



Decision of the Netherlands Authority for Consumers and Markets as referred to in Section 12(h) of the Establishment Act of the Netherlands Authority for Consumers and Markets

Case number ACM/23/182045
Our reference ACM/UIT/613562
Date March 12, 2024

1 Summary

1. Following an investigation by ACM, Slachterij Vion committed to presenting an amended agreement to its pig farmers. This agreement describes, among other things, the price system on the basis of which pig farmers supply their pigs to Vion. With the amended agreement, it is no longer possible for Vion to unilaterally change the terms agreed with its pig farmers. Unilaterally changing the terms of the supply agreement is prohibited under the Agriculture and Food Supply Chain Unfair Trading Practices Act.
2. ACM considers the amended agreement that Vion wishes to present to be an improvement in the pig farmer's negotiating position. First, on the basis of the proposed amended provisions, Vion can no longer unilaterally change the price system. In addition, Vion must adhere to the one-year notice period, and it can no longer immediately terminate the agreement if the parties fail to reach an agreement on a change after consultation.
3. ACM considers that Vion's commitment will eliminate the risks identified by ACM. ACM therefore declares Vion's commitment binding and discontinues its investigation. ACM will verify whether Vion complies with its commitment.

2 Application

4. On November 14, 2023, the Netherlands Authority for Consumers and Markets (hereinafter: ACM) received an application to declare a commitment from Vion Farming B.V. (hereinafter: Vion) binding.¹ The commitment concerns the agreements between Vion and its suppliers (pig farmers) for the supply of pigs. Vion commits to changing its agreements only with the consent of its suppliers and to delete the possibility of unilateral changes from the agreements.
5. ACM declares Vion's commitment to be binding. In Section 2, ACM provides information on the legal framework. Section 3 contains a description of the course of the procedure. Section 4 describes the context in which the commitment was made. Section 5 describes the trading practices of Vion related to the Agriculture and Food Supply Chain Unfair Trading Practices Act (hereinafter: Agriculture UTP Act). Section 6 describes the content of the commitment. In Section

¹ As referred to in Section 12(h) of the Establishment Act of the Netherlands Authority for Consumers and Markets (hereinafter: the Establishment Act).

7, ACM assesses the commitment in terms of its effectiveness. Finally, Section 8 contains the declaration that the commitment is binding.

2 Legal framework

6. ACM can take the decision to declare an undertaking's commitment application to be binding. By declaring a commitment binding, ACM no longer has the power to impose an administrative fine or an order for incremental penalty payments on that undertaking.²
7. ACM may declare a commitment application to be binding if it considers that it would be more effective than an investigation that could possibly lead to the imposition of an administrative fine or an order for incremental penalty payments. The purpose of the commitment is to eliminate or adequately minimize a possible violation of the Agriculture UTP Act. The undertaking must conduct itself in accordance with the commitment decision. If an undertaking fails to do so, it risks an administrative fine.³
8. In order to assess whether declaring a commitment binding is more effective than imposing an administrative fine or an order for incremental penalty payments, one of the things ACM looks at is the phase of an investigation into a suspected violation and the nature of the violation.

3 Course of the procedure

9. Following media reports, ACM launched an investigation into a possible violation of the Agriculture UTP Act by Vion. On the basis of those reports, it was suspected that Vion had unilaterally changed the agreements with its suppliers (pig farmers). The Agriculture UTP Act prohibits buyers from unilaterally changing an agreement. On February 6, 2023, ACM received an enforcement application in this regard from POV, the producer organization of Dutch pig farmers, which represents Vion's suppliers (and others). In that enforcement application, POV states that Vion unilaterally changed the agreements between Vion and the pig farmers in three ways.⁴
10. On April 26, 2023, ACM sent a draft decision containing an order for incremental penalty payments to Vion and POV. Both parties gave their opinions of this draft decision. In response to this draft decision, Vion contacted ACM about the possibility of giving a commitment.
11. Vion indicated its wish to eliminate the risks identified by ACM by giving a commitment. Vion emphasized that this did not constitute an admission of violation of the Agriculture UTP Act, nor acknowledgement any liability in this regard.
12. ACM notes that the commitment, which relates to two of the three complaints from POV as described in its enforcement application, eliminates the risks identified by ACM. This has resulted in this decision declaring Vion's commitment to be binding. The commitment does not apply to a third complaint from POV that it filed in the enforcement application. ACM will decide on this complaint, which concerns the calculation of the DG-Agri carcass price quotation, in a separate decision.⁵

² Section 12h of the Establishment Act.

³ Under Section 12m of the Establishment Act.

⁴ See Section 4.1 of this decision.

