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Registered
Stek Avocaten B.V.

The Hague, 24 February 2022

Number of enclosures: 1
Our Reference: ACM/UITNZP/001356
Contact:
Subject: No action letter for Agreement among distribution system operators
regarding CO₂ valuation

Dear ,

This letter is in response to your request to The Netherlands Authority for Consumers and Markets (ACM), filed on behalf of the distribution system operators (DSOs), for informal guidance with regard to the draft Guidelines regarding sustainability agreements.¹ ACM's assessment of the agreement, planned by the DSOs, is included in the annex and is based on the information that you and your clients have provided. Based on this assessment ACM has decided to not further investigate this agreement.

In March 2021, the DSOs informed ACM of their plans for an agreement to use a uniform internal CO₂ calculation price in their purchase and investment decisions. The objective of this agreement is to take into account CO₂ emissions in a uniform manner in investment and purchase decisions in order to reduce CO₂ emissions in their procurement activities.

ACM has assessed the proposed agreement in accordance with the basic principles of its draft Guidelines regarding sustainability agreements. On the basis of the submitted facts, ACM has come to the conclusion that it cannot be ruled out that the agreement may appreciably restrict competition, even though the DSOs do not compete directly with each other because they operate in mutually exclusive territories. However, even when assuming that the DSOs compete directly, ACM considers likely that the agreement would benefit from the exemption offered by Section 6, paragraph 3 of the Dutch Competition Act. In the Annex to this letter, ACM sets out its assessment.

ACM may assess the agreement again in more detail in future, for example if a complaint against the agreement were filed. However because you have sought our prior view in this matter, even if

¹ <https://www.acm.nl/nl/publicaties/2e-concept-leidraad-duurzaamheidsafspraken-mogelijkheden-binnen-het-mededingingsrecht>.

new facts and circumstances reveal more serious competition problems, ACM will not impose a fine but instead look for a solution together with the parties to the agreement.

The assessment of this sustainability agreement shows that arrangements between undertakings can help realize sustainability objectives in an effective manner, and contribute towards meeting national and international climate targets. ACM notes that the use of a uniform internal CO₂ calculation price for purchase and investment decisions could also be easily applied in other sectors of the Dutch economy and may as such set a useful precedent.

Do you have questions?

If so, please do not hesitate to contact [...] who is your casehandler, by [...].

Yours sincerely,

The Netherlands Authority for Consumers and Markets,
On its behalf,

M. Denkers BA, MSc, MBA
Director
Competition Department

Annex 1. Assessment of planned agreement between DSOs

Outline of the planned agreement

1. The planned agreement between the distribution system operators (DSOs) concerns the use of a uniform internal CO₂ calculation price in purchase and investment decisions. In the Netherlands, the DSOs are responsible for approximately 2-3% of total CO₂ emissions. These emissions are primarily caused by grid losses, gas leakages, and network components. Prompted by their social responsibility and sustainability ambitions, several DSOs took the initiative and decided in 2020 to study in greater detail how they would be able to further reduce CO₂ emissions. They agreed to start using a common CO₂-calculation price in purchase and investment decisions, starting with a price of 50 euros per ton CO₂, combined with annual adjustments following an evaluation. The planned agreement is supported by Netbeheer Nederland, the trade association of all Dutch system operators for both electricity and natural gas.
2. System operators play a role in the realization of climate targets. One of the ways in which they can help realize those targets is by pricing CO₂ internally.² Several system operators had already used internal individual calculation prices prior to the planned agreement, ranging between 20 and 40 euros per ton CO₂. These calculation prices are, however, not high enough, according to the system operators, for choosing other technical solutions and realizing climate targets.
3. In order to determine the level of their common CO₂ calculation price, the DSOs follow the most recently available efficient CO₂ prices, estimated on the basis of the prevention cost method by the CPB Netherlands Bureau for Economic Policy Analysis (CPB) and the PBL Netherlands Environmental Assessment Agency (PBL)³. An efficient price is the social valuation of the necessary CO₂ emissions reduction to the level as formulated in the Dutch climate policy objective, achieved at the lowest possible costs (including those to society). As such, the DSOs follow the approach taken by ACM in its draft Guidelines regarding sustainability agreements (hereafter: the Guidelines).⁴ Commissioned by the DSOs, research agency CE Delft developed a tool for determining CO₂ emissions of different purchase and investment options for the main regional network inputs.

