatory authorities and dilemmas of responsiveness

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Abstract
The regulation of markets emerged as one of the core pillars of government policies during the 1990s. However, the ascendance of ecological values and issues, such as sustainability and security in the following decades challenge some of the basic tenets of the underlying neo-liberal ideas. We argue in this paper that market and competition regulators have come under pressures to uphold the market and economic values of the prevailing anti-trust policies while being responsive to societal pressures that cherish non-economic values. Competition authorities find themselves locked-in to economic theories of regulation and find little room for engaging with ecological issues. We illustrate this with the case of the Dutch competition authority’s approach to managing the balance between economic and sustainability and animal welfare values.

Keywords
Bureaucratic responsiveness, competition authorities, ecological regulation, regulatory conflict

Introduction
‘There will be a better chicken, for all our customers!’, Dutch supermarkets proclaimed in an advertisement early 2013. There, farmers’ organizations and representatives of the Dutch retail industry kicked-off their campaign in favour of
animal-friendly and sustainably bred chicken meat. Shortly before, the food industry had finally given in to the fierce naming-and-shaming campaigns of animal protection organizations against the bio-industry. The ‘Chicken of Tomorrow’ would have more space and sleep and ‘behave more naturally as a chicken’. In a similar vein, in September 2013, more than 40 governmental and private sector parties signed the Energy Agreement. The parties committed themselves to invest in the development of renewable energy sources and a substantial reduction of CO₂ emissions by 2050. The parties also promised economic growth and the creation of tens of thousands of new jobs for the coming decades. The centrepiece of the agreement was the closing down of five coal-fired electricity plants (Sociaal Economische Raad (SER), 2013). To the parties’ and public’s bitter surprise, however, both agreements were bluntly rejected by the Netherlands Authority for Consumers and Market (ACM), the Dutch competition authority. ACM declared both agreements in violation with competition law and a distortion of the market. The decisions contributed to the reputation of ACM as an overtly technocratic authority with no empathy towards ecological goals.

Both cases represent a recurring problem in regulatory studies: the goals of competition policy stand in the way of attaining sustainability goals. Regulatory goals are often disparate and the logic of market regulation conflicts with environmental, health, occupational and safety goals. The conflicts are basically about what constitutes ‘the good society’ (Haines and Gurney, 2013). What is more, the resolution of such fundamental conflicts has become more and more the responsibility of independent regulatory authorities. They became main sites where ultimate judgements on fundamental value conflicts are made. Moreover, we could say that with the spread and establishment of regulatory authorities since the 1990s (Jordana et al., 2011), we have arrived at a point where some of the most fundamental value conflicts in our societies are being decided by non-elected officials (Vibert, 2007).

While the delegation of authoritative decision making is delegated to these authorities, they are not well equipped to adequately resolve the above-described value conflicts. Regulators have a too narrow scope and mandate to balance economic versus non-economic values (Hyman and Kovacic, 2013; Jordana and Levi-Faur, 2010). As Parker and Hains (2018) argue, ‘instrumental rational regulation’ fails to acknowledge that the ‘economy’ is actually embedded in the broader ecology. Instrumental regulation ‘privileges piecemeal instrumental thinking to address particular externalities ... yet systematically ignores cumulative, interrelated systemic problems’ (Parker and Hains, 2018: 143). As long as economic rationality is the dominant regulatory paradigm value conflicts will be treated as a form of market externality (Parker and Haines, 2018). The chances that the economist paradigm changes at the short term are slim. Established in the (early) heydays of neo-liberal theories (1980s–1990s), regulatory institutions are locked-in to the logic of capitalist economic thinking and will seemingly remain so in the foreseeable future (Levi-Faur, 2005).
Regulators have become main sites where value conflicts are addressed. Therefore, we present an ‘intra-agency’ account of how a regulator addresses conflicts between economic and non-economic values. We ask to what extent regulatory authorities are responsive to non-economic values? We assess and apply various insights from bureaucratic responsiveness theories to answer this question.1 Bureaucratic responsiveness is here defined as bureaucratic agents’ willingness to consider the preferences and the interests of diverse audiences when designing and implementing public policies. The structure of this paper is as follows. We will first review the bureaucratic responsiveness literature. We show that bureaucratic responsiveness can be a function of institutional design, bureaucratic reputation and bureaucratic representation. We argue that each approach has its limits when it comes to enhance regulatory responsiveness to ecological concerns: the mandates of regulatory authorities are limited to a logic of market competition, too limited to incorporate ecological concerns into their decision-making schemes. This argument, admittedly, is based on a case study of regulatory decision making within a single regulator. The study is nevertheless, we believe, generalizable to the broader regulatory setting as the underlying value conflicts are universal across regulatory governance. The paper ends with a discussion and conclusion.