⁵ ACM/UIT/616738.

13. ACM published a draft of this commitment decision on its website on December 4, 2023.⁶ Stakeholders had the opportunity to state their opinions on this draft decision. POV used this opportunity. ACM received a written opinion from POV on January 9, 2024⁷, which the latter explained orally on January 18, 2024.⁸ A summary of the opinion and ACM's response to it is shown in Section 7.3 of this decision.

4 Context

4.1 Purpose of the Agriculture UTP Act

14. The Agriculture UTP Act came into force on November 1, 2021. This Act is based on an EU directive⁹ that aims to strengthen the position of farmers, fishers, market gardeners and other suppliers of agricultural and food products. Substantial differences in size and turnover between suppliers and buyers can lead to an imbalance in bargaining power in the supply chain. This may result in certain trading practices that are contrary to the principles of good faith and fair trading. This increases uncertainty and risks for the weaker party in the chain (the supplier) and can have a negative impact on innovation and investments and lead to inefficient production decisions. Unfair trading practices thus hinder the development of economically vital businesses.¹⁰
15. The Agriculture UTP Act protects agricultural producers and food suppliers against unfair trading practices by relatively large buyers. One of the trading practices that this Act prohibits is unilaterally changing the terms of a supply agreement for agricultural and food products associated, among other things, with payment by or prices for the buyer.¹¹ This is a prohibited unfair commercial practice that is included in the blacklist in the Agriculture UTP Act. This means that a unilateral change to delivery conditions is not permitted even if the buyer and the supplier have agreed on such a change in writing in advance.
16. For a violation of the Agriculture UTP Act, one thing ACM can do is impose an administrative fine or an order for incremental penalty payments.

4.2 The parties

17. Vion is responsible for the supply of pigs from the farm to the various Vion slaughterhouses. Vion Farming B.V. is part of Vion Food Group, an internationally operating Dutch food company that mainly owns slaughterhouses and meat-processing businesses for pork and beef.
18. POV is a producer organization that represents a significant part of pig production in the Netherlands. The members of POV supply pigs to various buyers, of which Vion is one of the largest.

⁶ ACM/UIT/609562.

⁷ ACM/IN/834506, supplemented by ACM/IN/835155 on January 11, 2024.

⁸ ACM/UIT/613510. POV made comments on the report: ACM/IN/843599.

⁹ Directive (EU) 2019/633, April 17, 2019 (the 'Directive').

¹⁰ Explanatory Memorandum, 2020-2021, 35 642, no. 3.

¹¹ Section 2(1)(c) of the Agriculture UTP Act.

4.3 The Agreement

19. Pig farmers with whom Vion has a contract supply their pigs to Vion on the basis of what is known as the Good Farming Balance agreement and the associated conditions (hereinafter: the Agreement). The Agreement contains the delivery conditions and a price system.
20. Pig farmers who conclude the Agreement with Vion can choose to supply on the basis of the Price Index Guarantee system (PIG system). The Agreement obliges pig farmers who supply according to the PIG system to supply their pigs exclusively to Vion. In short, the PIG system means that Vion pays pig farmers a price for the pigs they supply, which is derived from a set of prices: a 'Basket' of quotations. That Basket consists of various Dutch and European quotations, including the Vion quotation.
21. The Agreement also includes a supplementary payment system under which Vion calculates and pays a supplementary payment to its pig farmers at the end of each year. This supplementary payment system is also based on the Basket, or more specifically on the average of the weekly changes in the Basket. If the weekly change in the Basket during the year was on average higher than that of the Vion weekly quotation, the pig farmer will receive a supplementary payment for this difference per kilogram.
22. The Agreement is concluded for an indefinite period. The Agreement can be terminated at any time by the pig farmer or by Vion, subject to a notice period of twelve months.

4.4 Possibility for Vion to change the Agreement unilaterally

23. Under a 'general' modification power in the Agreement, Vion can unilaterally change or deactivate 'specifications, payment tables, and price systems' and the Good Farming Balance conditions. In accordance with the delivery conditions, these changes are communicated to the pig farmers in a timely manner. If the pig farmer does not agree with a change and consultation does not provide a solution, both Vion and the pig farmer have the right to terminate the Agreement with immediate effect.
24. The Agreement also contains specific (and unilateral) modification powers for Vion that relate to the PIG system. For example, Vion may decide to disregard quotations that develop in a 'non-regular' way. It may also decide to deactivate the entire PIG system when the regular market is disrupted.
25. POV believes that Vion unilaterally changed the Agreement in 2022 and 2023 in three different ways for pig farmers who supply under the PIG system. POV states first that Vion unilaterally adjusted the price system by temporarily excluding a quotation from the Basket when calculating the price. It also argues that Vion unilaterally changed the supplementary payment system by capping the supplementary payment. The third complaint from POV concerns the calculation of the supplementary payment for 2022.
26. POV states that these practices of Vion contravene the Agriculture UTP Act and it therefore submitted an enforcement application to ACM.

