

ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'

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Summary

In May 2014, the Netherlands Authority for Consumers and Markets (ACM) released its Vision Document on Competition and Sustainability. In that document, ACM provided clarity about how sustainability initiatives are tested against competition regulations, and about what room there is for these kinds of initiatives. The Vision Document gives businesses tools to be able to assess for themselves whether or not a planned collaboration with regard to sustainability is allowed under the competition rules. In order to give even more insight into how ACM assesses sustainability initiatives, ACM has carried out an analysis of the so-called 'Chicken of Tomorrow.' The 'Chicken of Tomorrow' is the name for sustainability arrangements made between producers and retailers about completely replacing from 2020 regularly-produced broiler chicken meat that is currently part of the standard product range of supermarkets.

On the basis of available information, ACM comes to the conclusion that the sustainability arrangements concerning the 'Chicken of Tomorrow' result in a restriction to competition in the consumer market for broiler chicken meat. In line with its Vision Document, ACM has therefore examined in detail whether these sustainability arrangements are still allowed because they meet the four so-called exception criteria laid down in competition regulations. ACM analyzed the costs and benefits with regard to animal welfare, the environment, and public health. As part thereof, it looked into, among other aspects, how much value consumers attach to the measures for the improvement of animal welfare of broiler chickens. ACM's analysis has revealed that the benefits of these sustainability arrangements do not offset the costs. Furthermore, ACM believes that less far-reaching measures are possible that may also lead to making the chicken meat offered in supermarkets more sustainable such as improved consumer education about the options with regard to sustainable chicken meat.

Following from the above, ACM very recently already advised the organizers behind the 'Chicken of Tomorrow' to adjust their sustainability arrangements so that they can comply with competition regulations.

Introduction

In its Vision Document on Competition and Sustainability (hereafter: Vision document), ACM reveals how it tests sustainability arrangements against competition law, and what room there is for these kinds of arrangements. In the Vision document, ACM explains in what cases sustainability arrangements can be incompatible with the prohibition of cartels (*more specifically Section 6, paragraph 1 of the Dutch Competition Act and/or Article 101, paragraph 1 of the Treaty on the Functioning of the European Union*). In addition, ACM provides insight into under what conditions these types of arrangements may qualify for exceptions based on the four so-called exception criteria (*more specifically Section 6, paragraph 3 of the Dutch Competition Act and/or Article 101, paragraph 3 of the Treaty on the Functioning of the European Union*). Furthermore, the Vision document clarifies the way ACM assesses sustainability initiatives within the boundaries of the [Policy rule on competition and sustainability](#) of the Dutch Minister of Economic Affairs of May 6, 2014.

The Vision Document gives businesses tools to be able to assess for themselves whether or not a planned collaboration with regard to sustainability is allowed under the competition rules. The basic principle is that businesses do this themselves. In this specific case, ACM has carried out an analysis of the sustainability arrangements of the ‘Chicken of Tomorrow’ in order to give businesses an example of what a competition-law assessment of sustainability arrangements entails.

Details of the sustainability arrangements regarding the ‘Chicken of Tomorrow’

At a roundtable discussion in February 2013, organizations in the poultry industry, the broiler meat processing industry and the supermarket industry made arrangements about the production of broiler meat. The objective of these arrangements is making the chicken meat offered in Dutch supermarkets more sustainable.

Meat production methods attract a lot of public attention these days. The media, lawmakers and consumers discuss about, for example, animal welfare with regard to keeping and slaughtering animals. In response thereto, the Dutch cattle breeding industry indicated it wished to change production methods. To that end, a declaration of intent was signed in 2012 (also called the ‘The Treaty of Den Bosch’) in which the selling of ‘only sustainably produced meat’ was defined as a goal. A related initiative is ‘*Ander Vlees 2020*’ or ‘*Different Meat 2020*,’ which is a more detailed interpretation of said declaration of intent. As part of the latter initiative, the ‘Chicken of Tomorrow’ was launched. The arrangements include the complete replacement of regularly-produced broiler chicken meat that is currently part of the standard product range of supermarkets with the ‘Chicken of Tomorrow’ from 2020.