The use of shadow prices

4. Each climate target has its own efficient price (the so-called shadow price). The level of this shadow price depends on the maximum global temperature increase in degrees Celsius that is targeted. For example, if a global temperature increase of no more than 4 degrees Celsius is targeted, the government will have to consider less expensive alternatives than in a scenario where an increase of no more than 3 degrees Celsius is targeted. As a general rule, the higher the efficient price is, the lower the temperature increase is that the government would aim for. The PBL uses a different efficient price for each target.

² ACM assumes in this assessment that the suppliers of DSO's are not subject to the EU Emissions Trading System (ETS).

³ <https://www.cpb.nl/sites/default/files/omnidownload/CPB-PBL-Achtergronddocument-23nov2016-WLO-klimaatscenario's-en-de-waardering-van-co2-uitstoot-in-mkbas.pdf> (in Dutch).

⁴ Draft version of ACM's Guidelines regarding Sustainability Agreements, section 58.

5. With regard to the common calculation price, the DSOs follow the target of limiting global warming to 2 degrees (the 2-degree scenario). The PBL and CPB's analysis of the 2-degree scenario offers a range⁵, where, in each year, the system operators roughly take the midpoint of the range. By calculating the average efficient price for 2050 back to the present, the DSOs arrive at a calculation price of €200 for the year 2020. Since July 2021, the DSOs have used an internal CO₂-price that can gradually increase as a percentage of the PBL's basis for efficient prices. The system operators started with a percentage of 25% of the PBL's basis, which was €50 per ton CO₂.
6. In its assessment of the planned agreement, ACM follows the shadow prices that were set for the 2-degree scenario, and follows the approach taken by the system operators by taking the middle of the range as the starting point for the shadow price. In its assessment of the planned agreement, ACM also uses the average shadow price per year as the efficient price. In that context, ACM notes that, as time goes by, the CPB and the PBL can adjust the efficient prices if they adjust or update their estimates. It is up to the system operators to keep on checking themselves whether or not the common calculation price that they use follows the most recent shadow prices.

ACM's assessment

7. In each region of the Netherlands, only a single DSO is active, which means the DSOs do not directly compete with each in the 'normal' sense of the word. However, they do compete on costs in an indirect way. The reason is that they are subject to sector-specific regulation based on yardstick competition, which provides an incentive to minimize costs. Regulated network tariffs are set on the basis of cost data from all DSOs, which means that a DSO that manages to reduce cost more than the other DSOs has a benefit. As a result, the DSOs have an incentive to minimize costs. This incentive mechanism is put in place to accommodate for the lack of 'normal' competition. The goal is that the regulation brings about the benefits of competition, such as avoiding monopoly prices.
8. As the DSOs are no competitors in the 'normal' sense it is uncertain whether Section 6, paragraph 1 of the Dutch Competition Act (Mw) is applicable. Because yardstick competition as above mentioned is intended to replace cost competition and has an impact on prices and quality in the relevant market, it cannot be ruled out that the DSO's are competitors in the framework of competition law. In that case the planned agreement falls in principle under the scope of Section 6, paragraph 1 of the Dutch Competition Act (Mw). The system operators have agreed to implement the planned agreement regarding a common internal CO₂ calculation price, which uniformizes part of the purchase decisions, and, as such, may affect the costs DSOs incur and the outcome of the previously explained yardstick regulation.
9. On the basis of the submitted facts, and assuming that the DSOs are competitors, ACM still comes to the conclusion that the planned agreement does not have the object of restricting competition, and that, with the planned calculation price of €50 per ton CO₂, it is currently unlikely that competition could be impeded appreciably. The system operators expect that, with this calculation price of €50 per ton CO₂, the investment decisions will

⁵ ACM: PBL prices are: 60-300 euros per ton CO₂ in 2015, 100-500 euros in 2030, and up to 200-1,000 euros per ton CO₂ in 2050 for the 2-degree scenario. Source: <https://www.cpb.nl/sites/default/files/omnidownload/CPB-PBL-Achtergronddocument-23nov2016-WLO-klimaatscenario-en-de-waardering-van-co2-uitstoot-in-mkb-as.pdf> (in Dutch)

hardly deviate from a scenario without the agreed upon calculation price. However, ACM does not rule out that, with higher common calculation prices of, for example, €200 per ton CO₂ or higher, competition can be appreciably restricted in the long term.

10. So in case it turns out that the DSO's are competitors within the competition framework and the planned agreement happens to restrict competition appreciably ACM carries out an assessment under Section 6, paragraph 3 of the Mw, and applies the draft Guidelines to the planned agreement.

