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Translation

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REGISTERED LETTER AND PER E-MAIL

Tuinbranche Nederland

The Hague, 2 September 2022

Our reference : ACM/UITNZP/001508
Subject : Informal Guidance regarding Sustainability Initiative of Dutch Garden Retail Sector (Tuinbranche NL)

Dear X,

The Netherlands Authority for Consumers & Markets (ACM) processed your request of 19 May 2022 for an informal assessment under the draft Guidelines on Sustainability Agreements (hereafter: the Guidelines).[1] In its assessment of the planned collaboration between members of the Dutch Garden Retail Sector (Tuinbranche Nederland, TBNL)[2] about curtailing the use of illegal plant protection products (PPPs or pesticides) within the floricultural sector in the Netherlands (hereafter: the Initiative), ACM used the information you provided as the basis for said assessment. The analysis shows that, prima facie, the Initiative does not restrict competition. On the contrary, the Initiative contributes to the proper functioning of the Dutch floricultural market in terms of sustainability. Based on this assessment, ACM has decided not to investigate the Initiative any further.

In this letter, ACM explains how it arrived at this conclusion. First, ACM will outline the background of the request, which is followed by a description of the Initiative as well as ACM's analysis of the relevant competition rules.

Background of the request

In early 2016, several market participants signed the first “Ambition: Plant Protection in Floriculture”[3]. The signatories included the joint garden retailers, a number of trading partners as well as other market participants in the production chain together with Dutch consulting firm CLM Research and Advice (CLM), Dutch foundation Nature and Environment (in Dutch: Natuur & Milieu, N&M) and TBNL. One element of said ambition is that the sector will phase out the use of certain pesticides that are harmful (or very harmful) to humans, animals, and the environment.

[1] ACM, *2nd Draft: Guidelines Sustainability agreements – Opportunities within competition law,* 26 January 2021, accessible via: https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf
[2] The Dutch Garden Retail Sector (in Dutch: Tuinbranche Nederland, TBNL) is the sector organization for the entire garden chain, which includes manufacturers, importers, wholesalers in garden items, as well as green spaces and garden centers (retailers).
[3] TBNL, N&M and CLM, *Ambitiebrief: Eisen en wensen van Retail in certificering in de sierteelt,* 2016, accessible via: https://www.clm.nl/uploads/nieuws-pdfs/Ambitiebrief.pdf (in Dutch).

Pesticides are used to control and combat diseases, pests, and weeds. However, certain plant protection products may contain harmful substances. At this point, most of the products that TBNL had wanted to phase out with its first ambition have also been banned under the Plant Protection Products and Biocides Act.[4] This Act stipulates that only plant protection products that have been proven safe are permitted. In 2021, TBNL published an updated version of the ambition, which was Ambition 4.0 Plant Protection in Floriculture (Ambition 4.0).[5] In this ambition, the lower limit is not to use any substances that are prohibited by law.

To get a clear overview of the progress of the ambition (and of subsequent versions), N&M, as an independent NGO, has carried out an annual residue measurement since 2018 together with CLM. CLM analyzes the results. The results of the 2021 residue measurement were compared with those from previous years, and held up to the light of Ambition 4.0. That assessment showed that the share of illegal substances found each year in residue measurements has not decreased. That share has stayed between 10-15%, according to N&M.

According to N&M, retailers took action individually when illegal substances were found, ranging from confronting the supplier with their findings to no longer making any purchases from that supplier. However, the results show that the measures that have been taken are not sufficiently effective. One of the reasons was that many retailers did not dare to take any individual measures for fear of disrupting the trade relationship. In addition, in the absence of any information exchange within the sector, plants with illegal residues ended up (cheaper) at other retailers anyway, thus creating a waterbed effect. In 2021, N&M concluded that, in order to prevent the use of illegal plant protection products, "it is crucial to take stricter measures against this, for example, in the form of a binding sanctions framework".[6]

In this context, it is also relevant that, in its 2022 report, the Dutch Food and Consumer Product Safety Authority (NVWA), which is charged with oversight over the trade and use of plant protection products and biocides, too, recommends market participants in the supply chain to fulfill their roles more effectively in identifying illegal activities and in increasing awareness in the sector. One example that is mentioned is focusing on prevention and awareness among growers and garden retailers, for example, through social pressure.[7]

The Initiative

Proposed measures

N&M's recommendation to take stricter measures, for example in the form of a binding sanctions framework, has been taken up by TBNL. This has resulted in the Initiative. To prevent the use of illegal plant protection products, TBNL proposes several measures.