Theories of bureaucratic responsiveness

Regulatory authorities need to balance disparate set of goals (Alon-Barkat and Gilad, 2016; Carpenter, 2010; Eckert, 2017; Hyman and Kovacic, 2013; Ottow, 2015; Van Veen, 2014). This requires a sufficient degree of bureaucratic responsiveness to adequately address the multitude of often conflicting goals and values. What are prevailing modes of bureaucratic responsiveness and how well do they fit the context within which regulators operate?

We can distinguish between three approaches. One approach starts from the organizational design of regulatory authorities. A central question in this field concerns the effects of single- or multi-sector regulators on the outcomes of regulation. The structure of the regulated area affects the ‘agency scope’ (Jordana and Levi-Faur, 2010). By designing the regulator’s organization as well as the context in which it is to operate, that is, by bureaucratic rules, norms and structures, politicians can constrain the range of responses eligible to regulators (Bryer, 2007). For the regulation of the telecom market, for example, the convergence of information and communication technologies, that is, of broadcasting, Internet, and mobile phones, could plea for the design of a media authority. An alternative path could be the creation of a ICT regulator within general competition authorities (Garcia-Murillo and MacInnes, 2003; Henten et al., 2003; Yesilkagit, 2013). The main message of this approach is that the ‘complex portfolio’ structure of regulated sectors requires a search for the proper organizational design of a regulator.

Hyman and Kovacic (2013) argue therefore that a ‘specific amalgamation of policy tasks within a single government body has important consequences for how
competition agencies define their goals, allocate resources, and select programs to fulfill their duties’ (2013: 2). The assignment of policy tasks to regulatory agencies does not follow a benign model of delegation. The assignment of tasks is mainly a function of political delegation of portfolios, they argue, and it lacks a Coasean ‘optimal boundary’ of agency design. While theory prescribes that the allocation or portfolios to regulatory agencies should follow benign principles of coherence and consistency, in practice agencies gain or lose portfolios mostly through mundane events, such as accident or fortuity, changes in technology or legislative divestiture after the agency is perceived to have failed the performance of its tasks. Hence, regulation is full of ambiguities and the assignment of values to regulatory authorities produces by definition ‘complex policy portfolios’ that preclude the optimal regulatory designs in practice. Coordination becomes imminent.

Followingly, Eckert (2017) distinguishes between a ‘coordination model’ and an ‘integration model’ of regulatory design. Each model follows a different logic of delegation with different outcomes in the practice. In the coordination model, the mandates for the regulation of the various values are delegated to different specialized regulatory authorities. In this setting, dedicated mandates for economic regulation, social regulation and consumer protection, are delegated to single-purpose regulators. The proper balancing of the various values requires coordination between the different authorities. Proper balancing may, however, yield to ‘institutionalized conflict’ when the mandates of the various authorities are defined broadly (Eckert, 2017: 4). In the integration model, policymakers delegate multiple portfolios to a single regulatory authority. Here, the balancing between the different values becomes a matter of coordination between the various specialized divisions within the authority. Bureaucratic responsiveness in the coordination model is hence a function of inter-organizational politics whereas in the integration model responsiveness becomes subject to internal bureaucratic politics.

Another line of research focuses not so much on the design of regulatory bodies, but on the relations that regulatory authorities build and maintain with their environment (Van Veen, 2014). According to this approach regulatory authorities operate within a ‘regulatory space’ (Hancher and Moran, 1989) that consists not only of traditional political institutions (the executive, parliaments) but also of courts, interest groups, other administrative bodies, the media, experts and target or client groups. To Bryer such ‘collaborative responsiveness’ reflects the extent to which administrators ‘are open to new ways of thinking and behaving and to which they change their thoughts and behaviors according to consensus-based decisions of their stakeholders’ (Bryer, 2007: 487). Here, responsiveness lies in the act of involving stakeholders to the decision-making and deliberative processes. At the same time, administrators are placed between the demands of their stakeholders and their political principals.

Relational approaches are also premised on the widely shared observation that globalization and devolution have forced public agencies into collaborative governance with societal actors under competing ethical and normative obligations (Rhodes, 1997). Accountability studies in this domain stress the ‘vertical',
‘horizontal’ and ‘diagonal’ accountability relationships that regulatory authorities need to maintain with these actors (Black, 2008; Bovens, 2007; Maggetti, 2010; Scott, 2000). Others have studied the involvement of the external actors in the regulatory decision-making processes and the level of responsiveness of regulatory authorities to the preferences prevailing in their environment and the attentiveness of regulatory authorities to heed the preferences of these groups (Kerwin, 2003; Yackee and Yackee, 2006).

