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Decision of the Netherlands Authority for Consumers and Markets within the meaning of Section 12h of the Establishment Act of the Netherlands Authority for Consumers and Markets

Reference : ACM/UIT/584188
Case no. : ACM/21/053808
Date : **20 September 2022**

1 Request

1. On August 23, 2022, the Netherlands Authority for Consumers and Markets (hereafter: ACM) received a request, within the meaning of Section 12h of the Establishment Act of the Netherlands Authority for Consumers and Markets (hereafter: Establishment Act), filed by Greenchoice B.V. (hereafter: Greenchoice).¹
2. In this decision, ACM assesses the request for declaring a commitment of Vattenfall binding. In chapter 2, the background of the investigation into Greenchoice is explained, as well as a description of the course of the procedure. Chapter 3 contains the contents of the commitment. In chapter 4, ACM discusses the legal framework. In chapter 5, ACM assesses the commitment itself. Finally, chapter 6 contains the declaration itself, which declares the commitment binding for a period of two years.

2 Background and course of the procedure

3. As part of its focus on the energy transition and sustainability issues in general, ACM in 2020 focused on consumer problems in the energy transition², and carried out a study into the use of sustainability claims by businesses.³ ACM launched this study because more and more sustainability claims emerge in different sectors. Behavioral research shows that consumers increasingly take into account sustainability aspects (and in this case, more specifically, environmental aspects) in their

¹ ACM/IN/710864

² ACM, 2020-2021 ACM Agenda, [The energy transition | ACM.nl](https://www.acm.nl/en/energy-transition)

³ Sustainability claims are statements in advertisements and marketing regarding the environment and labor conditions, also referred to as 'environmental claims' and 'ethical claims'. Sustainability claims can come in written forms or in visual forms, for example logos or illustrations.

day-to-day purchase decisions, but that they do not always trust the claims that are made.⁴ ACM finds it important that consumers are able to make sustainable choices on the basis of trustworthy information *and* that businesses that *do* operate in a sustainable manner are able to set themselves apart from their competitors by using their sustainability claims. These were critical reasons for launching a study into the sustainability claims used in different sectors, and to check whether they could be misleading. In the study, ACM found that sustainability claims were quite common, and that they were not always clear or correct.⁵

4. Although the application of legislation regarding unfair commercial practices to sustainability claims was not new,⁶ this study still provided an opportunity to give businesses more information about the use of sustainability claims. It resulted in the publication of the Guidelines regarding Sustainability Claims (hereafter: the Guidelines) by ACM in January 2021.⁷ In these Guidelines, ACM offers businesses guidance about honest communication regarding sustainability aspects in the form of five rules of thumb.
5. On 30 April 2021, ACM sent letters to over 170 businesses in the clothing⁸, energy⁹, and dairy¹⁰ sectors. ACM sent letters to all licensed energy suppliers. In the letter, ACM reminded those businesses of the Guidelines, and explained what problems ACM at that point saw in their respective sectors. In that context, ACM indicated, using examples, what the most frequent misleading sustainability claims were, specifically in the energy sector. In the letter, ACM also explained how such claims can be brought in line with the relevant rules and regulations.
6. In that context, ACM asked these businesses to review their commercial sustainability claims in all their communication channels, and, where necessary, to bring these in line with legislation regarding unfair commercial practices. In addition, ACM has indicated that it would continue its investigation from 14 June 2021, and that traders making sustainability claims that do not comply with the aforementioned legislation run the risk of enforcement by ACM from that date onwards.¹¹
7. Following these letters, ACM has received various questions and comments. On 27 May 2021, ACM published on its website a list with frequently asked questions together with the answers to those questions.¹² On May 31, 2021, ACM informed the energy suppliers about this.¹³ ACM also received several questions through Energie Nederland, the Dutch trade association of energy companies. ACM sent the answers to the questions to the energy suppliers to which the letter of April 30, 2021 had also been sent.¹⁴

⁴ ACM/UIT/573214, annex 8. European Commission, *Consumer market study on environmental claims non-food products*, https://ec.europa.eu/info/sites/default/files/study_on_environmental_claims_for_non_food_products_2014_en.pdf, July 2014.