[4] Act of 17 February 2007, regulating the Authorization, placing on the market, and the use of plant protection products and biocides (Plant Protection Products and Biocides Act, in Dutch: Wet gewasbeschermingsmiddelen en biociden). This Act is based, in part, on Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC. Point 8 of the Regulation states, among other things, that "the precautionary principle should be applied and this Regulation should ensure that industry demonstrates that substances or products produced or placed on the market do not have any harmful effects on human or animal health or any unacceptable effects on the environment." The Dutch Board for the Authorization of Plant Protection Products and Biocides (Ctgb) reviews substances for the Dutch market.

[5] TBNL, N&M and CLM, *Ambitie gewasbescherming in de sierteelt van de Nederlandse tuinretail 4.0* 2021-2023, 2020, accessible via: https://www.tuinbranche.nl/uploads/ambitie-4-0-sierteelt.5632f2.pdf.

[6] N&M, *Bestrijdingsmiddelen in tuinplanten 2021*, p. 22, accessible via: <https://natuurenmilieu.nl/app/uploads/Bestrijdingsmiddelen-in-tuinplanten-2021.pdf.>.

[7] NVWA, *Handel in illegale gewasbeschermingsmiddelen in Nederland*, 2022, p. 18, accessible via: https://open.overheid.nl/repository/ronl-e7f4543e08a00addf7acbbe803644728bc4dc254/1/pdf/22050438bijlage-3-nvwa-illegale-handel-in-gewasbeschermingsmiddelen-in-nederland-12-februari-2022.pdf. See also the thereto-related Letters to the Dutch House of Representatives of 25 May, Parliamentary Paper 27858-569, and of 22 June 2022, Parliamentary Paper 28286-1259, accessible via: https://open.overheid.nl/repository/ronl-1e3bcf250a0854c02ffcdbcc4d4a36583e24c83e/1/pdf/moties-en-toezeggingen-op-het-gebied-van-gewasbescherming.pdf and https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2022D26319&did=2022D26319.

Contractual clause on purchasing conditions

The first measure is for participating retailers to include the following clause in their general terms and conditions: "*The Supplier is liable for and shall indemnify the Buyer against any damage that the Buyer may suffer as a result of the presence of prohibited substances (in the relevant plant) in the goods delivered by them.*" The grower will therefore be accountable for any costs for non-compliance with the legal rules. The rationale behind this clause is that it creates an extra incentive for the grower not to use illegal substances.

Enforcement mechanism

A second measure is the introduction of an enforcement mechanism after the use of an illegal substance has been established by a residue measurement. This enforcement mechanism consists of two steps.

Step 1 - after detection of an illegal substance

After an illegal substance has been found in the residues on a plant, the following actions are taken:

- The retailer where the plant was found informs the supplier or grower about the use (suspected or otherwise) of an illegal substance;
- The retailer will take the relevant species of plants of the supplier or grower off the shelves, as it may pose a risk to humans, animals, and the environment;
- The supplier or grower may only sell the plant species again to the retailer concerned if:
  i. the supplier or grower indicates in writing to the retailer before any delivery of new plants, that no illegal substances have been used, and also indicates specifically what action has been taken to ensure that the substance previously found will no longer be found or be used again; and
  ii. the retailer carries out an additional residue measurement on new plants delivered by the supplier or grower concerned, which shows that no illegal substances have been used.[8]

A substance is considered to have been used if at least 0.05 mg/kg of residue is found in the measurement or if use has proven to be plausible.[9]

If, after the first detection of use of an illegal substance, a retailer unilaterally decides not to trade any longer with the grower in question, the retailer will inform TBNL accordingly. TBNL then ensures that, in the next residue measurement, the plants of this grower will be tested again in order to reduce the risk of supplying the contaminated plants to other retailers.

Step 2 - in the event of repeated use of illegal substances

If a second residue measurement on a second delivery of the relevant species of plants again reveals the use of illegal substances by the same grower, the following actions will be taken:

a) All participants in the Initiative are informed about the use of illegal substances by the concerned grower for the specific plant species,[10] and are required to follow steps 1b) and 1c) before they are allowed to trade again with the supplier or grower for that specific plant species; and
b) TBNL reports these findings to MPS/Global GAP, the certification body in the floricultural sector,[11] and to NVWA, the regulator.

This second step is aimed at preventing plants containing illegal substances from reaching the market via other retailers and thus still finding their way to consumers; the waterbed effect.

2022 Pilot

First, a pilot will take place in 2022, in which only the results of the residue measurement as part of Ambition 4.0 will be considered. An accredited laboratory (Eurofins) will carry out this residue measurement. CLM will

[8] The retailer conducts the residue measurement in accordance with a protocol drawn up in advance.
[9] Levels between 0.01 and 0.05 mg/kg may also have other causes, such as use in a previous year or carry-over from other fields.
[10] In each case, the following information is passed on: the name of the grower, the plant species concerned, the pesticide in question, and the date on which the residue measurement was conducted. The name of the retailer where the pesticide was found on a plant is not disclosed to the other participants.
[11] According to TBNL, the certification body will not stop certification on the basis of the report. However, the notification may contribute to additional investigations by the relevant authority at the grower's premises.

subsequently investigate the substances found, and establish the possible use of an illegal substance. At the end of the pilot project, the Initiative will be evaluated. From 2023 onwards, the Initiative will have a broader scope, and will also be applied to other residue measurements (carried out by the retailers themselves).