The relational approach to regulatory authorities that has become prevalent during the past half-decade is organizational reputation theories (Busuioc and Lodge, 2016; Carpenter, 2010; Carpenter and Krause, 2012). Organizational reputation theories argue that an administrative organization’s strength and autonomy are a function of the ‘set of beliefs about an organization’s capacities, intentions, history, and mission that are embedded in a network of multiple audiences’. To the students of organizational reputation, the ‘understanding [of] how organizational reputations are formed and subsequently cultivated fundamental to understanding the role of public administration in a democracy’ (Carpenter and Krause, 2012: 26). Central to theories of reputation is that organizational reputations are developed exogenously by multiple external audiences on the basis of their judgement of the performance of the organization; and endogenously by the public managers who ‘by necessity and training [are] acutely aware of their audiences and that their audiences monitor them’ (Carpenter and Krause, 2012: 27). A positive reputation on a variety of dimensions from different audiences is crucial for the autonomy and performance of an agency. The ‘courting’ of these different audiences in order to forge a positive image of the organization is a complex endeavour, as it requires a delicate balancing act from the agency. Agencies not only have multiple audiences but are also inhabited by groups with different world views and beliefs about the goals of their organization.

Finally, theories of political representation perceive regulatory policymaking as an alternative to the standard model of representative democracy (Rosanvallon, 2011; Van Veen, 2014). In the standard model, representation is electoral representation (cf. Pitkin, 1967). The rise of ‘non-majoritarian’ institutions spurred the rethinking of political representation. To Rosanvallon (2011), independent regulatory authorities are exemplary for the ‘decentering of democracies’ and harbingers of the ‘new age of legitimacy’. Building further on the new theories of representation, Van Veen has developed a model of representative claim-making by regulators. His main conclusion is that for independent regulatory authorities to ‘gain more democratic legitimacy’, the authorities ‘should ... responsively communicate with the intended consumer constituency ... if they wish their non-electoral representative claims to be more widely understood and possibly accepted’ (Van Veen, 2014: 230). ‘Negotiated responsiveness’ (Bryer, 2007), finally, involves the balancing act bureaucratic agents need to perform with regard to competing demands emanating from the environment upon the bureaucratic decision making. Inherent to negotiation processes is that the bargains that are struck cannot
accommodate the various conflicting demands in a manner that is satisfactory for all stakeholders.

Although these theories of bureaucratic responsiveness are premised on different logics and perspectives on bureaucracy and regulation, they present independent regulatory authorities as sites of contestation between conflicting values. They open a new debate within political science and public administration on the legitimacy of regulation independent from elected politicians. From a design-orientated perspective, value clashes are perceived as regulatory conflicts that need to be resolved primarily through the design of appropriate portfolio mixes and/or coordination mechanisms. From a reputation perspective, regulatory conflicts are considered as potential damages to the reputation and eventually the survival of regulatory agencies – hence the urgency to manage reputations. Finally, representational theories argue that responsiveness to consumers-constituencies, in the form of representational claims, is crucial for the legitimacy of independent regulation.

The approaches thus far suggest, albeit with different reasonings, that regulatory value conflicts can be resolved by responsively acting independent regulatory authorities. We will argue for none of the modes will alleviate the regulator’s ecological problem, even not when there is ‘really responsive regulation’ (Black and Baldwin, 2010). The main reason for this is, we argue like Parker and Hains (2018), that regulatory agencies are constrained in their responsiveness to non-economic values by the strictness of their legal mandates and the dominance of economic thinking. In the following case study, we demonstrate this by describing how the Dutch competition authority addressed the animal-friendly production of chicken meat and the agreement for sustainable and renewable energy sources.

**Case study and data collection**

The research in this paper concentrates on a single regulatory agency, the Dutch Authority for Consumers and Markets (ACM). Two of the cases in which sustainability values were confronted with competition values are selected: the Energy Agreement and the Chicken of Tomorrow agreement. The two cases are not selected randomly. Both cases have raised controversies among policymakers, stakeholders and academics regarding the question of how the agency handled the issues. The Netherlands Authority for Consumers and Markets (ACM) is a relatively young agency that was created on 1 April 2013 as a merger between three previously existing authorities: the Netherlands Competition Authority (NMa), the Netherlands Consumers Authority (CA), and the Netherlands Independent Post and Telecommunication Authority (OPTA). The creation of ACM was part of a cost-cutting programme by the Dutch government, as it was felt that by combining the different agencies into one a more efficient agency could be achieved (Cabinet-Rutte I, 2011).