⁵ See also [Rules of thumb for sustainability claims have been finalized, serving as basis for ACM's enforcement | ACM.nl](#)

⁶ For example, there has been guidance from the European Commission regarding the use of sustainability claims since 2016, laid down in the 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices and an earlier version from December 2000, the "Guidance on Making and Assessing Environmental Claims".

⁷ [Guidelines sustainability claims | ACM.nl](#).

⁸ [Sector letter regarding sustainability claims in clothing sector \(acm.nl\)](#)

⁹ [Sectorbrief energie duurzaamheidsclaims \(acm.nl\)](#) (in Dutch)

¹⁰ [Sector letter regarding sustainability claims in dairy sector \(acm.nl\)](#)

¹¹ [Letters to companies in the energy, clothing, and dairy sectors about sustainability claims | ACM.nl](#)

¹² <https://www.acm.nl/nl/faq-duurzaamheidsclaims-nav-sectorbrieven>.

¹³ ACM/UIT/557087.

¹⁴ ACM/UIT/573859.

8. After 14 June 2021, ACM checked the websites of the ten largest energy suppliers (in terms of market share on the small business market) in more detail. Greenchoice is one of these suppliers. This check on the website specifically focused on the use of misleading sustainability claims with regard to:
 - The supplied volume of green power, and the origin thereof. This needs to correspond with the power content label¹⁵;
 - The use of the phrases “green natural gas” (in Dutch: “groen gas”) and “carbon-compensated natural gas” (in Dutch: “CO₂-gecompenseerd gas”). The use of these phrases must correspond with the product that is offered; and
 - Comparative claims that portray an energy supplier or its products as sustainable. Such claims cannot use vague, absolute or generally phrased terms without explanation. Energy suppliers must clearly indicate with whom or what the comparison is made, and must substantiate the comparison.

9. In a letter of September 28, 2021,¹⁶ ACM informed Vattenfall that ACM’s investigation had revealed that Greenchoice had sustainability claims on its website that probably do not comply with the rules regarding unfair commercial practices. In the same letter, ACM indicated that the investigation into Greenchoice would be continued with an eye to enforcement. Finally, ACM in the letter requested further information for the assessment of the sustainability claims in question.

10. On January 24, 2022, ACM published a press release in which it said it had assessed the sustainability claims of ten major energy suppliers, and that, on the basis of its findings, ACM would launch a follow-up investigation into two energy suppliers where ACM found the highest number of misleading sustainability claims. ACM informed Greenchoice about this follow-up investigation.¹⁷

11. On March 25, 2022, ACM sent the body of facts that had been established during the investigation to Greenchoice, and gave it the opportunity to respond to it.¹⁸

12. The most important findings of ACM’s investigation into Greenchoice’s commercial practices are:
 - Greenchoice has designate the product “forest-compensated gas” (in Dutch: ‘bosgecompenseerd gas’) as green gas and green energy, whereas the sustainability characteristics of forest-compensated (or carbon-compensated) gas and green gas differ considerably from each other.
 - Vattenfall used different comparisons to present itself as sustainable, whereas these comparisons were insufficiently substantiated or painted a picture that did not match reality. This concerns the following claims:
 - a. Greenchoice presents itself as “the greenest energy movement in the Netherlands” (in Dutch: ‘de groenste energiebeweging van Nederland’) without making clear what

¹⁵ With power content labels, energy suppliers give information about the origin and environmental quality of the power they supply.

¹⁶ ACM/UIT/573573.

¹⁷ By email ACM/UIT/570188 and over the phone ACM/INT/442000.

¹⁸ ACM/UIT/574087.