More specifically, the organizations involved in the ‘Chicken of Tomorrow’ initiative agreed on the following:

- *The introduction of a new, slower growing chicken breed for the basic chicken meat varieties. This chicken will have a lower growth rate of, at the most, 50 grams/day. A slower growing chicken is able to move more, and needs less antibiotics.*

- *Fewer chickens per square meter in broiler chicken barns. A 10% reduction of the occupancy rate from 42 to 38 kilos per square meter, which, in practice, means from 21 to 19 chickens per square meter.*
- *Good litter materials (more straw) and additional distraction materials (such as roosting poles and straw bales) for the chickens. As a result, the risk of foot pad lesions decreases considerably.*
- *Strict enforcement of compliance with legal animal welfare standards, thereby keeping the number of injuries to the foot pads and breasts to a minimum.*
- *In the barns, it will be dark for at least six consecutive hours, allowing the chickens to have a natural circadian rhythm. As a result, the chickens are more relaxed, and they suffer fewer injuries.*
- *Reduction of the use of antibiotics by setting stricter requirements. Antibiotics are only used if animal welfare is at issue (with serious symptoms of an illness).*
- *100% use of RTRS-soy (sustainably grown soy in accordance with the standards of the ‘Roundtable for Responsible Soy’) in animal feed.*
- *Various environmental measures such as reduction of ammonia emissions and particulate emissions, complete manure processing, reducing the CO2 ‘footprint’, increasing the share of European protein commodities (in those cases where it’s more sustainable) and making energy more sustainable (green natural gas).*
- *The Chicken of Tomorrow is a new minimum standard. The supermarket chains continue to have the freedom to sell chicken meat products that have production features that are more sweeping, such as chicken with the ‘Better Life’ label (‘Beter Leven’ of the Dutch Society for the Protection of Animals) and organic chicken meat.*

These arrangements concern buying conditions for supermarkets. The supermarket chains involved in the ‘Chicken of Tomorrow’ will adjust their buying conditions to these criteria. This means they will buy and sell chicken meat products that meet at least these features. The abovementioned criteria are applied in such a way that, according to the organizations involved, it continues to be possible having a profitable production method in the poultry industry. The arrangements do not apply to the production of chicken meat that is sold by butchers, poulterers and market traders. In addition, chicken meat that is exported (approximately 70 percent of national production) does not fall under the proposed criteria. The sustainability arrangements concerning the ‘Chicken of Tomorrow’ go further than the statutory minimum requirements that apply to commercial poultry farming in the Netherlands.

The organizations involved have already started on the initial steps in order to have realized the objective of the sustainability arrangements before 2020. After all, it has been agreed on to have regular chicken meat in the participating supermarkets be completely replaced by the ‘Chicken of Tomorrow’.

Analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' by ACM

Effects on competition

Dutch competition regulations (Section 6, paragraph 1 of the Dutch Competition Act)

In line with ACM's Vision document on Competition and Sustainability, ACM first analyzed what the effects of the sustainability arrangements concerning the 'Chicken of Tomorrow' are on competition in the market. In other words, ACM assessed whether these arrangements fall under the so-called prohibition of cartels of Section 6, paragraph 1 of the Dutch Competition Act. This section says that arrangements between businesses about important competition parameters such as price or production volumes, restrict competition in a market. Such arrangements are not allowed under the prohibition of cartels.

ACM establishes that the sustainability arrangements concerning the 'Chicken of Tomorrow' lead to a restriction to competition in the consumer market for chicken meat. As such, the arrangements violate the prohibition of cartels. As a result of the arrangements, consumers from 2020 will no longer be able to purchase regularly-produced chicken meat in Dutch supermarkets. The consumers' freedom of choice is thus restricted. On top of that, by far the biggest share of chicken meat that is sold in the Netherlands to households is sold in supermarkets. ACM therefore believes that the sustainability arrangements concerning the 'Chicken of Tomorrow' also have a considerable effect (real or potential) on the consumer market for chicken meat.

European competition regulations (Article 101, paragraph 1 of the TFEU)

ACM has also assessed whether the sustainability arrangements concerning the 'Chicken of Tomorrow' have any effects on other countries in the European Union and whether the European competition rules therefore also apply to these arrangements. According to ACM, the arrangements have cross-border effects, thereby also violating European prohibition of cartels laid down in Article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU).

Dutch supermarkets buy chicken meat from producers, traders, or suppliers both domestically and abroad. There is a substantial import of chicken meat into the Netherlands, which largely comes from our neighboring countries. Under the arrangements, non-Dutch chicken meat that does not meet the buying criteria of the 'Chicken of Tomorrow' cannot be sold to participating Dutch supermarkets. The participating Dutch supermarkets have locations throughout the Netherlands. The arrangements thus cover the entire country. According to the courts, arrangements that cover the entire area of a member state present obstacles to the free movement of goods and services, provided that the participating organizations in the member state involved enjoy a high market share. With regard to the arrangements concerning the 'Chicken of Tomorrow,' that is the case: the participating supermarkets sell approximately 95 percent of all chicken meat sold to consumers in the Netherlands.

