FIDE XXX CONGRESS SOFIA 2023

TOPIC II: THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

THE NETHERLANDS

Mariska van de Sanden and Edmon Oude Elferink*

COMPETITION

GREEN COMPETITION POLICY

On 1 March 2022, the European Commission (EC) published draft Horizontal Guidelines including a chapter on sustainability in which it sets out its approach towards sustainability agreements.[1] As this draft reflects the latest position of the EC, it is taken as a starting point for the purpose of answering the questions on green competition policy.

Question 1

Question 1a

The Dutch Authority for Consumers and Markets (ACM, *Autoriteit Consument & Markt*) currently takes a more liberal approach than the EC as to whether or not sustainability benefits to wider society should be considered when examining agreements between competitors under Article 101(3) Treaty on the Functioning of the European Union (TFEU) and/or the equivalent Article 6(3) of the Dutch Competition Act (DCA, *Mededingingswet*).

ACM's approach is set out in its draft Guidelines on sustainability agreements (draft Sustainability Guidelines, *Leidraad duurzaamheidsafspraken*).[2] The main differences between ACM's and the EC's proposed methods to assess sustainability agreements are:

(i) ACM defines a distinct category of environmental damage agreements (*milieuschadeafspraken*). It concerns agreements which aim to reduce negative externalities, i.e. damage to society that is not included in the price for a product or services, and that thus contribute to more efficient usage of natural resources.[3] The EC does not introduce such a notion in its draft Horizonal Guidelines;

(ii) ACM considers that if an environmental damage agreement contributes to compliance with an international or national standard or if it helps realizing a concrete policy goal (to prevent such

* Mariska van de Sanden: senior enforcement official at ACM. Edmon Oude Elferink: partner Antitrust, Competition & Trade at CMS. With contributions from Anke Prompers, Aron Bouman, Rasmus Geertsema, Gerrit Oosterhuis, Dionne Annink, Ekram Belhadj, Christiaan van Dissel, Esther Jongejan, Maarten van Laar, Kirill Ryabtsev, Mai-Ly Pham, Ann-Marie Kühler, Jotte Mulder and Merle Temme.

[1] EC, 'Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines', 1 March 2022, <www.ec.europa.eu/competition-policy/public-consultations/2022-hbers_en>, visited 13 September 2022.

[2] ACM, 'Guidelines on Sustainability Agreements (Second draft version)', 26 January 2021, <www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>, visited 13 September 2022.

[3] Ibid, p. 6.

damage), then benefits for others than merely the users can be taken into account and users do not need to be compensated in full for Article 101(3) TFEU and/or Article 6(3) DCA to apply.[4] The EC, on the other hand, still requires that the pros for the users outweigh the cons for that very same group of users; and

(iii) ACM contends that in situations where the benefits are global, like in case of a reduction in CO_2-emissions, all benefits can be taken into account to calculate the benefits of the agreement, while the EC seems to suggest that only a proportionate amount of those benefits can be used and taken into consideration.

ACM's approach can be best illustrated with a reference to the informal guidance that ACM gave to Shell and TotalEnergies with regard to a joint marketing initiative to store CO_2 in empty North Sea gas fields.[5] In that case, ACM stated that even if the initiative were not to fully compensate the users, the benefits for society in the form of cleaner air and less CO_2 pollution would still outweigh the negative effects under Article 6(3) DCA.

This particular CO_2-project is only one of many sustainability initiatives that ACM has recently assessed under its draft Sustainability Guidelines.[6] By providing this essential guidance to the market, and by being particularly vocal on the topic,[7] ACM has clearly taken up to the role of frontrunner in the European Union (EU) where it concerns the interface between competition rules and sustainability.

Question 1b

We are unaware of any judgments in private actions in the Netherlands based on competition law where sustainability arguments have been raised and considered by the courts.

However, Dutch courts do show an inclination to take sustainability arguments into account in private actions in general, notably in two major tort cases of recent years against the Dutch government and the oil major Shell.[8] It is therefore our expectation that the courts would also be willing to consider sustainability arguments if they were brought forward in a private action based on competition law.

[4] See also ACM, 'Fair share for consumers in a sustainability context', 27 September 2021, <www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>, visited 13 September 2022.

[5] ACM, 'Informal guidance on collaboration between Shell and TotalEnergies in the storage of CO_2 in empty North Sea gas fields', 27 June 2022, <www.acm.nl/nl/publicaties/informele-zienswijze-samenwerking-shell-totalenergies-co2-opslag-noordzee>, visited 13 September 2022.

[6] ACM, 'System Operators can collaborate in order to reduce CO2 emissions', 28 February 2022, <www.acm.nl/en/publications/system-operators-can-collaborate-order-reduce-co2-emissions>, ACM, 'ACM favors collaborations between businesses promoting sustainability in the energy sector', 28 February 2022, <www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector>, ACM, 'ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles', 26 July 2022, <www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles>, ACM, 'ACM agrees to arrangements of garden centers to curtail use of illegal pesticides', 2 September 2022, <www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides>, all visited 13 September 2022.

[7] E.g. ACM, 'Speech Martijn Snoep: Climate change requires a fresh look on fair and efficient in competition law', 21 June 2022, <www.acm.nl/en/publications/speech-martijn-snoep-climate-change-requires-fresh-look-fair-and-efficient-competition-law>, visited 13 September 2022.

[8] Dutch Supreme Court, 21 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*) and District Court of The Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Royal Dutch Shell*).