Benefits of the environmental-damage agreement

11. The planned agreement is an environmental-damage agreement within the meaning of ACM's draft Guidelines.
12. Due to the specific nature of CO₂ emissions and their negative impact, both consumers in the relevant market will substantially benefit from a reduction, and persons outside the relevant market will benefit from the advantages offered by the agreement. Based on its analysis as set out more fully below ACM concludes that the consumers within the relevant market receive a fair share of the benefits in the sense of appreciable objective advantages in line with the EU case law on this matter.
13. As explained in ACM's draft Guidelines, shadow prices are used for expressing in monetary terms the social benefits of environmental-damage agreements. Since in this case the group of consumers substantially overlaps with the group that benefits from the agreement, the assessment is whether these benefits in monetary terms sufficiently offset the costs of the agreement. By using shadow prices, it can be determined what monetary value must be given to the benefits that the planned agreement will make through the realization of a CO₂ reduction. In such a quantitative analysis, the key question is whether the cost-benefit analysis results in a positive outcome, which proves that the environmental-damage agreement helps realize, in an efficient manner, concrete policy objectives. In that context, it should be noted that at this stage the DSOs themselves are not able to estimate properly what the agreement's total costs and benefits are. After all, this will depend on the opportunities in purchase and investments decisions in the future to opt for alternatives with fewer CO₂ emissions.
14. The costs of the agreement – and the harm in terms of price increases - are the extra costs that the system operators will incur. This is the difference between, on the one hand, the chosen, less polluting yet more expensive, investment, and, on the other hand, the costs of the investment with the lowest price that would have been selected without settlement of the CO₂ costs. These are the total costs of the agreement.
15. The benefits of the agreement are the value of the CO₂ emissions that are avoided. This is the difference in CO₂ emissions because, with the help of the common internal CO₂ calculation price, another, less polluting investment is chosen compared with the least expensive option (excluding the CO₂ costs). These CO₂ savings are multiplied by the efficient price / shadow price. These are the total benefits. ACM will explain how such a cost-benefit assessment can be made, using the hypothetical example below.

Hypothetical example

16. Suppose the DSOs choose a common internal calculation price of €100, and the efficient price is €100 per ton CO₂. A distribution system operator has a choice between i) option A, with total costs of €2 million and CO₂ emissions of 5,000 ton CO₂ and ii) option B with total costs of €2.2 million and CO₂ emissions of 2,000 ton CO₂.
- Without a CO₂ calculation price, the system operator chooses option A, with costs of €2 million, and 5,000 tons of CO₂ emissions.
 - The costs for investment A are lower than the costs of investment B: Investment A costs €2 million compared with €2.2 million, which are the costs of investment B.
 - With an internal calculation price of €100, the DSOs choose option B, with costs of €2.2 million and 2,000 tons of CO₂ emissions.
 - The costs for investment A are higher than the costs of investment B: Investment A costs €2.5 million compared with €2.4 million, which are the total costs of investment B.

Costs of the agreement are the difference between the costs that the DSOs incur in the scenario with and without the calculation price. In this example, that is €0.2 million.

Benefits of the agreement are the efficient price times the saved CO₂ emissions: in this example, €100 * 3,000 = €0,3 million.

As a result, the costs of the agreement are lower than the benefits, which means the criterion of having the benefits offset the costs has been met.

17. As shown by the example, the costs of the agreement are not directly linked to the common internal calculation price. The extra costs would have been €0.2 million with any calculation price over €67. With a calculation price lower than €67, investment A would have been more economical for the system operator, the more polluting investment would have been chosen, and the agreement would not have had any effect on the investment decision. In the example, the total costs and benefits are easy to calculate. In practice, however, this is much more difficult, and each system operator can only do so for each individual purchase decision.
18. Another way to make the cost-benefit assessment is to look at the costs per saved ton of CO₂ and to compare these with the efficient price. In this example, the total costs per saved unit of CO₂ (€200,000 / 3,000) are €67. The efficient price is €100. The costs per saved ton of CO₂ are lower than the highest efficient price, which means the agreement is an efficient contribution to the reduction of CO₂ emissions.
19. In the example, the costs per ton CO₂ are lower than the maximum efficient price. The costs per saved ton of CO₂ are always equal or lower than the used internal calculation price, and *can never be* higher than the calculation price, which is the case in this example too, where a calculation price of €100 leads to costs of €67. When applied to the case that has been submitted to ACM, the costs per saved ton of CO₂ will always be lower or equal to the shadow price / efficient price, if the system operators set their calculation price equal to the shadow price or lower.
20. ACM therefore sees that the agreement will always sufficiently offset the costs of the agreement if the used internal CO₂ calculation price is, at the most, equal to the CO₂ shadow price. For the planned agreement, the costs and benefits that are actually realized are difficult to estimate. However, the internal calculation price and the shadow price are

known. The common internal calculation price in the planned agreement will eventually be no more than 100% of the average efficient price that is determined by the PBL and the CPB. The shadow price that ACM uses in the assessment of the case at hand is the same average efficient price in that year. Since the maximum actual costs per saved ton will not be higher than the average efficient price, the benefits will always offset or equal the costs of the agreement. The agreement is therefore likely to meet criteria 1 and 2 of Section 6, paragraph 3 of the Mw.