The primary sources of data for this study originate from interviews and documents of ACM. With the help of a senior staff member of the ACM, one of the
research team members drafted a list of nine appropriate interview candidates to be approached. Another two respondents were added to the list upon the recommendation of other interviewees. All 11 respondents were approached via e-mail between 13 June 2016 and 1 July 2016 and all positively responded to the request. The respondents were selected on the basis of horizontal and vertical differentiation and their involvement with the research topic. The interviews took place between 4 July 2016 and 13 July 2016 at the ACM offices. All interviews were recorded and transcribed by the researcher, using the ATLAS.ti software. All respondents were sent an interview report and agreed on the use of the material for quotes on condition of anonymity. The interviews were done in Dutch and translated by the researcher for the incorporation in this study. The interviews were semi-structured. Respondents received an interview report and agreed on the use of the material for quotes on condition of anonymity.

Documents are used to gather information to support the insights that have been gained from the interviews. Most of the documents are sourced from the official website of ACM. These documents can be divided into two categories: policy documents that give an impression of the general strategy and concerns of ACM, and case-specific documents, such as decisions and communications (e.g. press releases) regarding decisions or analyses. Internal documents were used to clarify details in the timeline. Other sources include parliamentary proceedings, documents from the Ministry of Economic Affairs and the European Commission, and newspaper articles.

**Analysis**

We will examine the manner ACM dealt with the conflicting regulatory regimes in the following ways. First, we discuss the position ACM took on the issue in its various policy documents. Second, we will examine how ACM applied its own position in the two cases of the Energy Agreement and the Chicken of Tomorrow. Finally, we will look at how ACM responded – and defended – its choices vis-à-vis the public in the aftermath of its rulings in these two cases.

**Drafting policy guidelines for sustainability initiatives**

Immediately from the start, ACM released a number of public documents in which the authority positioned competition law in relation to sustainability. On 12 March 2013, shortly before the creation of ACM, its predecessor NMa published a memorandum on ‘The assessment of anticompetitive practices as a result of sustainability initiatives in practice’ (ACM, 2013d). The memorandum formulated guidelines on the interpretation of competition policy in light of sustainability initiatives. After consultation rounds, ACM released a Vision Document Competition & Sustainability in May 2014 (ACM, 2014b). The primary goal of the Vision Document is to give guidance to businesses on the nuances of competition policy.
with respect to sustainability initiatives. In addition to its vision document, ACM did also publish a Strategy Document (ACM, 2014a), in which the topic of sustainability is addressed as one of the recognized public interests. Finally, on its website ACM released a Knowledge Bank on Sustainability where it informed the private sector about models for admissible cooperation between businesses regarding sustainability initiatives (ACM, 2013c).

The Strategy Document reveals that the topic was considered an important issue on the new agency’s agenda. In the Strategy Document, how to deal with the ‘different public interests that play a role’ in the areas relevant to ACM is identified as ‘one of the important questions’. As a multifunctional authority (responsible not only for competition policy enforcement, but also regulation and consumer protection) these include ‘well-functioning markets, optimal regulation of statutory or natural monopolies, and consumer protection’ (ACM, 2014a: 6). In the section that follows, the topic of public interests and competition is discussed. Here, it is acknowledged that ‘a free-market system can sometimes have adverse effects, for example on the environment’. Arrangements between undertakings that have desirable positive effects and also result in negative effects will be assessed as to the ‘necessity, proportionality and effectiveness of such arrangements’ (ACM, 2014a: 7).

It is important to note that the content of the documents reflects ACM’s own view. In other words, the authority drafted its position autonomously from the ministry. Even though the Ministry of Economic Affairs, too, was asked by the Parliament to draft its views on the relationship between competition law and sustainability, which the Ministry formulated in its Policy Rule (Ministerie van Economische Zaken, 2013, 2014), one our respondents declared that the Vision Document was created by us, independently. There was some dialogue with the Ministry, but that was only in clearing up some of the margins. The Policy Rule was made by the Ministry. (R3)

The content of the Vision Document cannot unequivocally be viewed as a step towards a more permissive attitude towards sustainability initiatives. As pointed out by Pijnacker Hordijk (2013), the Vision Document of ACM does not pay any substantive attention to the possibility of exempting sustainability initiatives from the first paragraph of Article 101 TFEU (on ‘ancillary restraints’, i.e. the Wouters doctrine). Some competition experts consider this doctrine to be a legitimate approach to widening the possibilities for sustainability initiatives to be exempted from competition law. One of the respondents recalled that ‘[the Board] chose to follow the cautious line’ (R2), rather than to interpret competition law in a more reformist but uncertain way. The Vision Document makes a reference to the Wouters doctrine, but it does not go further than stating that ‘ACM believes [the Wouters doctrine] has been insufficiently explored yet in the case law in order to be able to make statements on its application in this Vision Document’ (ACM, 2014b: 10).
Applying the guidelines 1: The Energy Agreement