Question 2

Question 2a

To the best of our knowledge, there are no merger control decisions in which ACM has considered claims related to sustainability as recognisable efficiency benefits. It should be noted though that in Dutch literature, it has been argued that ACM could take positive sustainability effects into account.[9]

Question 2b

ACM considered a transaction's likely detrimental effects on the environment as competitive harm in at least two merger cases.[10] In the first case, ACM identified the risk that the transaction could lead to a less powerful incentive to invest in sustainability because of the reduction in competition.[11] In the second case, ACM assessed whether lowered purchase prices due to the increased purchasing power of the two merging companies would withhold parties upstream from investing in sustainability.[12]

Question 3

The draft Sustainability Guidelines provide an insight into how ACM intends to determine the trade-off between harm to competition and benefits to sustainability when it is to assess sustainability agreements under the cartel prohibition. For example, quantification of the pros and cons of a sustainability agreement is only required if (i) the undertakings concerned have a combined market share of more than 30% or if (ii) the harm to competition is not evidently smaller than the benefits of the agreement.[13]

In those instances, the trade-off should be identified as accurately as possible and needs to be expressed in monetary terms:

– With regard to environmental damage agreements (see question 1a), ACM refers to environmental prices or shadow prices as tools to quantify the benefits. The guidelines that apply to governmental agencies when making social cost-benefit analyses (SCBAs) can be used as a starting point.[14] Together with the Greek competition authority, ACM has commissioned a report that describes the concepts of negative externalities and environmental

[9] E. Raedts and I. Lulof, 'De opwarming van concentratiecontrole: mogelijkheden een groen licht te geven aan concentraties beschouwd', *Markt en Mededinging*, No. 4/5, 2020, pp. 195-202.

[10] See also ACM, *Sanoma/DPG Media*, 10 April 2020, <www.acm.nl/en/publications/acm-clears-acquisition-publishing-company-sanoma-media-rival-publisher-dpg-media>, visited 13 September 2022, as sustainability generally also includes labour conditions. In this case, ACM investigated the effects of the transaction on the labour conditions of journalists, such as the fees paid to them by the companies.

[11] ACM, *Harbour B.V./AEB Holding N.V.*, 11 April 2022, <www.acm.nl/en/publications/further-investigation-needed-acquisition-waste-management-company-aeb-avr>, visited 13 September 2022. On 27 May 2022, parties filed a request for a license at ACM, <www.acm.nl/nl/publicaties/avr-en-aeb-vragen-een-vergunning-aan-voor-overname-concentratiemelding>, visited 13 September 2022.

[12] ACM, *Van Drie Group/Van Dam*, 19 August 2021, <www.acm.nl/sites/default/files/documents/concentratiebesluit-van-drie-krijgt-vergunning-voor-overname-van-dam.pdf>, visited 13 September 2022.

[13] Ibid, p. 15.

[14] E.g. G. Romijn & G. Renes, 'General Guidance for Cost-Benefit Analysis', *CPB Netherlands Bureau of Economic Policy Analysis and PBL Netherlands Environmental Assessment Agency*, 23 June 2015, <www.pbl.nl/en/publications/general-guidance-for-cost-benefit-analysis>, visited 13 September 2022. See also S. Tey, 'Anticipating future public policy changes in environmental cost benefit analysis', *Oxera*, 30 March 2022, <www.oxera.com/insights/agenda/articles/anticipating-future-public-policy-changes-in-environmental-cost-benefit-analysis/>, visited 13 September 2022.

damage and gives an extensive overview of the empirical instruments available to measure sustainability gains.[15]

– In the case of other sustainability agreements, for instance those regarding animal welfare and human rights, ACM requires full compensation and advocates a "willingness to pay" analysis as a tool to determine benefits.[16]

As regards abuse of dominance, ACM has yet to take a decision on the basis of Article 102 TFEU and/or Article 24 DCA where sustainability arguments are considered. In our view, benefits to sustainability can certainly be invoked as an objective justification for potentially abusive behaviour since Article 3 Treaty on the European Union (TEU) mentions sustainable development as one of the EU's objectives.[17] In order to establish whether those arguments hold ACM may well apply the analytical framework laid down in its draft Sustainability Guidelines.

In future merger cases, ACM is in our view also likely to apply its draft Sustainability Guidelines to assess efficiencies, in particular for the purpose of the valuation of the sustainability gains at a monetary amount.

EUROPEAN STRATEGIC AUTONOMY, THE PROMOTION OF "EUROPEAN CHAMPIONS" AND COMPETITION LAW ENFORCEMENT

Question 4

Question 4a

In the context of the investigation into the proposed merger between Siemens and Alstom, ACM shared the EC's concerns raised in the statement of objections.[18] In its intervention, ACM underlined that the remedies offered by the parties to the transaction fell far short of what would be required to address all concerns to the required standard. ACM did not allude to the industrial policy dimension but seemed not to be inclined to accept the argument that the parties' high combined market shares should be discounted in light of ever evolving and emerging markets.

The Dutch government did not make an official statement at the time but several papers issued between 2019 and 2021 indicate that the Netherlands supported the EC's position.[19]

---

[15] R. Inderst et al., 'Technical Report on Sustainability and Competition', January 2021, <www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf>, visited 13 September 2022.

[16] "Willingness to pay" is the maximum price that a customer is willing to pay for a product or service. See for examples ACM, 'Chicken of Tomorrow', 26 January 2015, <www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> and ACM, 'Coal power plants', 26 September 2013, <www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf>, visited 13 September 2022.

[17] E.g., S. Holmes, 'Climate Change, sustainability, and competition law', *Journal of Antitrust Enforcement*, Vol. 8, No. 2, July 2020, pp. 354-405.

[18] ACM (together with the NCAs from Belgium, the UK and Spain), 'Letter from national competition authorities on the Siemens – Alstom merger', 21 December 2018, <www.acm.nl/sites/default/files/documents/2018-12/siemens-alstom-open-letter-to-com.pdf>, visited 13 September 2022.

[19] Paper by the Netherlands, Denmark, Finland, Ireland, Romania and Sweden, 'Why strong EU competition and state aid rules matter', 11 November 2021, <www.permanentrepresentations.nl/documents/publications/2021/11/11/competition-and-state-aid>, and Position paper by the Netherlands, *Strengthening European Competitiveness*, 15 May 2019, see: <www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness>, both visited 13 September 2022.

Question 4b

According to our knowledge, there were no market players from the Netherlands that intervened in the Siemens/Alstom matter.

