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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/584187
Case no. : ACM/21/053806
Date : **20 September 2022**

1. Request

1. On September 19, 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 Vattenfall Sales Nederland N.V. (hereafter: Vattenfall).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 Vattenfall 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 day-to-day purchase decisions, but that they do not always trust

¹ ACM/IN/716297.

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.

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

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.

April 30, 2021 had also been sent.¹⁴

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. Vattenfall is one of these suppliers. This check 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 Vattenfall 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 Vattenfall 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 Vattenfall 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 Vattenfall, and gave it the opportunity to respond to it.¹⁸
12. The most important findings of ACM’s investigation into Vattenfall’s commercial practices are:
 - By using various claims about green power, Vattenfall gave the impression that it only sells green power, whereas this is only the case for one particular product. Vattenfall also sells gray power.
 - In various claims, Vattenfall referred to the power content label too late for the substantiation of its claims: the link to the power content label was more than two clicks away from the claim.

¹⁴ ACM/UIT/573859.

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

¹⁶ ACM/UIT/561915.

¹⁷ ACM/INT/441957.

¹⁸ ACM/UIT/572896.

- 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:
 - Vattenfall posted the claim “*world record for cheapest wind power*” (in Dutch: ‘Wereldrecord goedkoopste windstroom’) on its website, although it cannot substantiate that it supplies the cheapest wind power on the planet.
 - Vattenfall also claims that it goes further than the Paris climate goals, but it does not explain what these goals are nor how Vattenfall goes further than these goals.
 - Vattenfall claims that it is on the right track while referring to its achievement of earning eighth place on the Sustainable Brand Index (SBI). In that context, Vattenfall says that the SBI is a ranking of the most sustainable brands, compiled by an independent jury, even though the SBI ranking does not look at Vattenfall’s actual sustainability efforts, but rather measures the perceptions of consumers.

13. On March 31, 2022, ACM received Vattenfall’s response to the body of facts.¹⁹ In its response, Vattenfall asked about the opportunity to make arrangements about adjusting the claims on Vattenfall’s website.
14. Vattenfall 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. Vattenfall filed a formal request with ACM for declaring a commitment binding. ACM received this request on September 19, 2022.²⁰

3. Contents of the commitment

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

Contents of the commitment

Vattenfall Sales Nederland N.V. (Vattenfall) requests ACM to declare the following commitment binding for a period of 24 months starting from the date of the commitment decision within the meaning of Section 12h of the Establishment Act (commitment decision):

1. Following ACM’s findings, Vattenfall has implemented several changes to its websites, thereby eliminating the risk of misleading practices as identified by ACM. Vattenfall includes evidence in writing (consisting of screenshots, among other things) with this request, serving as proof of these changes. This concerns the following changes:

¹⁹ ACM/IN/687900.

²⁰ ACM/IN/716297.

- a) Since July 29, 2022, on webpages where the product “Green from the Netherlands” (in Dutch: ‘Groen uit Nederland’) is offered (such as “Green power” and “100% generated in the Netherlands | Vattenfall”, in Dutch, respectively “Groene stroom” and “100% opgewekt in Nederland | Vattenfall”²¹), near the link to the power content label, information is shown that gives a better explanation of the total fuel mix of Vattenfall.
 - I. As of March 29, 2022, a link to the power content label has been included on the homepage of Vattenfall.nl.
 - II. The page about green power has predominantly become an information page. The explanation of green power has been moved to the top of the page, including a short video with explanation. Furthermore, it has been explained more clearly what sources of green power are, also with information about and a link to the power content label. Also, the option to switch has been removed from this page.
 - III. Vattenfall explicitly clarified that these concern the pages with the product “Green from the Netherlands” (in Dutch: ‘Groen uit Nederland’), and not Vattenfall’s full product range.
- b) On the webpages where the product green power is offered (including so-called ‘landing pages’ of campaigns, such as “Choose Green from the Netherlands too”, in Dutch: “Kies ook voor Groen uit Nederland | Vattenfall”²², which are currently not active), a link to the power content label will be added to the sustainability claim no later than September 15, 2022, where it will also be explained that the power content label offers information about the origin of the power;
 - I. In addition, the visual display of the power content label for the product “Green power” (in Dutch: “Groene Stroom”) has been removed.
- c) The claim “*world record for cheapest wind power*” (in Dutch: ‘Wereldrecord goedkoopste windstroom’) has been removed since September 28, 2021, because this claim could have given the impression that Vattenfall offers the cheapest wind power to consumers worldwide, while this was not the intended message.
- d) On the webpage “Officially in line with Paris” (in Dutch: ‘Officieel in lijn met Parijs’), multiple examples have been added since August 4, 2022, about the way in which Vattenfall meets this goal, and it has been clarified that, when clicking on a link, visitors can go to a website where actions are listed that Vattenfall carries out in order to reach that goal. In addition, the sentence “That is how we go further than the Paris climate goals” (in Dutch: “zo gaan we verder dan de doelstellingen van klimaatop in Parijs”) on the webpage on wind power has been removed since August 4, 2022.
- e) The connection, as suggested by Vattenfall, between the high ranking in the ‘Sustainable Brand Index’ and the measured achievements of Vattenfall with regard to sustainability is no longer on the website.