5 Vion's trading practices

27. Vion adjusted the composition of the Basket as of September 26, 2022, invoking the specific modification power under the Agreement. On that date, Vion temporarily removed its German quotation from the Basket. It did this in response to a market disruption in Germany as a result of

African swine fever. Vion informed its pig farmers of this by letter. On January 16, 2023, Vion returned the German quotation to the Basket.

28. In addition, Vion implemented a structural change to the Agreement with effect from January 16, 2023, invoking the general modification power in the Agreement. This change concerned a cap on the annual supplementary payment (hereinafter: the cap) that Vion pays to its pig farmers. Vion announced this change in a letter to its suppliers on December 20, 2022. It indicated its desire to consult with pig farmers who did not agree to the change. According to Vion, dozens of pig farmers subsequently entered into consultations with Vion, after which the vast majority of pig farmers agreed to the amended contract. Vion states that, after consultation, some pig farmers decided to terminate the Agreement and supply their pigs elsewhere.
29. ACM sees that the provisions that give Vion the right to unilaterally change the Agreement and the way in which Vion uses it are at odds with the Agriculture UTP Act.
30. A relevant point in this context is that during the preparation of the Agriculture UTP Act it was noted that individual farmers often sell homogeneous products and that it is difficult for them to match supply to demand in the short term. In addition, many agricultural products are traded on an international market and farmers and market gardeners have to contend with risks that are not always easy to cover. The links further down the chain have a greater degree of concentration, which means that the bargaining power between the various operators in the chain can be unevenly distributed. Price is an important purchasing criterion for consumers and creates continuous pressure to lower sales prices. This means farmers often have to accept market prices as quoted and their position in the chain can quickly come under pressure. These circumstances may also apply to the market in which Vion and the pig farmers operate.
31. Based on its investigation into the Agreement and its implementation by Vion, ACM concludes that this could lead to a less balanced negotiating position for the pig farmers. The contractual option for Vion to unilaterally change the Agreement – whether or not on the basis of subjective criteria such as 'non-regular price developments' – and the option for Vion to terminate the Agreement immediately if a pig farmer does not agree to the change could lead to pig farmers feeling compelled to agree to a change to the Agreement proposed by Vion. This would entail increased uncertainty and risks for pig farmers.

6 Content of the commitment

32. Vion requests ACM to declare the following commitment binding:
 - I. Vion will request its pig farmer[s] in writing no later than two weeks after announcement of the commitment decision to agree to the amendment of the Good Farming Balance agreement (hereinafter: the agreement). In the amended agreement the provisions that allow Vion to change the specifications and payment tables in Annex 1, price systems (in particular the Price Index Guarantee system) in Annex 2 and the Good Farming Balance conditions in Annex 3 without the supplier's agreement will be amended. This concerns the following articles:
 - For the current articles 3.1 and 3.2 of the agreement, Vion proposes the following amendment to its suppliers:
 - 3.1 *The Good Farming quality program is constantly developing and subject to changing market conditions. If Vion intends to change the specifications and payment tables in Annex 1, price systems in Annex 2, the Good Farming Balance conditions in Annex 3 and/or to impose additional conditions, Vion will submit the intended change for which no change provision was included in the Agreement to the GFB partner for approval.*

3.2 *If the GFB partner does not agree to the intended change, Vion and the GFB partner will consult on a reasonable solution. If this consultation does not result in a reasonable solution for both Parties, the Parties have the right to terminate the Agreement, taking into account the notice period stated in Article 2.1.*

- For Annex 2 to the agreement, Vion proposes the following amendment to its suppliers with regard to a possible change to the PIG basket:

5. *In the event of force majeure, as specified in Article 6 of the general purchasing conditions included as Annex 4 to this Agreement, with the exception of the phrase "iedere niet voorzienbare stagnatie in de geregelde gang van zaken in de onderneming van koper of van leveranciers van koper" (any unforeseeable stagnation in the regular course of affairs in the undertaking of the buyer or the buyer's suppliers) stated therein, the PIG system will be deactivated. If Vion is able to purchase pigs in the situations specified in Article 6 of the general purchasing conditions included as Annex 4 to this Agreement, with the exception of the phrase "iedere niet voorzienbare stagnatie in de geregelde gang van zaken in de onderneming van koper of van leveranciers van koper" (any unforeseeable stagnation in the regular course of affairs in the undertaking of the buyer or the buyer's suppliers) stated therein, these will be charged for in accordance with the Vion quotation. The PIG system will come into operation again when the situations described above have ended.*