Analysis of the exception criteria

Arrangements between or behavior among undertakings or organizations of undertakings that restrict competition may sometimes have benefits that compensate the drawbacks of the restrictions to competition. If certain criteria are met, such arrangements or behavior may be yet allowed. The exception criteria, as referred to in Section 6, paragraph 3 of the Dutch Competition Act, come down to the following:

1. *The anticompetitive arrangement must contribute to the improvement of production or distribution, or to the promotion of technical or economic progress;*
2. *Consumers are to be allowed a “fair share” of these benefits;*
3. *The anticompetitive arrangement must be necessary and proportional to the attainment of the efficiencies that are realized by the arrangement;*
4. *Sufficient residual competition must continue to exist in the market.*

Testing against European regulations, more specifically Article 101, paragraph 3 of the TFEU, is practically the same since these contain the same exception criteria as the Dutch Competition Act.

These criteria provide insight into the potential room for sustainability arrangements. In this case, ACM has analyzed the sustainability arrangements of the ‘Chicken of Tomorrow’ to give businesses an example of what a competition-law assessment of sustainability arrangements entails. In principle, businesses carry out such assessments themselves.

ACM’s analysis concerns the retail market, which is the consumer market of chicken meat. As part of arrangements concerning the ‘Chicken of Tomorrow,’ several improvements to the production process are named. For example, it is claimed that the ‘Chicken of Tomorrow’ leads to an increase in animal welfare, and that it has positive effects to the environment and public health.

It is discussed below how the four exception criteria apply to the ‘Chicken of Tomorrow’.

1. Is there an improvement to the production or distribution process, and/or a promotion of technical or economic progress?

In order to be able to answer this question, ACM examined the potential benefits of the ‘Chicken of Tomorrow’ for consumers. The arrangements’ benefits and costs have been analyzed with regard to animal welfare, the environment and public health. This analysis was based on data collected by ACM from the participating organizations, and on opinions of animal welfare experts, among others. A report of the full ACM study (in Dutch) has been included in the annex (*‘Economische effecten van de Kip van Morgen’*, ACM Office of the Chief Economist, October 2014).

The effects of the arrangements concerning animal welfare, the environment and public health benefit consumers if consumers attach actual value to them. So this is about the value that consumers attach to the effects, for which no ‘market price’ necessarily exists. However, ACM does assume that the additional costs to implement the arrangements are passed on to consumers. In order to be able to include the value of the effects on animal welfare in the analysis, a so-called

“willingness-to-pay” study was conducted among consumers. In such studies, the value that consumers attach to animal welfare measures is converted into a degree of willingness of consumers to pay for these measures (hence the name ‘willingness-to-pay’).

First of all, the study reveals that consumers are only willing to pay a small amount for the animal welfare measures as agreed upon in the ‘Chicken of Tomorrow’ arrangements, which is 68 eurocent per kilo of chicken filet. In addition, it turns out that the environmental effects have a positive effect, which is 14 eurocent per kilo of chicken filet. Finally, public health has no positive effect, which is 0 eurocent per kilo of chicken filet. The latter is because the objective of reduced use of antibiotics will already be achieved irrespective of the sustainability arrangements concerning the ‘Chicken of Tomorrow.’ Therefore, the total benefits of the ‘Chicken of Tomorrow’ are: 82 eurocent per kilo of chicken filet. On the other hand, there are costs, which are the additional costs that consumers are charged for chicken in the supermarkets. These costs are estimated at EUR 1.46 euro per kilo of chicken filet.

The above shows that the additional costs per kilo of chicken filet for implementing the measures for the ‘Chicken of Tomorrow’ exceed the benefits with regard to animal welfare, the environment, and public health. The ‘Chicken of Tomorrow’ does not generate any net benefits for consumers. The sustainability arrangements therefore do not seem to meet the first exception criterion.

ACM stresses that the study does reveal that consumers are willing to pay more for certain improvements to production for the benefit of animal welfare. That willingness to pay depends on the kind of improvement, the extent of improvement, and the awareness of such improvements among consumers. For example, consumers are willing to pay almost EUR 12 more per kilo of chicken filet that meet the requirements of the 1-star ‘Better Life’ label (in Dutch: *het Beter Leven-kenmerk*) of the Dutch Society for the Protection of Animals (in Dutch: *de Dierenbescherming*). That is even more than the price this particular variety of chicken meat is currently sold for in supermarkets. Yet the market share of chicken filet with the 1-star ‘Better Life’ label is not large. According to ACM, this seems to indicate that the market is unable to communicate the benefits of this chicken to consumers effectively, despite the attention there is nowadays for labels (such as ‘Better Life’). With regard to this aspect, ACM does see room for improvement, and opportunities for businesses.

