



Clairfort Advocaten
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*Please note: this is an unofficial
version of the Dutch original
version.*

*The Dutch version of this document
is authentic.*

The Hague, 4 October 2023

Our reference : ACM/UIT/605715
Subject : Informal assessment of sustainability initiative regarding the recycling of
commercial waste

Dear [confidential],

The Netherlands Authority for Consumers and Markets (ACM) has handled your request for an informal assessment submitted by you on behalf of the Dutch Waste Management Association (DWMA, in Dutch: *Vereniging Afvalbedrijven*) and of several of its members (Parties). ACM has done so on the basis of its Policy Rule on ACM's oversight of sustainability agreements (the Policy Rule).

The self-assessment submitted by the Parties as well as additional information have revealed the following. The members of the *Vereniging Afvalbedrijven* are waste collectors. They intend to agree to always try to offer new corporate clients (disposers of waste) a contract for at least two sorted waste streams, such as food and yard waste, organic waste, foil, and paper/cardboard (the Initiative). These contracts are for disposers who deliver at least 240 liters of commercial waste per week. The Initiative is consistent with a statutory waste-separation obligation applicable to (almost) all clients of the Parties (the disposers of waste). It additionally offers disposers of waste an extra incentive to separate their waste, and to develop an awareness for sustainable waste management.

In response to the Parties' request, ACM performed an initial inventory assessment. ACM based this assessment on the information provided by the Parties. The analysis shows that it is plausible that the Initiative meets the criteria as laid down in section 3.1 (compliance agreements) of the Policy Rule. ACM will therefore not investigate the Initiative further. This is explained below.

The planned Initiative

According to the Parties, it is up to the disposers of waste to determine which waste streams will be separated as part of the Initiative, on the condition that this must relate to the following waste streams: food and yard waste, organic waste, foil, paper and cardboard. A better separation of waste (at the source) promotes sustainability because it prevents waste of resources, and effective recycling ensures that fewer resources are needed and less waste is incinerated. This helps optimize the circular use of waste materials in a more sustainable economy.

Participation in the Initiative is voluntary; compliance cannot be enforced. Both members of the Dutch Waste Management Association and non-members are welcome to join the Initiative. Dutch Waste Management Association members Renewi, PreZero and GP Groot have already expressed their intent to participate in the Initiative. According to the Parties, this comes down to 50%-80% of the market for non-hazardous commercial-waste collection.¹

¹ Responses to questions to the Dutch Waste Management Association with reference ACM/INNZZP/004282, December 15, 2022, question 1b.

Participants in the Initiative may choose to deviate from the agreement in individual circumstances, for example, if there is a cost increase that the disposer in question does not want to bear, while the participant does want the disposer as a client. Disposers of waste will also continue to be able not to separate their waste streams and offer their waste to waste companies not participating in the Initiative.²

Findings of the initial inventory assessment

The distinction between two different groups of disposers of waste is relevant when assessing the Initiative: (a) those disposers of waste who are subject to a statutory obligation to separate their waste, and (b) those disposers of waste to whom this does not apply.

(a) Statutory obligation to separate waste streams

In accordance with section 3.1 of the Policy Rule, ACM does not further investigate sustainability agreements that are solely intended to comply with sufficiently precise requirements or prohibitions in legally binding sources of law. In this regard, it is important to note that those requirements or prohibitions are not fully implemented or enforced by thereto-designated authorities. For the vast majority the Initiative involves a situation as referred to in section 3.1 of the Policy Rule, namely insofar as it relates to disposers subject to a statutory obligation to separate their waste. ACM explains this further below.

The policy framework National Waste Management Plan (Dutch acronym: LAP3)³ stipulates that disposers of at least 240 liters of commercial waste (up to 660 liters) a week must separate one waste category, i.e. paper and cardboard, organic waste, glass containers or plastic foil, and thus deliver two separate waste streams.⁴ Article 2.12(2) of the Environmental Management Activities Decree stipulates that it is prohibited for establishments within the meaning of the Environmental Management Act⁵ to mix certain waste materials with other categories of waste materials, if keeping them separate and delivering them separately can be required under the National Waste Management Plan in view of the quantities and methods of release of these waste materials and the costs of keeping them separate and delivering them separately.⁶ In view of these rules, the requirement for two separate waste streams already applies to establishments that deliver a minimum of 240 liters of commercial waste per week. According to ACM, this constitutes a sufficiently precise, legally binding rule as meant in the Policy Rule.