Question 4c

ACM is currently conducting a phase II investigation into the proposed merger between two major media companies, RTL and Talpa. According to news reports, the parties involved argue that they need to join forces in order to better compete with American and Chinese players in the media sector.[20] The ACM's phase I decision does, however, not include any reference to such an industrial policy argument.[21]

Question 5

When reviewing mergers, ACM applies the Guidelines on the assessment of horizontal mergers (*Beleidsregel beoordeling horizontale concentraties*).[22] These guidelines do not mention the possibility to take industrial policy concerns into account when assessing concentrations but there is nothing that prevent ACM from doing so either. As far as we are aware, ACM has never actually considered industrial policy in any of its merger decisions.

Question 6

In case ACM blocks a proposed merger on competition law grounds, Article 47 DCA provides for the possibility to request the Minister of Economic Affairs & Climate Policy (Minister, *Minister van Economische Zaken en Klimaat*) to "overrule" ACM's decision by granting a license for the merger in question. The Minister can only do so on the basis of public interest grounds which have to outweigh the negative effects on competition.[23]

The DCA does not define public interest grounds but provides that the decision of the Minister should reflect the sentiment of the Dutch cabinet.[24] The grounds can be of an economic or non-economic nature.[25] Examples are state security, substantial employment opportunities with long term effects[26] or the interest of efficiency that comes with economies of scale to be able to compete with markets beyond the Netherlands.[27]

The most recent case in which the Minister applied Article 47 DCA goes to show that there are limits to the Minister's discretion. In 2019, the Minister overruled ACM's decision to prohibit the acquisition of postal service company Sandd by Dutch incumbent PostNL on four grounds: (i) protection of customers

[20] NLTimes, 'RTL Nederland and Talpa to merge in major Dutch media fusion', 23 June 2021, <www.nltimes.nl/2021/06/23/rtl-nederland-talpa-merge-major-dutch-media-fusion>, visited 13 September 2022.

[21] ACM, 'Extensive investigation needed into merger between RTL and Talpa', 28 January 2022, <www.acm.nl/en/publications/extensive-investigation-needed-merger-between-rtl-and-talpa>, visited 13 September 2022.

[22] ACM, 'Beleidsregel beoordeling horizontale concentraties', April 2013, <wetten.overheid.nl/BWBR0033395/2013-04-01>, visited 13 September 2022.

[23] Article 47(1) DCA and *Kamerstukken* II 1995/96, nr. A, p. 19.

[24] Article 49 DCA.

[25] *Kamerstukken* II 1995/96, 24 707, nr. 3, p. 40-41.

[26] *Nota n.a.v. verslag II voorstel-Mededingingswet, Kamerstukken* II 1996/97, 24 707, nr. 6, p. 69.

[27] *Kamerstukken* II 1995/96, 24 707, nr. A, p. 18-19.

of postal services, (ii) continuity of the national postal service, (iii) protection of employees and (iv) protection of financial interests of the State.

The Trade and Industry Appeals Tribunal (CBb, *College van Beroep voor het bedrijfsleven*), the highest appeal court for competition cases in the Netherlands, ruled that the Minister does not have the power to "redo" ACM's assessment when applying Article 47 DCA.[28] Considerations of competition fall within ACM's remit, and the Minister has to respect and adhere to ACM's assessment, including the latter's analysis as to whether prohibiting the merger would obstruct the performance of a service of general interests.

The Minister can thus only grant a license for a blocked merger on the basis of public interest grounds that do not contravene ACM's decision and that outweigh the negative effects on competition resulting from the merger. Although the CBb accepted the protection of employment mentioned under (iii) as a valid public interest ground, this was insufficient to grant the license in this case.

Note that the merger in question has in the meantime been completed and that it is unlikely that Sandd will ever revive as an independent market player, regardless the outcome of PostNL's pending appeal against the ACM's prohibition decision.

Question 7

Question 7a

When it comes to cases against US digital platforms it is worth mentioning that ACM, amongst other things, conducted a market study into app stores in 2019 and called for tip-offs regarding possible abuse of the position that Apple had attained with its App Store.[29] During ACM's investigation, Match Group, the owner and operator of the popular dating service Tinder and other dating apps, filed a complaint with ACM. According to the complaint, Apple violated competition laws by forcing Match Group to use Apple's in-app payment systems and pay an excessive commission to Apple.[30]

ACM has effectively brought a case against Apple on the basis of Article 102 TFEU and Article 24 DCA for abuse of its dominant position.[31] ACM ordered Apple to allow alternative payment methods in Dutch dating apps and made this order subject to penalty payments (*last onder dwangsom*). Initially, Apple's proposals to remedy the situation did not suffice according to ACM, as a result of which it had to pay a total of EUR 50 million in penalty payments.[32]

[28] CBb, 6 June 2022, ECLI:NL:CBB:2022:289 (*PostNL/Sandd*).

[29] ACM, 'ACM launches investigation into abuse of dominance by Apple in its App Store', 11 April 2019, <www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>, visited 13 September 2022.

[30] Reuters, 'Match Group asks Dutch regulators to reveal possible Apple antitrust decision', 3 September 2021, <www.reuters.com/business/match-group-asks-dutch-regulators-reveal-possible-apple-antitrust-decision-2021-09-03/>, visited 13 September 2022.

[31] ACM, 'Summary of decision: abuse of dominant position Apple', 24 December 2021, <www.acm.nl/en/publications/summary-decision-abuse-dominant-position-apple>, visited 13 September 2022. This publication followed upon a ruling of the president of the District Court of Rotterdam largely rejecting Apple's requests for injunctive relief. See District Court of Rotterdam, 24 December 2021, ECLI:NL:RBROT:2021:12851 (*Apple*).

[32] ACM, 'ACM to assess adjusted proposal of Apple regarding its conditions for dating apps', 28 March 2022, <www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps>, visited 13 September 2022.

In the meantime, Apple has, be it under protest, changed its conditions in line with the ACM's order while appeals are pending. [33]

In May 2022, ACM launched a preliminary investigation into Google's Play Store dating-apps payment systems upon another complaint from Match Group.[34] Meanwhile, Brussels' media are suggesting that the EC will take over this investigation.[35]

Question 7b

The case of ACM against Apple (see question 7a) could be seen as contributing to a more vibrant digital economy and greater digital sovereignty.[36] The case provides a basis, be it a fragile one, for other parties to offer payment services and can potentially decrease dependence on Apple's payment method. In the same vein, the investigation into Google's Play Store, whether it is taken over by the EC or not, may potentially lead to benefits for the European digital economy.