- II. Vion will simultaneously request its pig farmers in writing to agree to the change to the Good Farming Balance agreement that relates to the supplementary payment system. This new system is intended to replace the system that was introduced on January 16, 2023.
- III. Vion will give its pig farmers the option in writing not to agree to the proposed change to the Good Farming Balance agreement. Vion will inform its pig farmers in a letter that Vion will in that case terminate the current Good Farming Balance agreement subject to the notice period. In this letter, Vion will inform the pig farmers that it will not make use of the option to change the Good Farming Balance agreement on the basis of Article 3 or Annex 2 of the agreement during this notice period.
- IV. In addition, if Vion does not agree to the proposed change to the Good Farming Balance agreement and does not wish to continue supplying on the basis of the current Good Farming Balance agreement, Vion will give its pig farmers the option in this letter to terminate the current Good Farming Balance agreement immediately. For these pig farmers, Vion will not make use of the option of cancelling the agreement immediately itself.
- V. Vion intends to propose a number of other contractual changes to the pig farmers separately from this commitment application. In the letter referred to in III and IV, Vion will draw a clear distinction between the changes resulting from this commitment application and the changes that are separate from it.
- VI. The obligations arising from the commitments will be entered into for a period of two years after the date on which Vion's commitments were declared binding by ACM.
- VII. Vion will send ACM a copy of the letter including enclosures that Vion sent to its pig farmers in response to the commitment decision. In addition, Vion will inform ACM no later than 12 months after the commitment decision and no later than one month before the end of the period in which Vion's commitments have been declared binding of the extent to which Vion complies with the specifications and payment tables in Annex 1, price systems (in particular the Price Index Guarantee system) in Annex 2 and the Good Farming Balance conditions in Annex 3 in the previous year and to what extent pig farmers agreed to this.

33. Vion states in its application that if ACM declares this commitment binding and subsequently publishes the commitment decision, for the entire market, suppliers, and buyers of pork, it will be made clear that a price mechanism can only be adjusted by a buyer if this is agreed in advance under clearly defined conditions.

7 Assessment of the commitment

34. As described above in Section 5, ACM sees risks for the position of pig farmers in relation to their buyer Vion.
35. Vion recognizes these risks and wishes to eliminate them through its application to declare the commitment referred in Section 6 of this decision binding.
36. At the request of an undertaking, ACM may decide to declare a commitment binding if it considers this more effective than imposing an administrative fine or an order for incremental penalty payments. ACM will assess whether the applicant's commitment is effective and efficient in the sense that it adequately addresses the identified risks. ACM will also assess whether it can verify that the applicant complies with the commitment.
37. The commitment is an instrument that is consistent with the problem-solving supervision practiced by ACM. By using various instruments, ACM searches for the most effective and efficient way to address market problems. It examines on a case-by-case basis which instrument is most appropriate.
38. ACM considers the commitment that Vion gives as formulated in Section 6 to be effective and efficient. Its considerations are as follows.

7.1 Efficiency and effectiveness of the commitment

39. ACM has discretionary power to choose which instrument to use in order to solve market problems. ACM emphasizes that it is charged with supervising compliance with laws with a view to achieving standard-compliant behavior on the part of market participants. As a rule, the sooner this is achieved, the better. A commitment is a rapid and efficient means of doing so.
40. In deciding to declare the commitment binding, ACM also takes into account that the Agriculture UTP Act is a relatively new law and that this is the first decision taken on the basis of it. ACM considers it important that the Agriculture UTP Act and the associated rights and obligations become known and clear as soon as possible for all operators to which the Agriculture UTP Act applies. This commitment decision and its publication will help ACM to make the legal standards arising from the Agriculture UTP Act clear relatively quickly to any party to whom it may be of importance.
41. This is particularly the case now that ACM has strong indications that the entry into force of the Agriculture UTP Act should urgently lead to adjustments to the contracts between Vion and its pig farmers.
42. By giving this commitment, Vion eliminates ACM's concerns regarding compliance with the Agriculture UTP Act. Although ACM's investigation into the possible violations was at a reasonably advanced stage, making it possible to submit a draft decision on an order for incremental penalty payments in April 2023, it became clear, partly as a result of Vion's opinion, that significant additional research was necessary to definitively determine the violations.

43. The commitment decision also serves the interests of POV (including its members) and other suppliers. In any case, it ensures for the future that the contracts between Vion and its pig farmers are in line with the Agriculture UTP Act.