In 2012, under the guidance of the Social and Economic Council of the Netherlands (SER) a large group of governmental and non-governmental stakeholders laid the groundwork for the Agreement on Energy for Sustainable Growth. The newly formed Cabinet-Rutte II soon committed itself to the Energy Agreement and the negotiations on its terms continued well into 2013. The Energy Agreement was comprised of a large and diverse set of ambitious goals including energy savings, an increased share of electricity from renewable energy sources, economic growth and employment. The core of the agreement was to expedite the closing of five coal-fired power plants, which together contributed to approximately ten per cent of the electricity generation capacity in the Netherlands at that time. It was stipulated that this agreement was dependent upon the approval by ACM (SER, 2013: 97).

ACM was aware of the large societal impact that their decision in this case could have. One of the respondents told us

ACM was brand new and this was the first really large decision with a great societal impact. That is something that everybody was aware of. (R6)

To the competition experts at ACM, it was clear from the beginning that the joint reduction of a rather significant proportion of generation capacity would entail an infringement of the principles of competition policy. However, the case also offered the possibility for ACM to showcase the implementation of its Vision Document Competition & Sustainability. The analysis of the Energy Agreement could serve as an example of the guidelines in a real-world case. Not surprisingly, then, ACM concluded that ‘the benefits of the agreement would insufficiently outweigh the negative effects for Dutch electricity consumers’, and therefore it was considered ‘likely’ that the agreement would fall within the scope of the relevant competition laws (ACM, 2013b).

ACM was not, however, insensitive to the political consequences, that is upheaval, of its ruling. There had been discussions within ACM to employ a more encompassing perspective, a ‘social cost-benefit analysis’, to the analysis of the case. This, it was internally discussed, could lead to a more politically favourable outcome. The respondent who had initially suggested this approach told us, however, that he eventually became ‘convinced that that is not what you should do as competition authority’ (R11). Another respondent adds:

we looked at the case from many different perspectives, to see if it wasn’t possible to do it differently. (...) Not everybody was convinced, and not everybody thought this outcome was desirable. (R9)

The discussion resulted into the conclusion that taking a different approach would probably not lead to a different outcome but would decrease the soundness of the analysis (R2).
At the same time that competition experts reached the above conclusion, also their confidence on the soundness and robustness of their standard analyses grew. Studies on the effects of renewable resources, electricity generation, and emission levels of potentially toxic substances, are a well-studied topic within economic analysis. One of the respondents explained:

> With the Energy Agreement we had the luck that there has been much research on this topic, so there was much information available from renowned institutions. This allowed us to do our analysis very well. (R5)

For certain parts of the analysis, ACM received input by the Netherlands Energy Research Centre (ECN) (ECN, 2013). Along the process, ACM staff became more convinced of pursuing a technical analysis. One of the respondents described it as follows:

> You only have techno-analytical concerns; politics no longer plays a role. (...) You don’t stress certain aspects; you just try to work according to the state of the art. (R2)

To ACM’s regret, when the decision was made public, the critical commentaries were indexed on the negligence of animal welfare, an area for which ACM has no mandate nor expertise. The general view was that ACM had failed to take sustainability concerns seriously in its analyses. The first signs of a rift between ACM and the Ministry of Economic Affairs sprang during this phase. To the ministry it seemed as if, one respondent declared, ‘that we had not considered all the benefits. By doing so we had antagonized [the Ministry] very much’. (R2)

### Applying the guidelines 2: Chicken of Tomorrow

The following case ran sequential to the ACM ruling in the Energy Agreement case. After the harsh reception of its decision in the Energy Agreement case, ACM was intent on proving the validity of its guidelines on combining sustainability initiatives and competition law laid down in the Vision Document – and hence the viability of its instrumentally rational perspective on competition regulation. Having observed ACM’s decision in the Energy Agreement case, public opinion had become less certain about the regulator’s guidelines. With the investigation of the Chicken of Tomorrow, ACM hoped to ‘communicate a positive story’ (R1) and hence to sustain its own strategy and vision document, which ACM drafted independent from the ministry.

