Kluwer Competition Law Blog

Dutch regulator actively facilitating sustainability developments

Tialda Beetstra, Daniëlle van de Vijver, Peter Willis (Bird & Bird) · Thursday, March 10th, 2022

High on the agenda of the Dutch Authority for Consumers and Markets ("**ACM**") is the topic of energy transition and sustainability. The ACM has started to tackle the subject this year by assessing two sustainability initiatives under the competition rules and by announcing that it will explore the opportunities that the energy law framework provides for prioritising sustainability projects.

Collaborations between competitions to achieve sustainability goals

On 28 February 2022, the ACM published a news article dicating that it has no objection to two initiatives in which undertakings that are assumed to be competitors collaborate to reach sustainability goals in the energy sector. Both projects could fall within the scope of the cartel prohibition as laid down in Article 6 Dutch Competition Act ("**DCA**", the Dutch equivalent of Article 101 TFEU), and thus the participants sought the views of the ACM. The ACM gave its opinion on both projects based on the Draft Guidelines on Sustainability Agreements ("**Guidelines**").

Businesses agree to jointly purchase wind energy

The first project is an initiative of VEMW (an association for business users of energy and water), under which VEMW wants to allow its members to collectively enter into a contract with the future developers of an offshore wind farm, namely Hollandse Kust West. As wind farms are now being developed without any government subsidy, it is important for the developers that the purchase of energy can be guaranteed. Under the agreement, the members of VEMW are able to purchase green energy directly from the producer. The members of VEMW and the developers will therefore enter into a power purchase agreement ("**PPA**"). This will make it possible for the members of VEMW to secure a fixed electricity price for several years, the members can use sustainable energy to reduce their CO2 emissions, and the generation of sustainable energy will be promoted by the members involved (see also here, in Dutch).

VEMW requested the opinion of the ACM as to whether the collaboration complies with competition law (and not a buying cartel). According to the ACM, this initiative does not violate

the DCA, as businesses and wind-farm developers will continue to have several options to buy and sell sustainable energy elsewhere. However, the ACM does require all parties purchasing the energy under the PPA to be members of VEMW (see also here, in Dutch). The ACM did not publish an informal opinion concerning this initiative, probably because the ACM considered it to be sufficiently clear that there is no appreciable restriction of competition.

Grid operators collaborate to reduce CO2-emissions

The second project concerns an initiative by all regional grid operators in the Netherlands. When making a purchase and investment decisions, these grid operators want to agree on using a fixed uniform settlement price, currently € 100 per tonne of CO2. This will make it more appealing for the operators to make potentially higher investments whilst reducing more CO2 emissions. As such a collaboration could constitute an infringement of the cartel prohibition, the ACM issued an informal opinion as requested by the parties.

In its informal opinion (only in Dutch), the ACM assessed the proposed collaboration against the Guidelines. Firstly, it is important to note that the ACM considered it disputable whether the operators can be considered competitors within the meaning of competition law, as the regions in which they operate do not overlap. This could mean that Article 6 DCA does not apply. However, grid operators are bound by sector-specific energy regulation in which a system of so-called 'yardstick competition' (*maatstafconcurrentie*), as determined in Chapter 3.6 Electricity Act 1998, exists. This mechanism provides for an incentive to minimise costs, affects prices and quality, and compensates for the lack of regular competition in the relevant market. A grid operator that reduces its costs will enjoy a competitive advantage by reference to the yardstick, and agreement on an element of those costs can, therefore, weaken competition. The ACM concludes that it can thus not be ruled out that the regional grid operators will be regarded as competitors within the meaning of the DCA.