7.1.1 Adjustment of contractual modification powers

44. ACM notes that, as a result of its commitment, Vion will soon present an amended Agreement to its pig farmers.¹² In this amended Agreement, the provisions that give Vion the option to unilaterally change the Agreement have been deleted or amended. Pig farmers can agree to this new Agreement, the provisions of which are in line with the Agriculture UTP Act in ACM's opinion. These amended provisions should prevent Vion from unilaterally changing the Agreement or the Basket included in it in the future. The proposed amended provisions mean that Vion will consult with pig farmers if it considers an amendment to the Agreement to be desirable or necessary.
45. ACM sees these changes as an improvement to the pig farmer's negotiating position, as intended by the Agriculture UPT Act. First, on the basis of the proposed amended provisions, Vion cannot unilaterally change the Basket or the price system. In addition, Vion must adhere to the one-year notice period, and it no longer has the option of immediately terminating the Agreement if the parties do not reach an agreement on a change after consultation.
46. In this case, ACM considers the commitment to be an appropriate instrument that addresses the concerns described in Section 5 in an effective and efficient manner. Under the Agreement that Vion agrees to present to the pig farmers, the Agreement can only be amended with the agreement of the pig farmer. Where the PIG system can still be unilaterally deactivated by Vion on the grounds of force majeure, this can only be done on objective grounds, as it will no longer apply to 'any unforeseeable stagnation in the regular course of events'.
47. Now that Vion has returned the German quotation to the Basket and a repeat of the course of events in September 2022 can be ruled out with the amended Agreement, ACM considers the commitment offered to be efficient and further enforcement on this point to be disproportionate.

7.1.2 Replacement of supplementary payment system

48. On December 20, 2022, Vion sent a letter introducing a cap on the annual supplementary payment, which took effect on January 16, 2023. In the aforementioned draft decision of April 26, 2023, ACM considered, subject to opposing views, that it had identified a violation in relation to this system change. Vion's opinion on that draft decision and a more detailed oral explanation from Vion add nuance to the picture outlined in the draft decision.
49. As a result of Vion's more detailed explanation, ACM has doubts concerning the answer to the question of whether the system change that introduced the cap was introduced without pressure and in agreement with the pig farmers, or whether it was introduced unilaterally. The consultations that took place between the supplier and the buyer on this matter took place by telephone or in person. It will thus be difficult to determine exactly how the eighty or so different negotiations/discussions on the introduction of the cap took place and/or under what possible pressure pig farmers did or did not agree. ACM should therefore conduct further investigations, which will require additional ACM capacity with the attendant uncertainty as to whether such an investigation will ultimately lead to the determination that the Agriculture UTP Act was or was not complied with.
50. The commitment by Vion also concerns the presentation of a new supplementary payment system in a revised Agreement to replace the cap as introduced on January 16, 2023. For pig farmers who wish to agree to the revised Agreement, reciprocity is thus a given and any previous unilateral changes are repaired.

¹² Vion cannot amend the Agreement unilaterally: it must reach agreement with the pig farmer. The amended Agreement will therefore be presented to the pig farmer.

51. It is possible for all pig farmers to agree to the amended Agreement, which in any case does not allow for unilateral changes and which replaces the old cap with a new supplementary payment system.
52. ACM recognizes that the commitment on this point does not provide a solution for what Vion expects to be a limited group of pig farmers who do not agree to the new agreement, because they will rely on the old Agreement, including the cap (which may have been introduced unilaterally by Vion). Vion will terminate the Agreement with these pig farmers in accordance with the notice period. ACM nevertheless assesses Vion's commitment on this point to be efficient and proportionate.
53. ACM notes that Vion has explained that it is happy to enter into lasting relationships with its pig farmers through long-term contracts. Such contracts provide certainty and stability on the basis of which a pig farmer can obtain financing for investment in sustainability initiatives, for example. Vion states that "the rules of play were changed during the game" due to the entry into force of the Agriculture UTP Act. Vion argues that this Act makes it more difficult for it to respond to current events because, for example, it can no longer unilaterally change the Basket (even temporarily), whereas it is bound by an indefinite contract with a notice period of one year. This means that, according to Vion, it is exposed major financial risks. Vion states that it introduced the cap in order to be able to bear these risks financially. If it has to continue to apply the current Agreement, without the possibility of interim adjustments, this could have financial consequences that affect not only Vion but also ultimately the pig farmer who supplies to Vion, according to Vion. For that reason it must continue to apply the cap for pig farmers who do not agree to the new Agreement in the remaining year after termination by Vion. ACM considers Vion's explanation described above to be sufficiently plausible.
54. A further important point for ACM is that for 2023 the price developments were such that the cap will in all likelihood have no effect on the supplementary payment paid to pig farmers. The introduction of the cap on January 16, 2023 therefore did not cause any damage to pig farmers for that year. The cap may nevertheless have an effect for 2024.
55. ACM also takes into account that Vion has committed not to use the option to terminate the Agreement with immediate effect, but will respect the one-year notice period, whereas pig farmers do have the freedom – if desired – to use the option to terminate the Agreement with immediate effect.
56. With the commitment as described in II, III and IV of Section 6 of this decision, in conjunction with ACM's expectation that a further investigation into a possible violation of the Agriculture UTP Act on this point will take additional time and may not lead to the identification of a violation of the Agriculture UTP Act, ACM does not consider that further enforcement action would be efficient.