In February 2013, producers and supermarkets reached an agreement on improving the living conditions chickens by 2020 under the name ‘Chicken of Tomorrow’. The agreement attracted substantial media attention and hereupon ACM initiated an investigation. To ACM, this agreement provided an opportunity to elucidate how sustainability aspects of competition cases could be brought in practice by parties themselves. Firms were uncertain about this and were reluctant
with introducing sustainability initiatives. ACM picked up this case to ‘give more guidance’ to the industry (R2). One of the respondents stated that

Our approach was to provide clarity about what businesses may and may not do under competition law, regarding sustainability initiatives. Apparently, there was a lot of uncertainty which led to a gut feeling saying: ‘We are not going to undertake any action because it will not be allowed by ACM’. (R1)

Much like the Energy Agreement, the Chicken of Tomorrow initiative as heavily publicized by the parties. As such, ACM was aware of the existence of the initiative. One of the respondents recalled:

We thought they might come to us to have a conversation or ask for an opinion, but they didn’t, so we were a bit suspicious. (R11)

This case differed in one important aspect from the Energy Agreement case. Economic studies on animal welfare were scant, a fact that placed the competition experts of ACM on somewhat less firm scientific ground than it was the case in the Energy Agreement. A respondent explained that ‘for animal welfare it is very difficult’ to do a proper analysis (R5). There did not exist an evident method for measuring the improvement in the living conditions of animals. With scientific studies absent, ACM experts resorted to a willingness-to-pay (WTP) analysis:

What we did was that we took something elusive like animal welfare and measured the value that the consumer attaches to it. (R1)

The outcome of the WTP analyses produced negative results. Hereupon ACM approached the parties to discuss with them alternatives to the Chicken of Tomorrow agreement on the table that would fall within the boundaries of competition policy. Instead, ACM encountered resistance against the results of the WTP and, moreover, against the method itself.

To strengthen the confidence in the applied methods, the WTP analysis was reviewed by the Economic Bureau of ACM. At the same time, the Ministry of Economic Affairs was also informed. Although not a party to the agreement, the Ministry supported the Chicken of Tomorrow initiative as the Ministry was by all means a staunch advocate of self-regulatory approaches within the private sector achieve sustainability targets. As such, the Ministry was keen on being informed by ACM on the progress of the case, even though ACM formally had all autonomy to pursue as it wished in its investigations. The Ministry was not pleased by the negative decision of ACM. A respondent explained

But at that time, when we had just started, we didn’t know yet what the outcome would be, on the contrary: there was a hope we would be able to give the go ahead. And the Ministry of Economic Affairs definitely had the same hope. Although they
were not an official party to the agreement, they had a very clear interest. That meant there was quite some pressure from the Ministry. We even went to the Ministry to give an extra explanation of how we came to our conclusions. That is quite unusual and indicates the seriousness of the matter. De facto you can say that there was pressure. But such is life for ACM. You nevertheless hold on to your independence. (R1)

This analysis revealed a disparity between the value that consumers attributed to the improved animal welfare and the increase in price. This disproportionality between the increase in price and the value attached to the improved animal welfare was the foremost reason for ACM to conclude that this agreement would not receive approval on grounds of competition policy. One of the respondents stated that ‘if we would have had the impression that the effect on animal welfare was substantially higher, the decision might very well have been different’ (R10). But, then again, ACM ‘cannot make a judgment on the improvement of animal welfare, because we are no animal welfare experts’ (R6).

In January 2015, ACM concluded their investigation and informed the parties and the Ministry of the final outcome of the assessment and published the analysis (ACM, 2015). The analysis refers to the Vision Document and explains that the Chicken of Tomorrow analysis was done to set an example for self-assessment of sustainability initiatives. The conclusion of the analysis is that the agreements would lead to a restriction of competition that could not be justified under the exception criteria.

**Impact of the decisions and response strategies of ACM**

In the communication of the Energy Agreement analysis, ACM was focused on explaining and justifying the technical aspects of the analysis. Only in hindsight was there a realization that this approach was not appropriate. However, the evaluation of the assessment of the Energy Agreement did not lead to any direct alteration of ACM policy or substantive changes in the way of analysing cases. It did lead to a ‘realization of the consequences of our decisions’ (R3). The political sensitivities of the case had been recognized early on and according to a respondent there was an awareness that ‘we had no friends’ (R5). Communicating the complexities of the case was difficult and this ‘tarnished the public image’ of ACM, as one of the respondents said: ‘For the general public, the story was too nuanced and complicated. What remained was an image of ACM as an impediment to sustainability initiatives’ (R11). The technical approach that was taken in the communication was not, in hindsight, the best approach according to the respondents, one of whom said:

We were too focused on the technicalities, whereas we could have just said: ‘The consumer has not been involved in the negotiations and this is a bad deal for consumers.’ We could have been more assertive in that respect. (R6)
The technical tone of the communication is exemplified by a column by one of the Board Members in the daily business newspaper about a month after the publication of the assessment. In this article, the assessment was justified on the basis of legal and economic nuances in competition policy; the word ‘consumer’ was not mentioned (Don, 2013).