- sustainability aspects it refers to, with what other organizations it compares itself, and on what basis it makes this claim.
- b. Greenchoice claims to be “the most sustainable brand of the Netherlands” (in Dutch: ‘het duurzaamste merk van Nederland’), on the basis of its first place on the Sustainable Brand Index (SBI), even though the SBI ranking does not look at Greenchoice’s actual sustainability efforts, but rather at the perceptions of consumers.
 - c. Greenchoice claims to be “the biggest buyer of solar power in the Netherlands” (in Dutch: ‘de grootste inkoper van zonne-energie in Nederland’). It is not clear on what basis it makes this claim, and with which companies it compares itself. Greenchoice was not able to demonstrate that it was truly the biggest buyer of solar power.
13. On April 7, 2022, ACM received Greenchoice’s response to the body of facts.¹⁹ In its response, Greenchoice asked about the opportunity to make arrangements about adjusting the claims on Greenchoice’s website.
14. Greenchoice and ACM subsequently held discussions about filing a request for declaring binding a commitment within the meaning of Section 12h of the Establishment Act. ACM stressed that the bar for such a request in the case at hand is high, in part because of the commercial practice’s nature and scope as well as the subsequent potential harm. ACM has also stated that it would continue with the investigation without abatement.
15. Greenchoice filed a formal request with ACM for declaring a commitment binding. ACM received this request on August 23, 2022.²⁰

3 Contents of the commitment

16. Greenchoice requests ACM to declare the following commitment binding:

Request to declare a commitment binding

Greenchoice values providing information about its sustainable energy products in a transparent and verifiable manner. Upon closer inspection of our website, we have to acknowledge, however, that certain claims could have been explained better, and should have been phrased better. Following questions from ACM, Greenchoice now makes the following commitment:

1) Changes to website

Greenchoice will implement changes to its website on the basis of the following principles:

- a) Greenchoice will not be designated as “the greenest energy movement in the Netherlands” (in Dutch: “groenste energiebeweging van Nederland”).

¹⁹ ACM/IN/689057.

²⁰ ACM/IN/710864.

- b) Greenchoice will not be designated as “the biggest buyer of solar power” (in Dutch: “grootste inkoop van zonne-energie”) without adding a solid substantiation with data.
- c) Greenchoice will only be designated as “the most-sustainable energy brand of the Netherlands” (in Dutch: “Duurzaamste energiemerk van Nederland”) or as “the most sustainable brand of the Netherlands” (in Dutch: “Duurzaamste merk van Nederland”) if this can be substantiated with facts, and if the designation itself explains what study this claim is based on, followed by further information (or a link thereto) about the study in question and the criteria that were applied.
- d) If Greenchoice refers to the Sustainable Brand Index (SBI), it will immediately explain that this concerns a consumer survey, followed by further information (or a link thereto) about SBI and the criteria applied by SBI.
- e) The phrase “green energy” (in Dutch: “groene energie”) will not be used as a designation of Greenchoice’s product “forest-compensated gas” (in Dutch: “bosgecompenseerd gas”).
- f) Greenchoice’s product “forest-compensated gas” (in Dutch: “bosgecompenseerd gas”) will always be designated as “forest-compensated gas” (in Dutch: “bosgecompenseerd gas”).
- g) Natural gas that is produced from renewable energy sources will be designated as “green gas” (in Dutch: “groen gas”).

From September 30, 2022, these changes to the website will be implemented permanently, and Greenchoice will check the next website on these points.

2) Monitoring, donation, and reporting

- a) From September 30, 2022, Greenchoice will implement a compliance protocol, including a website-content management protocol with limited authorizations, and a decision tree for sustainability claims by created Greenchoice’s Legal department for its compliance with the Guidelines regarding sustainability claims and with the rules and regulations concerning unfair commercial practices.
- b) The implementation of the pledged change to the website as well as compliance with the compliance protocol will be verified by Greenchoice’s Compliance Officer. ACM will receive a baseline measurement thereof (before November 1, 2022) from the Compliance Officer, and, going forward, a report every eight months for the duration of the commitment decision. This report for ACM contains a description of results of the performed checks as well as an overview of changes to the website with regard to sustainability claims as well as the assessment of any new sustainability claims. In addition, Greenchoice will, after the first eight months, provide an additional report of an external auditor regarding the implementation of the compliance protocol in practice, thereby providing insight into the checks that the auditor has performed.
- c) No later than December 31, 2022, Greenchoice will donate an amount of 450,000 euros to a forest project in the Netherlands run by an independent non-profit organization. In that context, Greenchoice says that the donation will actually go to the non-profit organization for the forest project, that this project is independent from Greenchoice, that it will not be better off as a result of the donation, and that the donation will not be presented as some form of