Necessity

21. The necessity criterion means that it is plausible that the sustainability agreement (on all points) is necessary for the realization of the sustainability objective and for the thereto-associated sustainability benefits. In that context, it means that (i) the agreement in itself is indispensable for realizing the benefits *and* (ii) that each of the individual restrictions of competition resulting from the agreement do not go beyond what is necessary in that effort.
22. The calculation price proposed by the system operators of €50 per ton CO₂ in the year 2021 is higher than the previously used calculation prices of some of the system operators (€20-€40 per ton CO₂). According to the system operators, these calculation prices are not high enough for realizing the objectives that have been set. The DSOs argue that, at the individual level, they cannot or do not want to raise the calculation prices unilaterally because they do not want to find themselves at a disadvantage after the competitive benchmark. In the absence of a uniform internal CO₂ calculation price, each DSO will, in principle, be stimulated to buy as economically as possible, and, in that process, not take into account CO₂ emissions. The planned agreement does ensure that, by taking into account CO₂ emissions, a DSO does not realize a more negative result, i.e. higher costs, than other system operators. In addition, the DSOs, together with CE Delft, were able to invest in a tool that helps them estimate the expected CO₂ emissions and savings for the main investment or purchasing projects. That is why the planned agreement is apparently necessary for making the DSOs make sustainable yet more expensive investments. The planned agreement does not only result in a higher CO₂ calculation price, but it also commits the DSOs to a growth path to make their operations more sustainable.
23. Moreover, the planned agreement follows the shadow prices set by the PBL and the CPB that reflect the government's most efficient measures. As long as the system operators do not set the calculation price too high, which means not higher than the average of the range of the shadow price set by the PBL and the CPB, it can be assumed that the planned agreement is cost-efficient.

Residual competition

24. With regard to the criterion of Section 6, paragraph 3 of the Mw, which stipulates that sufficient residual competition must remain on the market, ACM considers in the Guidelines that, as long as the market participants involved are able to compete with each other on other important parameters through competitive benchmarking, sufficient room for mutual competition will continue to remain, even with market-wide agreements.
25. The planned agreement is a market-wide agreement as it is an agreement between all DSOs in the Netherlands and all DSOs are members of Netbeheer Nederland. Nevertheless, ACM believes that the planned agreement leaves the system operators sufficient scope to compete with each other. Even with the planned agreement, system operators will be stimulated to look for the most efficient assets and investments, after

expressing the expected CO₂ emissions into monetary terms. In the development of their product ranges, suppliers will be incentivized to develop products that score favorably on CO₂ emissions, but, at the same time, also score favorably on purchase costs for the system operator. After all, the purchase decision is made on the basis of the sum of the purchase costs and the CO₂ valuation. In that context, it should be noted that the system operators do not directly compete with each other, but only compete with each other on costs, through the regulatory instrument of yardstick competition.

Effect on trade between member states/Article 101 TFEU

26. As stated above the planned agreement includes all DSOs in the Netherlands that are members of Netbeheer Nederland. Such agreement could in principle affect trade between member states. But as it solely concerns regulated yardstick competition and there are important entrance barriers, it is unlikely that the agreement affects trade between member states.

Conclusion

- 27 Even though the DSOs are no direct competitors for customers, the planned agreement may indirectly result in restrictions of competition through the regulatory instrument of yardstick competition. ACM has therefore assessed the planned agreement according to its draft Guidelines. On the basis of the information that has been submitted by the parties to the agreement and their advisors, ACM has come to the conclusion after an initial analysis that the planned agreement meets the criteria set out in the draft Guidelines. ACM concludes that there is no need for a further investigation into the planned agreement. However, this is on the condition that the system operators continue to evaluate whether the calculation price that they have chosen each year does not exceed the average of the range of the most recent shadow prices for that year that the PBL and the CPB use in their publications.
28. ACM has decided to not further investigate the planned agreement based on the information that has been submitted to ACM. Should the agreement prompt any complaints to be filed with ACM, ACM may launch a further investigation. In line with our approach to sustainability agreements, such an investigation will, in any case, not be aimed at imposing any sanctions, but, at the most, at adjusting the initiative if such would be necessary to increase its compatibility with the Dutch Competition Act.