The negative image that had resulted from the Energy Agreement assessment influenced the approach to the Chicken of Tomorrow agreement. First of all, the hope that this initiative would be approved was one of the reasons to decide to investigate the case, as one of the respondents explained:

We would rather have seen the outcome to be that the agreement could be allowed, but unfortunately it wasn’t. At that moment we had some regrets. If we had known the outcome, we might not have picked up the case. (R11)

Another sign of the influence of the Energy Agreement assessment on the approach to the Chicken of Tomorrow agreement was that more attention was paid to the communicative aspects of the case assessment. One of the respondents indicated that when it was recognized that the outcome of the assessment of the Chicken of Tomorrow agreement would point to a ‘no’, the Strategy and Communication Department was included to discuss the question ‘how to sell the “no” in the right way, given the societal pressure in this issue’ (R6). Nonetheless, also with the Chicken of Tomorrow there were problematic aspects in the communication. The first reason for this lies in the method that was employed in the assessment. The willingness-to-pay analysis was not only an uncommon method for the competition experts, but it was also problematic for the communication to the non-professionals. This opened ACM up to a lot of unnecessary criticism, according to one of the respondents:

I think everybody here [at ACM] was convinced the agreement was excessive. But we chose the difficult way of telling that to the outside world. The story was too complicated, and it was too easy to paint a negative picture of us. (R9)

In general, the conflict between competition interests and other public interests, such as sustainability, put ACM in a difficult spot. The mandate of the enforcement of the competition laws limits ACM in the decisions they make. Since the Energy Agreement and the Chicken of Tomorrow, the realization has been that communication is vital in the handling of this conflict. One of the respondents described it as follows:

Public interests are usually not our core business, but that of another institution. That means that an important aspect of our organisation is communication and sensing how society values public interests and how we should relate to that. But that does not necessarily mean that you have to do things differently. It also has to do with the way in which you communicate, so that people recognize that you have seen things from their perspective. (R7)
The relevant concern in considering public interests such as sustainability in the enforcement of competition law, is whether ACM has the authority to assign value to public interests other than competition interests. The assessment of the Chicken of Tomorrow and the Energy Agreement shows that ACM adheres to its mandate and professional standards. One of the respondents explained that this approach is problematic:

In both cases we established that the [sustainability] goal was undisputed, but the way to achieve that goal was expensive and could be smarter. Due to the way it was arranged in legislation we were forced to say ‘no’, and society did not accept that, because they agree with the goal. They accept that we can say when it is unnecessarily expensive, but they don’t accept that we then say ‘no’. (R7)

The only instrument that ACM has to try to mitigate this problem is in its communication, as indicated by another respondent:

The trick is to show the outside world the connection. That is not always easy, because you have to explain your assessment framework, which has a very economic-legal background, in language that people recognize. So, I see it as a communication problem. (R11)

The external communication has the task of explaining how and why ACM does what it does. The respondents indicated that the message they have to bring across can be difficult. The focus on communication is therefore seen as a continuous and fundamental aspect of the work of a competition authority. However, the conflict between different public interests has implications for other institutions as well. One of the respondents explained that the Ministry of Economic Affairs has similar concerns as ACM:

We have to find the right way of telling the story continuously, balance it, because it is not that we only stand for competition interests. We can and want to consider other public interests as well, but to do so requires that the public interest is clearly defined. (...) We see the Ministry struggling with their message. (...) I think the Ministry has difficulties in their message on the bigger picture of the conflict between free market policy and other interests. With other Ministries you see that they can identify with one interest and represent their stakeholders. The free market doesn’t have such clear stakeholders. (R9)

**Conclusion**

To what extent can regulatory authorities act responsively in the face of conflicting value sets? The answer to our question, which is admittedly based on a small number of cases within a single regulator, must be: quite limited. Our case study
shows that the legal and regulatory frameworks of competition law leave a regulator little room to balance economic with non-economic values in ways that allow the regulator to be responsive to broader ecological concerns and values. Really ecological regulation where regulators ‘must listen to and allow regulation by diverse human and non-human actors, and ultimately earth systems ... to connect different substantive policy goals or problems’ (Parker and Haines, 2018: 153) is a far cry. Whereas, on the one hand, ACM remained determined to uphold its responsiveness to the Ministry and to the laws and regulations that are entrusted to the competition authority, the agency, on the other hand, also pursued approaches to consider the values of the target groups and stakeholders. The latter were invited to partake in the deliberations prior to decision making and were given a position in the process. The agency developed new tools explicitly for assessing non-economic values displaying the agency’s intellectual flexibility in striking in the staffers’ eyes necessary balances. However, what has become clear from the data, all attempts of the competition authority to achieve a level of inclusiveness were mainly pursued from the idea that the forbidden agreements in both cases represented an externality to the food and energy markets, respectively.