CO2 compensation, and/or will not be used for generating or selling CO2 credits, and the donation will not be deducted from Greenchoice's tax return.

- d) The donation will be verified by an external auditor, who will draw up a report about this, which will be made available to ACM within three months after the donation, which will prove that the donation will have actually gone to the non-profit organization towards the forest project.

Greenchoice agrees to the publication of the Commitment decision. Greenchoice will inform its customers about this through a message on the website, which will be coordinated with ACM in advance.

4 Legal framework

17. Under Section 12h of the Establishment Act, ACM may hand down a decision in which it declares binding a commitment made by a market organization. When declaring a commitment binding, ACM's power to impose administrative fines or orders subject to periodic penalty payments on that market organization for the practices in question expires, under Section 12h, paragraph 1, of the Establishment Act. Requests for commitment decisions must be filed before ACM issues a decision regarding the imposition of an administrative fine or order subject to periodic penalty payments.
18. Under Section 12h of the Establishment Act, ACM can declare binding a commitment if it deems the declaration of a commitment binding more efficient than the imposition of an administrative fine or an order subject to periodic penalty payment. In order to determine whether the declaration of a commitment binding is more efficient than the imposition of an administrative fine or order subject to periodic penalty payments, ACM will look at, among other aspects, what stage the investigation into the alleged violation is currently in, as well as at the nature of the violation.
19. In addition, the contents of the commitments must:
 - Make a plausible case that Greenchoice complies with the decision in a verifiable manner.
 - Guarantee to ACM that, with the commitment decision, Greenchoice acts in accordance with the statutory instructions or prohibition for which the commitment has been made.
20. Under Section 12h, paragraph 5 of the Establishment Act, the undertaking must act in accordance with the decision after ACM has handed down a decision declaring a commitment binding. If an undertaking does not act in accordance with the decision, it will risk an administrative fine (under Section 12m of the Establishment Act) or ACM may amend or repeal the decision.

5 ACM's opinion

5.1 The adjusted commercial practice

5.1.1 Changes to the website

21. In its request for a commitment decision, Greenchoice acknowledges that several of its sustainability claims in the past could have been explained better, and should have been phrased more clearly.
22. In addition, Greenchoice has committed to adjusting its commercial practice. By September 30, 2022, Greenchoice will have implemented various changes to its website. These changes are aimed at ensuring the correct use of the phrases "green energy" (in Dutch: "groene energie"), "green natural gas" (in Dutch: "groen gas"), and "forest-compensated gas" (in Dutch: "bosgecompenseerd gas"). Also, the changes concern the comparisons that Greenchoice made to present itself as more sustainable. These changes ensure that these comparisons are no longer used or only if they are sufficiently clear, substantiated and explained.
23. Also, Greenchoice has committed to ensuring that future sustainability claims, too, will be in line with the rules and regulations. Finally, Greenchoice will inform its customers about the commitment.
24. With this commitment, Greenchoice will end the concerns identified by ACM and listed in paragraph 12 of this decision.

5.1.2 Compliance

25. The request for a commitment decision reveals that Greenchoice will implement a compliance program starting 30 September 2022, including a website-content management protocol as well as a decision tree for sustainability claims created by Greenchoice's Legal department for its compliance with the Guidelines regarding sustainability claims and with the rules and regulations concerning unfair commercial practices.
26. In addition, Greenchoice says that the changes to the website as well as compliance with the compliance protocol will be verified by Greenchoice's Compliance Officer. ACM will receive a baseline measurement thereof (before November 1, 2022) from the Compliance Officer, and, going forward, a report every eight months for the duration of the commitment decision. In addition, Greenchoice will, after the first eight months, provide an additional report of an external auditor.
27. With this compliance program, Greenchoice ensures that its sustainability claims are monitored more frequently. As such, ACM is confident that Greenchoice has built in sufficient safeguards to ensure that, when using sustainability claims, it will continue to act in accordance with consumer protection

regulations. The risk of consumers being misled as a result of misleading sustainability claims is thus reduced as much as possible.