Question 7c

At this point in time, it is difficult to assess if and to what extent the Digital Markets Act (DMA) will affect ACM's ability to bring its own competition law-based cases against digital platforms.

It is clear that some market conduct can violate both the DMA and competition law. As the main objective of the DMA is to prevent so-called gatekeepers (*poortwachters*) from abusing their strong market position in the first place, it may potentially impact the number of competition cases to be pursued by ACM. The more platforms and practices are subject to ex-ante scrutiny in accordance with the DMA, the less conduct should namely require the ex-post application of competition law.

Under the DMA national competition authorities (NCAs) can still bring competition cases against large digital platforms for breaches of competition law without approval from the EC.[37]As a matter of fact, ACM believes that it is useful for NCAs to pursue and to keep pursuing their own competition law-based cases against digital platforms. Not only with a view to the distribution of workload but also because it contributes to the development of thinking on competition law both on the part of NCAs themselves and of the EC.[38]

---

[33] ACM, 'Apple changes unfair conditions, allows alternative payment methods in dating apps', 11 June 2022, <www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps>, visited 13 September 2022. Apple filed an objection against ACM's order. ACM will take a decision (on this objection) in 2023. Afterwards, an appeal at the District Court of Rotterdam and subsequently at the CBb may follow.

[34] Reuters, 'With Apple fight ongoing, Dutch watchdog ACM to investigate Google Play store practices', 4 May 2022, <www.reuters.com/technology/dutch-watchdog-acm-investigate-google-play-store-practices-2022-05-04/>, visited 13 September 2022.

[35] Politco, 'EU antitrust enforcers investigating Google Play Store', 4 August 2022, <www.politico.eu/article/eu-antitrust-enforcers-investigate-google-play-store/>, visited 13 September 2022.

[36] ACM, 'Big Tech and the Dutch payment market: tightening of rules needed to maintain a level playing field', 1 December 2020, <www.acm.nl/en/publications/big-tech-and-dutch-payment-market-tightening-rules-needed-maintain-level-playing-field>, visited 13 September 2022.

[37] Article 38 (3) DMA.

[38] ACM, 'New European competition rules for Big Tech companies can be even more effective', 23 June 2021, <www.acm.nl/en/publications/new-european-competition-rules-big-tech-companies-can-be-even-more-effective>, visited 13 September 2022. See also ECN, 'Joint paper of the heads of the national competition authorities of the European Union: How national competition agencies can strengthen the DMA', 22 June 2021, <www.acm.nl/sites/default/files/documents/verklaring-voorstel-digital-markets-act.pdf>, visited 13 September 2022.

Question 7d

According to ACM, a good cooperation and coordination mechanism should be put in place to ensure that the DMA, on the one hand, and EU and national competition law, on the other, can be applied in a coherent manner.[39] The Dutch government takes a similar position.[40] Cases brought by either the EC or NCA's should not lead to undesirable inconsistencies or over-enforcement.

Question 8

From a national perspective, the EC approval of a Dutch scheme to compensate energy-intensive companies for indirect emission costs to prevent those industries from relocating their production outside the EU should be mentioned here. Although not related to the creation of a European industrial champion, this decision demonstrates that industrial policy concerns can play a role in relation to State aid measures.[41]

Question 9

According to a study commissioned by the EC on the national enforcement of State aid rules that came out in 2019,[42] Dutch courts tend to apply State aid rules relatively often. In the period from 2007 to 2018, the Netherlands had the second largest number of cases of private enforcement of State aid rules before national courts in the EU, namely 89, as well as a number of cases of public enforcement.

Be that as it may, Dutch courts seem to make little use of judicial remedies and other tools available to seek clarification in the context of State aid. According to the said study, Dutch civil courts have been reluctant to involve the Court of Justice of the European Union (CJEU) when applying State aid rules. Only a "few" preliminary rulings were reported. Another recent publication shows that not one Dutch administrative court has actually referred a matter to the CJEU between 2016 and 2022.[43]

From time to time, Dutch courts do involve the EC either in light of the previous and current Commission notice on the enforcement of State aid rules by national courts[44] or on the basis of Article

[39] Ibid.

[40] See Dutch Ministry of Economic Affairs and Climate Policy, German Federal Ministry for Economic Affairs and Energy and French Ministry of Economics and Finance, 'Strengthening the Digital Markets Act and its Enforcement', September 2021 <www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4>, p.2 and Dutch Ministry of Economic Affairs and Climate Policy, German Federal Ministry for Economic Affairs and Energy and French Ministry of Economics and Finance, 'Non-paper France, Germany & The Netherlands', May 2021, <www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4>, point 5.

[41] EC, 'State aid: Commission approves EUR 835 million Dutch scheme to compensate energy-intensive companies for indirect emission costs', 19 August 2022, <ec.europa.eu/commission/presscorner/detail/en/ip_22_4928>, visited 13 September 2022.

[42] EC, Monti, G., Bas, P., Meindert, L., et al., *Study on the enforcement of state aid rules and decisions by national courts : final study*, COMP/2018/001, PO 2019, <https://data.europa.eu/doi/10.2763/793599> and <https://op.europa.eu/nl/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1>.

[43] J. Langer et al., 'Kroniek toezicht Nederlandse bestuursrechters op de naleving en handhaving van de Europese staatssteunregels 2016-2021', *Tijdschrift voor Bouwrecht*, Vol. 138, 2021.

[44] Commission Notice on Enforcement of State aid rules by national courts, OJ 2021 C305/1. See CBb, 29 December 2017, ECLI:NL:CBB:2017 (*Rare sheep breeds*) and Court of Appeal of 's-Hertogenbosch, 16 May 2017, ECLI:NL:GHSHE:2017:2127 (*Waste processing*).

29(1) Regulation 2015/159.[45] According to the study commissioned by the EC, there were at least four opinions requested from the EC on the latter basis.