7.2 Term and monitoring

57. The commitment offered by Vion has a term of two years. It is important for ACM that Vion's commitment takes effect in the short term. The most important step that Vion must take to comply with the commitment is to present the amended Agreement to its pig farmers and send a copy to ACM. Vion will also send an accompanying letter to the pig farmers clearly setting out which proposed contract amendments follow from the commitments and which proposed amendments have not been assessed by ACM because they are separate from the commitment application. Vion will submit the amended Agreement and this letter to the pig farmers within two weeks of the announcement of this decision.
58. ACM considers it important to be able to monitor Vion's compliance with its commitment. First, as indicated, Vion will send a copy of documents it presents to its pig farmers in the short term. In addition, Vion will inform ACM twice about any changes to the Agreement that Vion will implement and indicate to what extent pig farmers have agreed to these. This will also show

whether Vion adheres to its commitment not to use the provisions that give it the option to unilaterally change the Agreement, and/or the option to terminate the Agreement with immediate effect if the pig farmers do not agree to the changed Agreement to be submitted (or the subsequently changed Agreement).

7.3 POV's views and the response from ACM

59. As described earlier, POV has submitted an opinion on the draft commitment decision.¹³ The most important points raised by POV are discussed below.

Process

60. In its opinion, POV states that ACM did not involve it in defining the commitment to be proposed by Vion. POV argues that as a result ACM was unable to assess whether there was support for the proposed commitment. After ACM made the draft commitment decision available for inspection, POV was given only a short time to express its opinion, whereas Vion was given several months to make its commitment acceptable to ACM. POV also argues that it is entitled to receive the previous proposals that Vion made prior to the final commitment application.
61. As ACM also explained during the meeting with POV on January 18, 2024, it did not consider it appropriate to invite POV at an earlier stage to comment on the proposals made by Vion. Since ACM did not consider the proposals that Vion submitted prior to the final commitment application to be sufficient to assess in a commitment decision, there was no point sending them to POV and questioning POV on them. Shortly after Vion submitted the final commitment application, ACM assessed it in a draft decision. Since ACM attaches importance to what stakeholders (including POV) think of this commitment, it made the draft decision available for inspection. POV expressed its opinion both in writing and orally. To this end, POV was sent the relevant documents on request.

Violation due to introduction of cap

62. POV notes from the draft commitment decision that ACM appears to suggest that the Agriculture UTP Act includes a threshold value before a violation is deemed to occur. This apparently follows from the fact that ACM states that, after announcing the cap, Vion entered into consultations with approximately eighty pig farmers, after which the vast majority agreed to the amended contract. POV states that a breach against one supplier can also constitute a violation. Moreover, according to POV, it is not that easy for pig farmers to switch to another buyer and a switch offers few advantages.
63. ACM did not mean to suggest that there was a threshold value before a violation is deemed to have occurred. ACM agrees with POV that a breach against one supplier can also constitute a violation. However, sufficient evidence is required to establish a violation, and such evidence is currently lacking for the unilateral action of introducing the cap. ACM has found that the largest group of Vion's suppliers did not engage in consultations with Vion, despite the call in Vion's letter dated December 20, 2022 announcing the introduction of the cap. This is despite the fact that Vion explicitly stated in that letter that it would be happy to enter into consultation with pig farmers who did not wish to agree to the change. The Agriculture UTP Act does not prohibit conditions from being amended with tacit consent, however. There must nevertheless be an opportunity to enter into consultations about a change in the conditions and this requirement has been satisfied in this case. Dozens of suppliers used this opportunity.