2. Are consumers allowed a ‘fair share’ of these benefits?

As the above has revealed, the sustainability arrangements concerning the ‘Chicken of Tomorrow’ do not generate any net benefits for consumers. And as there are no net benefits for consumers, ACM believes that the second exception criterion cannot be met. Testing against this criterion is therefore not relevant in this case.

3. Are the arrangements necessary and proportional?

Even though it has already been established that the sustainability arrangements concerning the 'Chicken of Tomorrow' do not meet the first and second exception criteria, ACM did look into the arrangements' necessity and proportionality. ACM did so in the interest of providing more insight into ACM's assessments of sustainability arrangements.

The question would thus have been whether the sustainability arrangements concerning the 'Chicken of Tomorrow' are necessary and proportional to attain the benefits, more specifically "*the improvement of production or distribution, or to the promotion of technical or economic progress.*"

In this context, ACM takes into consideration the following in this case. Supermarkets have been offering chicken meat that is produced in various ways for years now. One such example is the previously mentioned label of the Dutch Society for the Protection of Animals, the 'Better Life' label. Supermarkets decide for themselves to what extent they wish to buy such products, and to include them in their product range. In that sense, selling meat with, for example, a 'Better Life' label is also a way for supermarkets to compete with one another. Some supermarkets will, for example, deliberately draw consumers' attention to the production method thereof and to the stickers mentioning it. This can be part of a broader strategy of a supermarket to attract consumers who value sustainably produced products. As previously mentioned, ACM's study into consumers' willingness to pay for animal-welfare measures has revealed that not all advantages and disadvantages of a specific production method are reflected in the supermarket price. Consumers are apparently willing to pay more for chicken filet with a 'Better Life' label than the price it is currently sold for. According to ACM, there is plenty of room for improvement when it comes to consumer education and consumer confidence in other types of production methods.

In addition, ACM sees opportunities for supermarkets (or chains) to differentiate themselves even more from their competitors with differently produced chicken meat, whether or not more sustainable or more animal-friendly. An often-heard argument for not adopting measures in that area is the so-called "first-mover disadvantage". This means that any individual market participant cannot be the first one to adopt the improvements in question because it would lose too much market share or would have to take heavy losses. However, ACM believes that current market dynamics point towards a trend of differentiation with regard to animal welfare and/or sustainability. That is why ACM at this point does not see the necessity of the sustainability arrangements concerning the 'Chicken of Tomorrow. Without any detailed analysis of the necessity and proportionality of the arrangements, it does not appear to be plausible that the third exception criterion applies to the 'Chicken of Tomorrow.'

4. Is there sufficient residual competition in the market?

For the sake of completeness, ACM notes that doubts can be cast on the sustainability arrangements concerning the 'Chicken of Tomorrow' when it comes to the fourth exception criterion as well. All of

the major supermarket chains in the Netherlands participate in these arrangements. As a result of the arrangements, it is expected that, from 2020, consumers will no longer be able to buy regularly-produced chicken meat in Dutch supermarkets. Consumers that wish to buy such chicken meat, will then only be able to do so from smaller supermarkets that do not take part in these arrangements, and through other channels such as poulterers, butchers and market traders. However, these alternative sales channels only cover 5 percent of the consumer market for chicken meat.

So when it comes to the availability of regularly-produced and economically-produced chicken meat, some residual competition will continue to exist after 2020. The other forms of competition that will also continue to exist are competition between the different types of chicken meat that are produced according to higher animal-welfare standards, and competition on price.

Conclusion

In order to provide more insight into how ACM assesses sustainability arrangements, ACM has analyzed the sustainability arrangements concerning the 'Chicken of Tomorrow.' The 'Chicken of Tomorrow' is the name for sustainability arrangements made between producers and retailers about completely replacing regularly-produced broiler chicken meat that is currently part of the standard product range of supermarkets from 2020.

On the basis of available information, ACM comes to the conclusion that the sustainability arrangements concerning the 'Chicken of Tomorrow' result in a restriction to competition in the consumer market of broiler chicken meat. ACM has also examined whether there is still room for these sustainability arrangements if they meet the four so-called exception criteria laid down in competition regulations. ACM's analysis has revealed that this is not the case. The most important reason is that the sustainability arrangements as currently designed do not generate any net benefits for consumers. In that assessment, the benefits and costs for consumers with regard to animal welfare, the environment and public health have explicitly been taken into account.

Following from the above, ACM very recently already advised the organizers behind the 'Chicken of Tomorrow' to adjust their sustainability arrangements so that they can comply with competition regulations. After all, it is up to the organizations themselves to adjust their arrangements in such a way that the sustainability initiative does meet Dutch and European competition regulations.