GEOPOLITICAL INSTRUMENTS, TRADE INSTRUMENTS, AND COMPETITION POLICY

Question 10

We are not aware of cases decided on by ACM where existing trade instruments have affected a competition law analysis.

That said, we do expect this to happen if and once existing FDI screening instruments (see question 11), will be applied more regularly in the Netherlands. Regulatory restrictions have namely played a role in previous competition law analyses of ACM.[46]

TRADE

FDI CONTROL

Question 11

With a view to answering question 11, it seems useful to first give an overview of existing FDI screening mechanisms in the Netherlands.

General FDI-mechanism

On 19 April 2022, the Act on safety screening of investments, mergers and takeovers (Act VIFO, *Wet veiligheidstoets investeringen, fusies en overnames*) was adopted.[47] This act is the legal basis for a general FDI screening mechanism in the Netherlands.

The Act VIFO establishes a general system to assess changes in control and influence, in addition to the sectoral rules identified below. The Act VIFO applies to acquisition activities when they involve a target undertaking that is active as a critical service provider, an administrator of a high-tech campus, or an undertaking whose activities relate to a sensitive technology.

After entry into force,[48] the Act VIFO will have retroactive effect from 8 September 2020 onwards. On this date the draft legislative proposal and explanatory memorandum became publicly accessible for everyone. The geographical scope of the Act VIFO is not limited, which means that the investment screening is introduced for investments from all countries (including purely domestic transactions).

The Act VIFO determines that an acquisition activity cannot take place until the Minister has informed the party obliged to report, either the target undertaking or the acquirer, that (i) no review decision is required or (ii) a review decision has been taken.

If the Minister is of the opinion that the acquisition activity leads to a risk for national security (see also question 11e), he can in the review decision decide that the acquisition activity will be allowed if certain

[45] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty of the Functioning of the European Union, OJ 2015, L248/9.

[46] E.g. Summary ACM decision, 1 July 2021, <www.acm.nl/sites/default/files/documents/samenvatting-besluit-misbruik-van-economische-machtspositie-door-leadiant.pdf>, visited 13 September 2022 and the merger case concerning the waste processing market referred to in the answer to question 2b.

[47] *Regels tot invoering van een toets betreffende verwervingsactiviteiten die ene risico kunnen vormen voor de nationale veiligheid gezien het effect hiervan op vitale aanbieders of ondernemingen die actief zijn op het gebied van sensitieve technologie (Wet veiligheidstoets investeringen, fusies en overnames), Stb. 2022, 215*.

[48] The date of entering into force has not been set. However the Act VIFO is expected to enter into force late 2022 or early 2023.

criteria or further rules are met. If the risk for the national security cannot be sufficiently averted by these criteria or rules, the Minister will prohibit the acquisition activity. Prohibited acquisition activities can be void (*nietig*) or voidable (*vernietigbaar*).

Sector-specific FDI-mechanisms

In addition to the Act VIFO, the Netherlands already has sectoral regulation in place that includes FDI control. It concerns:

– Electricity Act (*Elektriciteitswet*):[49] investments, that have a change of control[50] as a consequence, in a production plant with a rated electrical output exceeding 250 megawatts or in an undertaking that manages a production plant with the aforementioned output are notifiable and subject to control by the Minister;

– Gas Act (*Gaswet*):[51] investments, that have a change of control as a consequence, in an LNG-installation or LNG-company are notifiable and subject to control by the Minister; and

– Telecommunications Act (*Telecommunicatiewet*)[52]: this act was expanded by the Act on undesirable control of telecommunications (*Wet ongewenste zeggenschap telecommunicatie*), which entered into force on 1 October 2020.[53] This act applies to investors who wish to obtain a controlling interest in a telecommunications party where this would result in influence in the telecommunications sector.[54] The Minister needs to be notified and can, also ex officio, prohibit a transaction or impose conditions for clearance in case of a threat to the public interest.

As far as we know, one notification was made under both the Electricity and Gas Act. A total number of six notifications were made under the Telecommunications Act, two of which fell outside the scope of the law. In addition, seven investigations have been completed under the Telecommunications Act. None of these notifications or investigations has led to the conclusion that the activity should be prohibited or that measures need to be imposed.

Question 11a

As far as the application of FDI-rules is concerned, the main challenge for undertakings is to determine whether an envisaged investment or transaction falls within the scope of the Act VIFO or of any of the

[49] Article 86f Electricity Act.

[50] In Article 26 DCA defines a "change of control" as the possibility to exercise decisive influence on the activities of an undertaking based on factual or legal circumstances.

[51] Article 66e Gas Act.

[52] Article 14a.2 Telecommunications Act.

[53] *Wet van 20 mei 2022 tot wijziging van de Telecommunicatiewet met betrekking tot ongewenste zeggenschap in telecommunicatiepartijen (Wet ongewenste zeggenschap telecommunicatie), Stb. 2020, 165, Besluit van 22 september 2022, houdende regels ter uitwerking van hoofdstuk 14a van de Telecommunicatiewet (Besluit ongewenste zeggenschap telecommunicatie), Stb. 2020, 352 en Regeling van de Staatssecretaris van Economische Zaken en Klimaat van 17 september 2020 houdende voorschriften met betrekking tot de melding van het voornemen overwegende zeggenschap in een telecommunicatiepartij te verkrijgen (Regeling melding Wet ongewenste zeggenschap telecommunicatie), Stcrt, 2020, 48965.*

[54] See T.M. Stevens, 'Investeringstoets telecommunicatie', *Ondernemingsrecht*, 2019; K. Berg, 'Wet ongewenste zeggenschap telecommunicatie – een analyse', *Computerrecht*, 2019; and E. Breukink, 'Het wetsvoorstel ongewenste zeggenschap telecommunicatie', *Maandblad voor Ondernemingrecht*, No. 5-6, 2019.

sector-specific regulations. It tends to be difficult to both identify relevant products and sensitive technology and to assess whether these products and technologies are caught by any of the FDI-regimes.