According to Parties, disposers of waste poorly observe the obligation to apply waste separation due to a lack of uniform and effective public enforcement, among other reasons. The Ministry of Infrastructure and Water Management (I&W) indicates that enforcement is vested in municipalities. To the knowledge of the Parties, there are few or no inspections by enforcement officers. Municipalities are said not to take sufficient action because it is difficult to ascertain which disposer of waste qualifies as an establishment within the meaning of the Dutch Environmental Management Act and delivers at least 240 liters of commercial waste a week. Indeed, not all disposers of waste that qualify as an establishment within the meaning of the Environmental Management Act are subject to a duty to report this to the municipality. Previous communications from the Dutch Waste Management Association on the importance of source separation have failed to yield the necessary result.⁷ ACM finds these arguments of the Parties convincing. ACM therefore considers that the legally binding rule as laid down in LAP3 and the Dutch Environmental Management Act is not sufficiently enforced.

² In this context, ACM notes that this does not relieve disposers of waste of any statutory obligations, as explained below.

³ National Waste Management Plan (LAP3), see <https://lap3.nl/service/english/>.

⁴ See Chapter B.3.4.2.3 of LAP3.

⁵ Establishments within the meaning of Section 1.1 of the [Dutch Environmental Management Act](#) are defined as 'Any enterprise undertaken by man commercially, or of a size commensurate with a commercial enterprise, which is conducted within certain bounds.'

⁶ See also Article 2.11a of the Environmental Management Activities Decree.

⁷ Similarly, according to the Parties and the PBL Netherlands Environmental Assessment Agency, the previous 2014 From Waste to Resource (VANG) program also achieved little result, due to a lack of specific requirements or goals.

Furthermore, ACM deems it plausible that the purpose of the Initiative is solely to achieve compliance with the separation requirement and thereby promote sustainability. The Initiative is limited to that which this group of disposers of waste is already required to do. Moreover, the Parties have incorporated sufficient safeguards to limit the Initiative to that which is necessary and proportionate: participation is on a voluntary basis and non-exclusive; also those who are not a member of the Dutch Waste Management Association may participate on the basis of the same conditions. In addition, the disposers of waste retain a degree of freedom: they decide which waste stream they want to separate, and participants in the Initiative can even deviate from the Initiative in individual cases by way of exception.

Based on the foregoing, ACM will not further investigate the Initiative in accordance with section 3.1 of the Policy Rule as far as it relates to those disposers of waste on whom there is a statutory obligation to deliver separated waste streams. This means that ACM will not take any enforcement actions against this.

(b) No statutory obligation to separate waste streams

The parties argue that they have only a limited number of clients who have no legal obligation to separate waste streams. Section 3.1 of the Policy Rule therefore does not apply to these disposers of waste. However, ACM considers it plausible that the restrictions of competition that may result from the Initiative for this (limited) group of clients could only have a negligible impact on the Dutch market. After all, the Initiative is voluntary and there is the possibility to deviate in individual cases. In addition, it is uncertain whether the Initiative would actually lead to higher costs compared to the situation without the Initiative, among other things because of the extended producer responsibility.⁸ Finally, ACM currently follows the Parties' view that sufficient residual competition remains, both between participating Parties and third parties and between participating Parties themselves on the basis of price, quality and service.

In view of the above, ACM does not consider it appropriate to further investigate the Initiative's anti-competitive effects on the group of disposers of waste on whom there is no legal obligation to separate waste streams.

Conclusion

As explained above, ACM concludes that, based on its Policy Rule, it does not consider a further investigation of this Initiative to be opportune.

ACM may still subject the Initiative to a further investigation at a later date, for example following a complaint. Given the fact that you have consulted ACM before the start of the Initiative and as far as you have informed ACM in good faith about this, ACM will not impose a fine even in light of new facts and circumstances showing that this Initiative nonetheless violates the competition rules. Together with the Parties, ACM will then search for a solution that complies with the competition rules.

Yours sincerely,

the Netherlands Authority for Consumers and Markets,

Mr. M. Denkers BA, MSc, MBA
Director
Competition Department

⁸ Decision on the arrangement for extended producer responsibility (Bulletin of Acts and Decrees 2020, 375), Article 2(2)(b).