The ACM considers that it cannot be ruled out that the collaboration restricts competition and consequently assesses the initiative under the exception of Article 6(3) DCA (four cumulative criteria, see below). The ACM – in one sentence and without substantiation – establishes that the collaboration between the grid operators constitutes an 'environmental-damage agreement' within the meaning of the Guidelines.[1] This determination is critical as under the Guidelines, it results in a different interpretation of the requirement that users are allowed a fair share of the benefits of the agreement. The ACM concludes as follows on the requirements to benefit from Article 6(3) DCA:

- **Efficiencies (1) and benefits users (2)**: As CO2-emission has a negative effect on society as a whole, reducing this effect will sufficiently benefit consumers within the relevant market. The benefits of environmental-damage agreements are measured by using a shadow price (basically by applying a cost-benefit analysis). If the settlement price used by the grid operators is set equal or lower to the shadow price, the cost per tonne of CO2 saved will always be lower than or equal to the shadow price. This results in the agreement always sufficiently compensating for the costs, meaning that the benefits will outweigh the disadvantages of the agreement. The first two criteria are thus likely to be fulfilled.
- **Necessary (3)**: The grid operators indicated that the agreement is necessary as they will not unilaterally increase the settlement price considering the system of yardstick competition.

Without the uniform settlement price, each grid operator will have the incentive to make purchase and investment decisions merely based on the lowest costs, not taking CO2 emissions into account. Furthermore, the agreement is cost-efficient as the settlement price reflects the most efficient measures of the government.[2]

- **Remaining competition (4)**: The ACM considers that each grid operator will continue to have the incentive to look for the most efficient assets and investment after weighing the expected CO2 emission. This will result in sufficient remaining competition.

Accordingly, the ACM concludes that the agreement fulfils the requirements laid down in Article 6(3) DCA and the Guidelines.[3]

It is relevant to note that the ACM indicates that – should the agreement be investigated at a later stage – further investigation will not be aimed at imposing enforcement measures but at most at amending the agreement to bring it in line with competition law. This is also the case if new circumstances cast a different light on the collaboration. This is a striking difference to other informal opinions on the application of Article 6(3) DCA that ACM has given in the past, which were usually without prejudice to possible enforcement in the future.

Prioritisation of sustainability projects

On 3 March 2022, the ACM published another news article related to the energy transition and sustainability. The ACM announced that it will explore possibilities for grid operators to prioritise projects contributing positively to the energy transition in terms of new grid connections and offering transport capacity. This could relate to solar or wind farms, charging stations for electric vehicles or battery storage.

The ACM will explore the opportunities for grid operators to prioritise grid connections that contribute to the energy transition in the lead-up to its draft decision concerning setting the maximum deadline for new connections to the distribution grid (expected July 2022). This decision follows the CJEU judgement, which affected the division of tasks between the regulator and the legislator, i.a. related to the connection deadline currently laid down in the law (see also here).

The new grid code will be published in 2022. The ACM uses this opportunity to investigate whether grid operators can give priority to projects based on sustainability criteria when refusing or allocating transport capacity in connection to congestion management. The capacity of the grid is and will continue to be a challenge for the coming years. Providing room for prioritisation of sustainably generated energy will likely be necessary for the energy transition, but the current legal framework in principle does not provide for such prioritisation (given the non-discrimination principle). Grid operators are not allowed to unjustly differentiate between different types of users. The ACM will investigate in what ways prioritisation can be realised in practice. The new grid code will include how, when, and under what conditions grid operators should use the system of congestion management.

The ACM also calls upon the Dutch legislator to develop a framework on the basis of which grid operators are able to prioritise their investments (as these will be substantial in the coming years to ensure that the grid is up to the challenge of the energy transition).

Conclusion

We are seeing some interesting and welcome developments from the ACM in terms of facilitating the market to collaborate in achieving sustainability goals to which society as a whole (in principle) benefits. We are eager to see what comes out of the investigation of the ACM and what else the ACM has lined up for energy companies in relation to sustainability initiatives and projects.

---

[1] Environmental-damage agreements concern the reduction of negative externalities, and, as a result thereof, a more efficient usage of natural resources, see paras. 8, 36 and 46-49 Guidelines.

[2] The settlement price is in line with the shadow price reflecting the most efficient measures of the government decided by the Netherlands Environmental Assessment Agency (PBL) and Netherlands Bureau for Economic Policy Analysis (CBP).

[3] Note that the ACM requires the grid operators to evaluate annually whether the settlement price does not exceed the CO2 prices per tonne as set by the PBL and CPB (CPB and PBL, *WLO-klimaatscenario's en de waardering van CO2-uitstoot in MKBA's*, 23 November 2016).

This entry was posted on Thursday, March 10th, 2022 at 5:30 pm and is filed under Netherlands, Sustainability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.