Once an undertaking has come to that conclusion, it is often difficult to assess if an investment runs an actual risk of being prohibited or only being cleared subject to conditions. In the absence of decisional practice and (national) case law, the notions used for the actual and substantive assessment, such as the risk for national security (Act VIFO) and the threat to the public interest (Act on undesirable control of telecommunications), still leave room for interpretation. We also refer question 11e.

Question 11b

On 18 November 2020, the Netherlands adopted the Implementation Act FDI Screening Regulation (Implementation Act, *Uitvoeringswet screeningsverordening buitenlandse directe investeringen*)[55] in order to implement the FDI Screening Regulation.[56]

In Article 2 Implementation Act, a contact point is established, i.e. the Minister. According to the Implementation Act, the Minister must ensure that the cooperation mechanism and information exchange with the EC and the other Member States takes place in accordance with Articles 6 to 9 FDI Screening Regulation.

In turn, the Minister has mandated the tasks emanating from the FDI Regulation to the Investment Review Agency (BTI, *Bureau Toetsing Investeringen*).[57]

In our view, the Act VIFO, which lays down the substantive Dutch rules on FDI, is in line with the standards set out in the FDI Screening Regulation and takes account of the criteria set out therein. Over all, the Netherlands does not seem to have gone beyond the harmonisation achieved in the FDI Screening Regulation.

For more information on the Netherlands' reporting on the basis of Article 5 FDI Screening Regulation, we refer to the first and second Annual Reports on the screening of foreign direct investments into the Union.[58]

Question 11c

See question 11a.

Question 11d

The Act VIFO applies to a critical service provider, administrator of a high-tech campus, or an undertaking whose activities relate to a sensitive technology. Critical service providers are undertakings active in the field of transportation of heat, nuclear energy, air transportation, harbour services, banking, infrastructure and the financial market. Other categories can be appointed by governmental decree.

According to the Act VIFO, sensitive technology includes:

[55] *Uitvoeringswet screeningsverordening buitenlandse directe investeringen, Stb. 2020, nr. 491.*

[56] Regulation (EU) 2019/452 of the European Parliament and of the council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019, L 79/1.

[57] Website BTI, <www.bureautoetsinginvesteringen.nl>, visited 13 September 2022.

[58] EC, 'First Annual Report on the screening of foreign direct investments into the Union', 23 November 2021, <trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf>, and EC, 'Second Annual Report on the screening of foreign direct investments into the Union', 1 September 2022, <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0433>, both visited 13 September 2022.

- Dual-use items for the export of which an authorization is required based on Article 3(1) Regulation 428/2009;
- Military goods as meant in Article 2 Strategic Goods Implementation Regulation 2012 (*Uitvoeringsregeling strategische goederen 2012*). This provision refers to the Common Military List of the EU;[59] and
- All technologies relating to semiconductors, photonics, quantum mechanics and High Assurance identification techniques.

By governmental decree it is possible to appoint other technologies as sensitive technologies. Conversely, certain dual-use items or military goods can be excluded from being qualified as sensitive technologies by governmental decree.

As mentioned, there are also several specific assessments that are embedded in sectoral frameworks. Additionally, draft legislation is being prepared for a sectoral test for companies that are part of the Dutch defence industry.[60]

Question 11e

Under the Act VIFO, BTI assesses whether an investment poses a risk to national security. BTI has only recently been founded. Although it got off to a flying start, its experience and decisional practice have to be built up.

National security is defined in Article 1 Act VIFO with reference to the concept of national security under the TEU and the concept of public security and essential interest of its security under the TFEU.[61] In particular, it is concerned with the continuity of critical processes, maintaining the integrity and information of critical or strategic importance for the Netherlands and preventing unwanted strategic dependence on other countries.

The following criteria will be considered when evaluating whether an investment, and/or investor, poses a risk to national security (Article 19 to 21 Act VIFO):

- the degree of transparency regarding the investor's ownership structure;
- restrictions under national and international law;
- the security situation in the investor's country or region of residence;
- whether the investor has committed crimes;
- the level of cooperation during the assessment;
- connection of the investor to regimes that have a different geo-political agenda than the Netherlands;[62] and

[59] Article 8 Act VIFO.

[60] Dutch government, 'Kabinet: open markt, maar bescherming nationale veiligheid', 8 July 2022, <www.rijksoverheid.nl/actueel/nieuws/2022/07/08/kabinet-open-markt-maar-bescherming-nationale-veiligheid>, visited 13 September 2022. For the current rules applicable to contractors of the Dutch Ministry of Defence, see Dutch Ministry of Defense, 'Algemene beveiligingseisen Defensie Opdrachten 2019 (ABDO)', <www.defensie.nl/binaries/defensie/documenten/beleidsnota-s/2020/02/04/abdo-2019/ABDO2019_Definitief_V1.1_web.pdf>, visited 13 September 2022. This includes a change of control notification requirement.

[61] *Kamerstukken* II 2020-21, 35880-3, Explanatory Memorandum, p. 130.

[62] Ibid, pp. 4 and 5.

– financing of the investment and resources used for the investment.

Other assessment criteria are specific to the investment, such as the exploitation track record in the case of the acquisition of vital infrastructure, and the track record of the investor on information security in case of an investment in sensitive technology. BTI has considerable leeway to assess national security risks.

The sector specific investment screening regulations contain limited guidance on the definition of public order or security.

Question 11f

In principle, there is no room for competition considerations in Dutch FDI control.[63]

Question 11g

The Minister is obliged to share information regarding FDI with the Member States and the EC as long as they fit within the definition provided in Article 2(1) FDI Screening Regulation.

Our understanding from contacts with BTI is that this information exchange works well. It allows the Member States to gather information about investments that are of interest to them, even if they are not notifiable in their own jurisdiction. Member States are known to use the exchange mechanism to gather information on investments where they could potentially have effect in their own Member State. For private parties, the downside to this is that may experience delays due to such exchanges.

Question 11h

Under the Act VIFO, BTI performs the review and the Minister issues the formal decisions in accordance with that act. A decision under the Act VIFO is a decision in the meaning of the Dutch General Administrative Act (*Algemene wet bestuursrecht*) and is open to reconsideration by the Minister (*bezwaar*), followed by appeal proceedings at the Rotterdam court of first instance and the CBb.[64] This process is also open to third parties who are individually and directly concerned by a decision under the Act VIFO.