²¹ <https://www.vattenfall.nl/groene-stroom/>

²² <https://www.vattenfall.nl/producten/energie/wind/>

Vattenfall will submit the additional evidence to ACM no later than September 30 in the form of screenshots. Vattenfall obviously commits to not reversing the abovementioned changes.

2. Vattenfall acknowledges that it could have formulated and explained more clearly with regard to sustainability claims. Vattenfall will inform an agreed upon group of consumers that switched to Vattenfall during the investigation period about this. These customer communications in the form of a personal message to customers and the BtC newsletter have been coordinated with ACM.

3. Vattenfall has introduced a complimentary compliance program that concerns the processes with which Vattenfall seeks to prevent sustainability claims on its website from not complying with the relevant rules and regulations regarding unfair commercial practices. This compliance program consists of employee training programs, a procedure for developing the content on the website and for bringing it up to date, and a procedure for a periodical compliance assessment. Vattenfall will have an internal and external audit of the compliance program carried out. Every eight months, ACM will receive a report of the internal audit, and, after the first eight months, a one-off report from an external independent auditor, which will check whether the execution of the compliance protocol has worked in practice. The report of the internal audit consists of, in any case, a description of the results of the performed audits, as well as an overview of the actual changes on the website with regard to sustainability claims and the assessment of any new sustainability claims.

4. No later than six months after the request has been declared binding, Vattenfall will donate an amount of 950,000 euros to an independent non-profit organization, which will fully go to PV systems. This will help make the buildings of this non-profit organization more sustainable. Vattenfall states that the donation will fully go to this non-profit organization, and will submit to ACM a copy of the signed agreement as well as a bank statement. In addition, ACM will receive a copy of a letter to the Dutch Tax and Customs Administration (in Dutch: Belastingdienst), in which Vattenfall declares that Vattenfall will not deduct this amount on its tax return.

Publication

Vattenfall agrees to the publication of the Commitment decision, provided it is in accordance with this commitment made by Vattenfall, and provided that Vattenfall is given the opportunity to identify any business-confidential information prior to publication.

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 Vattenfall complies with the decision in a verifiable manner;
 - Guarantee to ACM that, with the commitment decision, Vattenfall 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, Vattenfall acknowledges that some of its sustainability claims in the past should have been phrased and explained more clearly.
22. Also, Vattenfall explains that it has changed its commercial practices on the website. Vattenfall has adjusted various claims about the product "Green from the Netherlands" (in Dutch: "Groen uit Nederland"), as a result of which it is now clear that this information only concerns that specific product, and that the claims do not concern the entire range of products. In addition, Vattenfall has adjusted information about green power, adding more information. And Vattenfall now correctly refers to the substantiation of the claims about green power: Vattenfall added a link to the power content label to these claims. Furthermore, Vattenfall has removed the comparative sustainability claim "world record for cheapest wind power" (in Dutch: 'Wereldrecord goedkoopste windstroom') as well as the claims about the Sustainable Brand Index. Finally, Vattenfall has either adjusted or removed the comparative claims regarding the Paris climate goals. With the changes, the claims are now sufficiently clear, substantiated, and explained.
23. In addition, Vattenfall has committed to ensuring that the above changes are maintained, and, through a complementary compliance program, that future sustainability claims, too, will be in line with the rules and regulations. Finally, Vattenfall will inform its customers about these commitments.

24. With this commitment, Vattenfall will end the concerns identified by ACM and listed in paragraph 14 of this decision.

5.1.2. Compliance

25. In its request for a commitment decision, Vattenfall says it has set up a complementary compliance program, with which it seeks to prevent sustainability claims on its website from failing to comply applicable rules and regulations regarding unfair commercial practices. This compliance program consists of employee training workshops, a procedure for developing the content on the website and for bringing it up to date, and a procedure for a periodical compliance assessment.
26. In order to guarantee that the compliance program is correctly implemented and complied with, Vattenfall will carry out an internal and external audit of the compliance program. Every eight months, ACM will receive a report of the internal audit, and, after the first eight months, a one-off report from an external independent auditor, which will check whether the execution of the compliance protocol has worked in practice.
27. With this compliance program, Vattenfall ensures that its sustainability claims are monitored more frequently, now and in the future. As such, ACM is confident that Vattenfall 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. Vattenfall has committed to donating an amount of 950,000 euros to an independent non-profit organization. Vattenfall will not deduct this amount on its tax return. The above donation will fully go to PV systems, which will help make the buildings of this non-profit organization more sustainable. Vattenfall will submit evidence of this investment, 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, Vattenfall 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. During the next two years, Vattenfall will, every eight months, submit a report to ACM about the internet audit regarding the

execution of the compliance program. With the first report (after the first eight months), Vattenfall will also submit a report of an external audit that assesses whether the execution of the compliance protocol has worked in practice.

31. In connection with the execution of the compensation, too, Vattenfall will, for the duration of the commitments, submit evidence that prove that the donation fully goes to the non-profit organization, and that Vattenfall will not deduct this donation on its tax return.
32. With the submissions of the reports and evidence, ACM is able to verify compliance with the commitment.

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 Vattenfall'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 Vattenfall will be brought as quickly as possible in line with the rules and regulations, and will continue to be so. At the same time, Vattenfall 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 Vattenfall Sales Nederland N.V.
36. As such, ACM no longer has the power to continue the investigation launched against Vattenfall into its use of sustainability claims by Vattenfall 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.