Termination of the violation

64. POV further argues that a unilateral change to the agreement is a commission offense. Vion temporarily removed the German quotation from the Basket, which is a unilateral change and

¹³ ACM/IN/834506, supplemented by ACM/IN/835155 on January 11, 2024. With an oral explanation: ACM/UIT/613510. POV made comments on the report: ACM/IN/843599.

therefore a violation of the Agriculture UTP Act. According to POV, the violation will continue until all consequences have been eliminated. It argues that ACM must order Vion to pay the pig farmers by means of a remedial sanction. According to POV, the word "remedial" refers to the definition of the term "remedial sanction" in Section 5:2(1)(b) of the General Administrative Law Act: "an administrative sanction that fully or partially undoes or terminates a violation, prevents the recurrence of a violation, or eliminates or limits the consequences of a violation". This definition makes clear that eliminating the consequences of a violation is part of an order for incremental penalty payments, according to POV. According to the Explanatory Memorandum to the fourth division of the General Administrative Law Act, the basic principle is "that an enforcement decision must be aimed at completely terminating or undoing a violation (or its consequences)".

65. ACM does not follow POV's reasoning on this point. ACM considers that by amending the conditions as promised by Vion (removing the provision entitling Vion to unilaterally amend the Basket) and by restoring the German quotation, the violation alleged by POV was terminated. ACM considers it important that the standard concerns *unilateral* changes to the conditions of the supply agreement by the buyer. The case law cited by POV¹⁴ shows that the standard is relevant when answering the question of whether the violation was terminated. In this case, the standard is the unilateral change of the violation. Unilateral changes are no longer possible with the entry into force and implementation of the commitment decision. ACM does not therefore see how this violation can continue if the commitment decision is implemented.
66. This does not alter the fact that not including the German quotation for several months resulted in pig farmers receiving less money for the pigs they supplied to Vion during this period. However, ACM cannot require Vion to pay this money to its pig farmers. In this regard, ACM considers that enforcing the obligation to comply with agreements and compensate for damage in Section 112 of the Constitution is a power assigned to the civil court. This is once again emphasized in the Explanatory Memorandum to the Agriculture UTP Act: "The Netherlands Authority for Consumers and Markets does not have authority to order payments or refunds. The civil law is the appropriate route, via the Dutch Foundation for Consumer Complaints Boards or the civil court."¹⁵¹⁶
- POV: competence (or lack of competence) of ACM and effectiveness (or lack of effectiveness) of commitment decision*
67. In its opinion, POV further states that ACM is not competent to declare the commitment binding. According to POV, the commitment decision is not mentioned as an instrument in the Agriculture UTP Act or in the Directive. If ACM is nevertheless competent to take a commitment decision, POV does not consider Vion's commitment to be effective. A commitment decision makes the Agriculture UTP Act a paper tiger without any deterrent effect, according to POV. The reasons given by POV for this are summarized below.
68. According to POV, declaring a commitment binding is not intended for serious violations such as unilaterally changing an agreement.
69. POV then states that a *force majeure* clause in the contract as Vion proposes in the commitment should not exist. POV believes that with such a clause Vion would still be able to change the contract unilaterally on subjective grounds.
70. Furthermore, POV is concerned about the way in which Vion will present the amended contract to its pig farmers. If this is done electronically, POV fears that it will not reach every pig farmer or that they will not properly assess the relevance of the request.

¹⁴ ACM/IN/834506.

¹⁵ Explanatory Memorandum, TK 35642, no. 3, p. 6.

¹⁶ See also case law, CbB July 13, 2006, ECLI:NL:CBB:2006:AY3826 (BabyXL), ABRvS March 11, 2015, ECLI:NL:RVS:2015:697 and ECLI:RVS:2015:699. Repeated / confirmed in ABRvS February 15, 2017, ECLI:NL:RVS:2017:399 to 404 and ECLI:NL:RVS:2017:422 and ABRvS May 17, 2017, ECLI:NL:RVS:2017:1279, 1282 and 1283, CbB December 15, 2016, ECLI:NL:CBB:2016:381 and CbB June 17, 2014, ECLI:NL:CBB:2014:223.

71. POV also states that in its opinion ACM is allowing Vion to maintain unfair trading practices with impunity. According to POV, ACM could require Vion to compensate for both the damage resulting from the temporary removal of the German quotation and the damage that could arise from the introduction of the cap. In this context, POV refers to a number of commitment decisions taken by ACM in which undertakings have compensated for damage.
72. POV also considers the commitment ineffective because Vion would not promise anything more than it is already legally obliged to do. In the opinion of POV, the commitment is only to the advantage of Vion. Moreover, POV does not share ACM's argument that a commitment decision can provide clarity relatively quickly about the rights and obligations arising from the Agriculture UTP Act. That goal can be achieved just as quickly with an enforcement decision, according to POV.
73. POV considers that a commitment decision makes a civil court referral more difficult, especially since Vion does not recognize the violations of the Agriculture UTP Act. According to POV, a declaration that the commitment is binding rewards Vion for consciously violating the Agriculture UTP Act, because the commitment decision would give Vion the certainty that it does not have to eliminate the consequences of the removal of the German quotation and may continue to apply the unilaterally introduced cap to pig farmers who do not agree to the new contract presented to them.
74. POV considers that the commitment decision was prepared without due care and not adequately substantiated because the pig farmers were not involved in assessing the submitted commitment application. Vion's interests should not be taken into account in the decision-making, according to POV. In any case, the interests of the pig farmers should weigh most heavily.
75. POV concludes that ACM should reject Vion's commitment application.