The initiation of injunction procedures could also be a possibility, for instance in the case of an unlawful act by the Dutch State. There are no facts or cases regarding such cases in the public domain yet since BTI has only recently started its operations.

Question 11i

The COVID-19 pandemic was used by the Minister to speed up the introduction of the first draft of the Act VIFO which had been in the making for years.[65]

The Minister announced that the Act VIFO would apply retroactively from the date of his letter to Parliament in order to prevent investors from snatching up vulnerable companies, especially in the health care sector. Ironically, the health care sector has never been designated a vital sector but the retroactive application of the Act VIFO remained.[66]

[63] Ibid, pp. 38-41 (FDI evaluation criteria) and pp. 72-73 (relationship FDI control and competition law).

[64] Both courts are appointed by law as specialised courts for appeals under the Act VIFO, derogating from the regular process for appeals under Dutch administrative law.

[65] Ibid, p. 2. See also *Kamerstukken* II 2019-20, 30821, 113.

[66] *Kamerstukken* II 2020-21, 35880-3, Explanatory Memorandum, p. 125.

TRADE DEFENCE AND PUBLIC PROCUREMENT – FOREIGN SUBSIDIES

Question 12

In the Netherlands, there has been a genuine concern about the existence and impact of foreign subsidies.[67] Companies in third countries that could benefit from subsidies or financial relationships that are not structured at arm's length with the governments of these third countries have been considered as distorting the competition on the EU internal market for some time already. The concerns on the part of the Dutch government led to the publication of a Dutch non-paper on a Level Playing Field Instrument (LPFI) in 2019.[68]

Against this backdrop, it comes as no surprise that the Netherlands has fully supported the EC's proposal for the Foreign Subsidies Regulation (FSR) which was published in May 2021.[69] This support is reflected in the memo on new EU proposals (BNC fiche, *Beoordeling nieuwe commissievoorstellen*).[70] In that memo, the Netherlands mentions that, amongst other things, attention should be paid to the relationship with possible screening of foreign investments for the effects on national security and public order (including the FDI Screening Regulation) and the International Procurement Instrument (IPI).[71] Moreover, the Netherlands draws attention to the fact that investigations carried out by the EC on the basis of the FSR can cause delays in national public procurement procedures.[72] This potential impact needs to be considered and monitored once the FSR has entered into force.

On 30 June 2022, the European Parliament and the Member States reached a provisional political agreement on the FSR.[73] We have informal knowledge that the Netherlands considers the outcome of the legislative process satisfactory, taking into account the way the negotiations have gone and the short period of time a provisional agreement was reached.

---

[67] Dutch government, 'Kabinetsappreciatie witboek buitenlandse subsidies op de interne markt', 21 August 2020, <www.rijksoverheid.nl/documenten/kamerstukken/2020/08/21/kabinetsappreciatie-witboek-buitenlandse-subsidies-op-de-interne-markt>, visited 13 September 2022; and *fiche* (memo) of the working group Review New Commission Proposals (BNC), 'Verordening buitenlandse subsidies', 11 June 2021, <www.rijksoverheid.nl/documenten/publicaties/2021/05/05/fiche-2-verordening-buitenlandse-subsidies>, visited 13 September 2022.

[68] Dutch government, 'Non-paper strengthening the level playing field on the internal market', 9 December 2019, <www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2019/12/09/non-paper-on-level-playing-field/Dutch+nonpaper+on+Level+playing+field.pdf> visited 13 September 2022.

[69] Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021, COM/2021/223 final.

[70] *BNC fiche*, 2021 (see footnote 67).

[71] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), OJ 2020, L 173/1.

[72] N.A. Meershoek, 'Nationale veiligheid als natuurlijke begrenzing van EU aanbestedingsliberalisering', *Tijdschrift Aanbestedingsrecht en Staatssteun*, No. 4, 2021; M.J.A. Verseveld &. S.P.A. Boomkamp, 'De verwachte impact van de Europese regulering van buitenlandse Staatssteun op de aanbestedingspraktijk', *Tijdschrift Aanbestedingsrecht*, No. 5, 2021; C. Dekker, 'Proliferatie van het staatssteunrecht', *Markt & Mededinging*, No. 3, 2021.

[73] Council of the EU, 'Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament', 30 June 2022, <www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/ Provisional agreement resulting from interinstitutional negotiations> visited 13 September 2022.

Question 13

Whether or not there are limitations to the EU's approach to seek to transpose existing competition, public procurement and trade defence frameworks is difficult to say.

It is clear though that the EU is not only bound by EU law but also by international law. Free trade agreements between the EU and third countries as well as rules adopted by the Organization for Economic Cooperation and Development (OECD) will in any event have to be adhered to going forward.

MANDATORY DUE DILIGENCE AND REGULATING SUPPLY CHAINS

Question 14

On 11 March 2021, a proposal for the Act on Due Diligence (*Wet verantwoord en duurzaam internationaal ondernemen*)[74] was introduced in the Netherlands.[75] The Act on Due Diligence's aim is to identify, prevent and reduce adverse effects of business activities on human rights, employment rights and the environment. It is modelled on the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[76]

On 14 May 2019, the Act Duty of Care Child Labour (*Wet zorgplicht kinderarbeid*)[77] had already been adopted. This law is applicable to all undertakings, including foreign undertakings and undertakings that are only active online, that sell or supply goods or services to Dutch end users. If and once the proposed Act on Due Diligence is adopted, the Act Duty of Care Child Labour will be withdrawn.

In turn, the proposal for the Act on Due Diligence is likely to be amended in order to be brought in line with the proposal for a directive on Corporate Sustainability Due Diligence (Directive on CSDD) which the Commission published on 23 March 2022.[78] We also refer to question 15.

Question 14a

The Act on Due Diligence provides for a general duty of care that applies to all undertakings. However, the act also introduces a number of specific responsibilities with respect to the process of due diligence that only apply to large undertakings that carry out activities outside the Netherlands and that meet two out of three of the following criteria:

- balance sheet total EUR 20 million;
- net turnover EUR 40 million; and
- average number of employees during the fiscal year is more than 250.