Would another portfolio allocation or coordination mechanism have improved the agency’s responsiveness? Our answer is no as regulatory re-designs will not address the instrumental rational approach to regulation underlying the prevailing regulatory institutions. The case study does show that reputational and accountability concerns did play an important role in how the authority engaged with the environment following the public reactions after its Energy-decision and in anticipation of the public’s reaction before and after the Chicken-decision. However, reputational management by the authority was primarily a means for the agency to explicate its decisions and to maintain its legitimacy amidst a public critical to its decisions. Finally, representational claim-making was limited to the claims of Dutch consumers. The authority spends much effort to represent the consumer interest through the calculation of the effects of the sustainability initiatives on consumer prices for energy and chicken meat. But ‘consumer interest’ is not same as citizens’ ecological interests. By representing the citizen in his capacity as consumer, the authority has – by the narrowness of its mandate – failed to incorporate the importance of a sustainable environment for citizens.

In general, the establishment of independent regulatory authorities inaugurated an era of unelected non-majoritarian institutions, operating in horizontal governance landscapes, and confronting the challenge of managing a fine balance between often conflicting values. Responsiveness has therewith become an essential element of the legitimacy of democratic systems with post-electoral tendencies. In this study, we have illustrated some of the tensions and dilemmas that challenge competition authorities as they face the competing ethical and normative obligations that guide responsiveness to the sustainability issue. When governments of developed economies embarked on the path of creating competition and other market
regulatory authorities, the dominant policy paradigm dictated neo-liberal economic agendas. Regulatory authorities have frequently been challenged to engage with cases where one cherished public value (competitive markets) clashes with other public values (sustainability, security). Regulatory authorities, however, do not seem programmed for weighting and balancing the value sets. Quite the contrary, the laws that govern the functioning of regulatory authorities prescribe regulators to give prevalence to competition values over other, non-competition values. Regulatory decisions in specific cases have become contested by stakeholders and, as in sustainability issues, broad public audiences.

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Notes
1. Although there is overlap in the basic ideas guiding bureaucratic responsiveness and the concept of responsive regulation differ somewhat. Simply put, whereas ‘bureaucratic responsiveness’ is about the level of inclination of public officials to take into account the preferences and interests of private and societal actors that targeted by the policies they develop and implement, responsive regulation is more specifically a regulatory strategy that aims at achieving compliance to regulatory goals, preferably, in correspondence with regulatees.
2. While regulation requires interactions between regulators and a host of other stakeholders, the perspective of collaborative governance studies does not satisfactorily apply to the context within which regulators operate. The main reason is that interactions between regulators and other actors is often strictly regulated by (administrative) law. Of regulators is expected a high degree of impartial and professional but pertinent judgements that do not lend themselves for compromises with regulatees.
3. Four different reputations are distinguished: performative, moral, procedural, and technical reputation.
4. As in all studies with single cases, the potential pitfalls of external validity need to be addressed. ACM is the main and single competition regulator in the Netherlands and cannot be compared to any other competition authority in the country. However, the findings will be transferable, we believe, firstly, to EU Member States’ competition authorities. EU competition policy is strongly centralized and harmonized domain – all authorities are part of the European Competition Network and steered by DG Comp of the European Commission. Secondly, other regulatory authorities in notably but restricted to areas as finance and banking have to deal with regulatory conflicts and conflicting regimes. Hence, while the findings of ACM are quite generalizable to other competition authorities in the EU, the dilemmas of responsiveness ACM experiences will be recognizable to a multitude of other regulators as the domains they are regulating have known conflicts between regimes as well.
5. Respondents were all interviewed with the guarantee of anonymity. Three respondents work in the Strategy and Communications Department, four respondents work in the Competition Department, one respondent works in the Office of the Chief Economist, one respondent works in the Legal Department, and two respondents are Board Members. Besides the two Board Members, the selection includes three Directors and six (senior) staff members.

6. A model interview guide is available upon request.

7. For a discussion of ACM's legal mandate regarding the balancing of competing public interests in these fields, see Bos et al. (2018).

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