5.2 Compensation

28. Greenchoice has committed to donating an amount of 450,000 euros to a forest project in the Netherlands run by an independent non-profit organization. In that context, Greenchoice says that it will not be better off as a result of the donation, and that the donation will not be presented as some form of CO2 compensation, and/or will not be used for generating or selling CO2 credits, and the donation will not be deducted from Greenchoice's tax return. The donation will be verified by an external auditor, who will draw up a report about this, which will be made available to ACM within three months after the donation, thereby making the donation verifiable by ACM.
29. ACM aims to have consumer harm as a result of the insufficiently clear sustainability claims compensated. However, in this case, identifying the specific harm of individual consumers that have been harmed is not that easy. With the pledged donation, Greenchoice contributes to developments that promote sustainability in the Netherlands, and, as such, offers compensation for the harm inflicted on society.

5.3 Verifiability

30. ACM is of the opinion that the commitment is sufficiently verifiable. Over the next two years, Greenchoice will, every eight months, submit to ACM a report about the execution of the compliance program, and overview of changes to websites with regard to sustainability claims, and the assessment of any new sustainability claims.
31. With the first report, after the first eight months, Greenchoice will submit a one-off additional report from an external independent auditor, who will check whether the execution of the compliance protocol has worked in practice. Greenchoice will also submit evidence of the execution of the compensation three months after the donation by means of a report from an external independent auditor.
32. The submission of reports and evidence ensures that compliance with the commitments is verifiable by ACM.

5.4 Conclusion

33. The request for declaring a commitment binding was filed before ACM completed the statement of objections and thus also before any decision regarding the imposition of an administrative fine or an order subject to periodic penalty payments.

34. ACM believes, on the basis of the foregoing, that declaring Greenchoice's commitment binding is effective in this case. In that context, ACM takes into account the fact that, with this commitment, a potentially protracted sanctioning procedure is prevented. With this commitment, sustainability claims by Greenchoice will be brought as quickly as possible in line with the rules and regulations, and will continue to be so. At the same time, Greenchoice offers compensation for any harm to society. Furthermore, publication of this decision can take place sooner than publication of any sanctioning decision. Publication of this commitment decision aims to bring about a broad effect with regard to the improvement of sustainability claims in the entire energy sector.

6 Decision

35. Considering Section 12h, paragraph 2 of the Establishment Act, ACM decides to declare the commitments referred to in chapter 3 binding on Greenchoice.
36. As such, ACM no longer has the power to continue the investigation launched against Greenchoice into its use of sustainability claims by Greenchoice between June 14, 2021 and September 20, 2022.
37. ACM has the power to enforce compliance with this commitment. ACM can impose a fine in the case of non-compliance with this commitment. In addition, ACM can repeal this decision, and subsequently relaunch the investigation. ACM can assess new information that it receives after the commitment has been declared binding.
38. This decision will be effective for two years, starting from the date of publication.

Kind regards,

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

Edwin van Houten
Director
Consumer Department

Anyone whose interest is directly affected by this decision can file an objection against this decision with the Netherlands Authority for Consumers and Markets within six weeks after the publication date of this decision. The objection must be sent to the following address: ACM, Legal Department (DJZ), P.O. Box 16326, 2500 BH, The Hague, the Netherlands. Under Section 7:1a, paragraph 1 of the Dutch General Administrative Law Act, an interested party may request the Netherlands Authority for Consumers and Markets in its objection to agree to filing an appeal with the Dutch Trade and Industry Appeals Tribunal (CBb) directly.