Question 14b

As mentioned, the Act on Due Diligence provides for a general duty of care. Undertakings that know or can reasonably expect that their activities have adverse effects on human rights, employment rights or

[74] *Voorstel van wet van de leden Voordewind Alkaya, Van den Hul en Van den Nieuwenhuizen houdende regels voor gepast zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Kamerstukken* II 2020/21, 35 761, nr. 2.

[75] H. Koster, 'De voorgestelde Wet verantwoord en duurzaam internationaal ondernemen', *Bedrijfsjuridische Berichten*, Vol. 4, 2021.

[76] See OECD, 'OECD Guidelines' <www.oecdguidelines.nl/oecd-guidelines/all-about-the-oecd-general-information>, and Dutch Ministry of Foreign Affairs, 'NCP', <www.oecdguidelines.nl/ncp>, both visited 13 September 2022.

[77] *Stb.* 2019, nr. 401.

[78] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final.

the environment outside of the Netherlands, are obliged to take all precautionary measures that can reasonably be asked for to prevent these effects. The effects should be minimized and remedied as much as possible. Adverse effects on human rights, employment rights or the environment are in any event deemed to exist in case of a restriction of the freedom of association and collective bargaining, child labour, slavery and environmental damage.

Those undertakings that meet the requirements mentioned under question 14a need to ensure that they implement a due diligence process to identify, prevent and reduce the actual and potential adverse effects of their actions.

In accordance with the OECD Guidelines, this process consists of six steps: (i) include corporate social responsibility in the companies' policy and management systems, (ii) identify actual or potential adverse effects on corporate social responsibility related themes, (iii) stop, prevent or minimize these adverse effects, (iv) monitor the practical application and results, (v) communicate about how the effects are being handled and, if applicable, (vi) facilitate or take part in recovery.

Question 14c

The Act on Due Diligence creates clarity on the responsibilities of undertakings where it concerns adverse effects of business activities on human rights, employment rights and the environment. As a consequence, it may be easier for undertakings that act at each level of the supply chain to hold liable other undertakings that operate at a higher or a lower level in that same supply chain. Although technically the Act on Due Diligence does not provide for contractual cascades, it follows from the Explanatory Memorandum that non-compliance should ultimately lead to termination of contracts.[79]

The act addresses undertakings in the meaning of the Act on Trade Register (*Handelsregisterwet 2007*), or any entities that carry out an economic activity, including their subsidiaries. On this basis, a mother company can be held liable for any violations of the law in question committed by their subsidiaries, and possibly vice versa.[80]

Question 14d

As regards extra-territorial effects, it is important to note that the Act on Due Diligence focusses on international corporate social responsibility and introduces obligations that apply to the foreign part of the supply chain. Once in force, the legislation will be applicable to undertakings if and to the extent that they are active in countries outside the Netherlands.

This includes both undertakings based in the Netherlands and foreign undertakings that meet the requirements mentioned in our answer to question 14a and that carry out an activity in the Netherlands or sell a product on the Dutch market.

Question 14e

According to the Act on Due Diligence, a regulator will have to be appointed or established for the purpose of enforcing the law. This regulator will have the power to impose orders subject penalty payments and administrative fines.

The obligations laid down in the Act on Due Diligence can serve as a legal basis for civil liability of undertakings, e.g. on the basis of a wrongful act (*onrechtmatige daad*).

[79] *Kamerstukken* II 2020/21, 35 761, nr. 3, Explanatory Memorandum, pp. 19 and 60.

[80] Ibid, p. 28.

An infringement of the Act on Due Diligence can under circumstances also constitute an economic (criminal) offence.[81] In that event, it is possible that natural persons on the part of the undertaking are prosecuted in their capacity of managers (*feitelijk leidinggevers*).

Any person concerned (*betrokkene*) can invoke and rely on the Act on Due Diligence. This also includes persons or groups of persons of whom rights or interests are directly affected by a lack of due diligence or an organization with the protection of human rights, employment rights or the environment as its statutory objective.[82]

Question 14f

The Act on Due Diligence does not create a liability regime in its own right. The general civil liability rules in the Netherlands apply. On that basis, a civil liability claim for a wrongful act (*onrechtmatige daad*) can be lodged in a Dutch court, if there is no contractual basis for it.

Question 15

The Directive on CSDD and the Act on Due Diligence are similar in terms of scope and objectives. Both legislative initiatives are modelled on the OECD Guidelines. If the adoption of the Directive on CSDD will not take too long, the Act on Due Diligence may still be amended in order to implement the Directive on CSDD.[83] Alternatively, the Dutch government lets the Act on Due Diligence enter into force and subsequently amends it to transpose the directive.

There do not seem to be any major challenges where it concerns the implementation in the Netherlands of the Directive on CSDD if and once adopted. The Netherlands have been advocating the adoption of this type of legislation at EU-level.[84] The questions raised in the BNC fiche concerning the Directive on CSDD only pertain to the scope of application.[85] With a view to ensuring as much legal certainty for undertakings, the Netherlands proposes to bring the scope in line with the proposal for Corporate Sustainability Reporting Directive.[86]

* * *

[81] *Kamerstukken* II 2020/21, 35 761, nr. 3, Explanatory Memorandum, p. 25.

[82] Article 1 Proposal.

[83] *Kamerstukken* II, 2021/22, 35 761, nr. 6.

[84] Dutch government, 'Non-paper mandatory due diligence: building blocks for effective and ambitious European due diligence legislation', <open.overheid.nl/repository/ronl-42974c33-2ef5-42ed-ab61-2e41c0fdd988/1/pdf/mandatory-due-diligence.pdf>, visited 13 September 2022.

[85] *BNC fiche 'Richtlijn gepaste zorgvuldigheidsverplichting voor ondernemingen'*, 7 April 2022, <www.eerstekamer.nl/eu/behandeling/20220407/brief_regering_fiche_richtlijn/document3/f=/vlsojbc95dzx.pdf>, visited 13 September 2022.

[86] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21 April 2021, COM(2021) 189 final.