Participants

Participation in the Initiative is on a voluntary basis and is non-exclusive. One condition is that participants also take part in Ambition 4.0. The costs of the Initiative are passed on to the participants. Of the retail organizations affiliated with TBNL, Intratuin, Praxis, Welkoop, Hornbach, GroenRijk, Ranzijn and GRS Retail (which is a purchasing organization for 200 garden centers) want to participate in the Initiative. This group represents approximately 70% of the retail market for the sale of ornamental flowers and plants, according to TBNL. Several other traders will also participate.

The initial competition analysis

ACM has assessed the Initiative against the principles of its Guidelines. The Guidelines contain five categories of sustainability agreements that generally do not restrict competition and are therefore allowed. One of these categories concerns agreements whose sole purpose is to make the undertakings involved, their suppliers and/or their distributors respect the national or international standards.[12] This category is also known as combating *below-legal-standard competition*, because it involves illicit competition: this is competition that should not have taken place because of national or international standards (sustainability standards or otherwise).

In the Guidelines, this category applies to doing business in countries outside of Europe. According to ACM, combating below-legal-standard competition within Europe too is, generally speaking, not anticompetitive. After an initial competition analysis, ACM considers it plausible that the Initiative falls under this category of sustainability agreements for the following reasons.

Object of the Initiative: respecting a national standard that promotes sustainability

With this Initiative, in which approximately 70% of the retailers participate, the retailers do not set joint prices, do not try to share the market or to limit or control production. The Initiative is not aimed at restricting competition. On the contrary: at present, growers that use illegal pesticides have an (illicit) advantage over growers that comply with the law. By using illegal pesticides, these growers are able to produce plants with less effort and cheaper than growers that *do* comply with the law. Consumers also choose these products without knowing that the plants were grown using illegal substances. These growers do not compete on the basis of their own merits but because they do not comply with the law. This is not the type of competition that the competition rules seek to protect. The initiative of TBNL wants to counteract this illicit competition by ensuring enforcement of the statutory rules and, in doing so, promoting sustainability in the floricultural sector. After all, these statutory rules seek to protect people, animals, and the environment.

Necessity and proportionality

ACM has assessed whether the measures that are proposed as part of the Initiative are necessary and proportional in relation to the elimination of illicit competition and the promotion of sustainability. On the basis of the information provided by TBNL, ACM considers it plausible that the Initiative meets these requirements.

First of all, despite public oversight, illegal substances are still being used. As indicated above, the NVWA itself, too, calls on the sector to undertake private initiatives to enforce the law (or to have it enforced), including focusing on prevention and on awareness among growers and garden retailers, but also on filing reports more often of any illegal substances found.[13]

Second, previous private initiatives in the floricultural sector in recent years, such as improving the traceability of plants at retailers and the introduction of a certification system, have not led to a reduction in

[12] ACM Guidelines, paragraph 27. See footnote 1.
[13] See footnote 7.

the use of illegal substances either. According to TBNL, some of the reasons as to why the share of illegal substances used has not decreased are:

- the reluctance of individual retailers to take measures themselves and to report them to the NVWA at the risk of disrupting the trading relationship. According to TBNL, only joint action can take away this fear; and
- a waterbed effect, which means that plants on which illegal pesticides have been found are supplied anyway to other retailers, and ultimately do end up with consumers. This can only be prevented by sharing information with other retailers about on which batches of plants of which growers illegal pesticides have been found, and by no longer purchasing such plants.

TBNL has also built in safeguards in order to limit the Initiative to what is necessary and proportional, namely:

- The Initiative is open to anyone who wishes to participate, it is non-exclusive, and on a voluntary basis;
- The conditions for participation in the Initiative and the measures are announced publicly in advance through publication thereof on TBNL's website, among other channels;
- The contractual clause that will apply as a purchasing condition (general or otherwise) is limited to *'prohibited substances',* and therefore only refers to what already follows from the statutory rules;
- There are various safeguards within the enforcement mechanism to prevent situations where a grower is wrongfully found to have used illegal substances:
    - Plants are randomly tested at participating retailers by a third party.[14]
    - During the pilot, the residue measurement is carried out by an accredited lab. CLM acts as a third party that examines the results.
    - The minimum for a positive test has been set at >0.05 mg/kg, just to be safe, and in order to rule out as much as possible any other possible causes, such as spillage from other fields.
    - If illegal substances are found, CLM first will have a discussion with the grower regarding the origin of the substance. This discussion is conducted under the principle of hearing both sides. If the grower makes a plausible case that the pesticide came from a source other than illegal use (drift, watering, contamination, starting material), CLM will assess the plausibility thereof. Only if CLM, after this discussion, still considers it plausible that the pesticide was actually used by the grower itself, the earlier mentioned enforcement mechanism will be activated.[15]
- A request to other retailers not to purchase a specific plant from the grower unless the grower is able to demonstrate that no illegal substances have been used, will follow after it has been established that illegal substances have been used *twice* by the grower;[16]
- TBNL is responsible for keeping track of and communicating about violations of other retailers. In that context, only the grower's name is passed on, not where the plants that had tested positive were sold, so that the other retailers do not gain any insight into the trading relationships of their competitors;
- The enforcement mechanism is limited to the specific plant on which illegal substances were found. It remains possible to purchase other products from the grower in question; and
- When a new batch is offered of the plant species for which the use of illegal substances had been previously established, the grower has the opportunity to demonstrate that these plants were grown without the use of any illegal substances. The retailers do not collectively boycott the company that violated the rules, but only ban plants with illegal residues from the market.

[14] Commissioned by N&M, Eurofins visits two locations of each participant/retail organization and buys six different plants. By agreement, four of these are annually recurring species and two are 'surprise species'. Eurofins itself chooses the locations to be visited, and buys the plants. TBNL is not involved in this process.
[15] If an agent is found and the discussion reveals that it was not used by either the grower or supplier, but was found from another source, the grower is asked to draw up an improvement plan to prevent contamination with an agent from another source.
[16] It is assumed that, in the cultivation of the plant, the grower has committed a violation once (and there is therefore no second observation) if (i) it concerns the same plant species at two different retailers; or (ii) it concerns the same illegal substance found at two different retailers and two different plants.

ACM does note that an independent decision (or the opportunity to appeal) regarding the use of illegal substances by the supplier or grower is still lacking. It is correct that CLM, as a third party, has a discussion with the grower if it is established that illegal substances have been used. However, it is CLM itself that makes that establishment. In order to safeguard further the objectivity of the Initiative's enforcement mechanism, ACM therefore recommends that a procedure is put in place that provides for an independent decision (or the opportunity to appeal) regarding the establishment of the use of illegal substances in the very short term, as the economic consequences for the supplier or grower in question could be far-reaching.[17]

Finally, it is unclear how, after the pilot from 2023 onwards, the openness, objectivity, transparency and independence will be guaranteed, if the Initiative is not only applied as part of Ambition 4.0, but is also implemented more broadly in the market. ACM recommends TBNL to build in sufficient safeguards for this as well.

Conclusion

The Initiative does not appear to have an anticompetitive objective but rather a legitimate (statutory) objective, and pursues that objective in a necessary and proportionate way. Through the initiative, a fair (or fairer) competitive process can take place and the floricultural sector will become sustainable (or more sustainable). Assuming that the Initiative meets the requirements of openness, objectivity, transparency and independence, both in the pilot phase and thereafter, ACM considers it plausible that the Initiative does not restrict competition and therefore does not violate Section 6(1) of the Dutch Competition Act (Mw).

As a consequence, ACM does not need to consider the question whether the Initiative qualifies as an ancillary restraint, or in this case, whether or not the exception of Section 6(3) Mw would apply. ACM does not consider it *a priori* implausible that this could be the case, but has not conducted an analysis thereof.

To the extent that there is a cross-border effect and Article 101 of the Treaty on the Functioning of the European Union (TFEU) applies, ACM considers it plausible that, on the basis of that provision too, the same conclusion can be drawn.

Next steps

As set out above, ACM, on the basis of the information provided by TBNL, comes to the conclusion that it is plausible that the Initiative violates neither Section 6(1) of the Mw nor Article 101(1) TFEU. ACM will therefore, at this point, not further investigate this initiative to combat the use of illegal plant protection products in the floricultural sector in the Netherlands.

ACM may still subject the Initiative to a further investigation at a later date, for example, in response to a complaint. Even if new facts and circumstances show that the Initiative violates competition rules anyway, ACM will not impose a fine as you consulted ACM prior to the Initiative and insofar you informed ACM about this in good faith. In such a situation, ACM together with TBNL will try to find a solution in order to comply with competition rules.

Yours sincerely,

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

Michiel Denkers BA, MSc, MBA
Director
Competition Department

[17] This option may be available after the first observation already, but, in any case, after the second observation considering the more far-reaching consequences in that case. In the latter situation, the grower should still be able to question the first observation.