ACM's response to the alleged lack of competence and ineffectiveness of the commitment decision

76. ACM first notes that it also has competence under the Agriculture UTP Act. In accordance with Section 12h of the ACM Establishment Act, ACM may declare a commitment binding if it considers this to be more effective than imposing a fine or an order for incremental penalty payments. This applies to all laws supervised by ACM and is not limited to less serious violations. ACM sees no indications that the Establishment Act excludes the use of the commitment instrument for 'serious violations'.
77. Although ACM regrets that POV does not consider a commitment decision to be effective in the present case, even after taking note of POV's opinion, ACM maintains its judgement that the commitment decision is more effective than any other decision. ACM refers to the assessment in Sections 7.1 and 7.2 of this decision. In addition, ACM discusses the arguments of POV below as summarized in marginals 69 to 75 inclusive of this decision.
78. First, ACM considers that the Agriculture UTP Act does not prevent the existence of a *force majeure* clause. It must remain possible for both supplier and buyer to suspend or terminate the agreement in exceptional cases. A *force majeure* clause provides guidance in the event that a situation arises that hinders or prevents compliance with the agreements. It is important, however, that the description of the situations in which *force majeure* occurs is formulated in such a way that a *force majeure* clause does not *de facto* become a unilateral amendment clause. In ACM's opinion, this is not the case in the clause proposed by Vion. It follows from the commitment that Vion will not use the sentence that ACM qualifies as subjective to change the Basket. ACM also notes that if the use of a *force majeure* clause were to result in an unfair commercial practice, ACM could take action against it.
79. ACM cannot understand POV's concerns about the amended contract not reaching all pig farmers if its sent electronically. So far, ACM has not received any indications that Vion's communications are not reaching its suppliers. ACM regards pig farms as professional

companies that are able to communicate with their buyers electronically and understand the relevance of a new contract.

80. POV also commented that compensation was indeed promised in other commitment decisions. Although that observation is correct, it does not alter the fact that ACM does not have the power to demand this from an undertaking.¹⁷ However, a party may, on its own initiative, undertake to make good any damage suffered, compensate by other means or comply. There is no question of that in the present case. ACM notes that with its commitment Vion is doing more than it is obliged to do under the law. In addition to amending the agreement so that unilateral changes are no longer permitted, Vion also promises to amend the conditions regarding the previously introduced cap, although ACM cannot determine any violation on this last point. Vion also undertakes not to use the provision that entitles it to terminate the Agreement without notice.
81. It is important for ACM that the commitment decision gives pig farmers clarity much faster and enables them to rapidly approve an agreement that, in ACM's opinion, is in line with the Agriculture UTP Act.¹⁸ If ACM were to determine a violation and/or impose an order for incremental penalty payments, Vion would oppose this as well as its publication. Such processes before the administrative court can take a lot of time. By choosing the commitment instrument, ACM was able to clarify which rights and obligations arise from the Agriculture UTP Act on December 4, 2023, by publishing the draft commitment decision. This also makes clear to other parties operating in the agricultural sector what rules arise from the Agriculture UTP Act.
82. A further consideration is that – as also discussed during the meeting with POV on January 18, 2024 – ACM does not see how a commitment decision impedes a referral to the civil court. This commitment decision is not *carte blanche* for Vion not to compensate for any damage caused. It is simply that ACM has no power to grant this.
83. ACM emphasizes that the interests of Vion's suppliers have always been paramount in arriving at this decision. All interested parties had the opportunity to express their opinions on the draft decision. POV used this opportunity. In addition, ACM maintained discussions with POV throughout the process. In ACM's opinion, the fact that POV was unable to respond to previous commitment proposals from Vion does not mean the decision was made without due care or without substantiation, as described in marginal 62.

ACM's conclusion on effectiveness of commitment decision

84. Based on the foregoing, ACM concludes that this decision is more effective than further enforcement action. This decision results in the fastest certainty for pig farmers about what is and is not permitted and the option to accept an agreement on the basis of which the buyer can no longer unilaterally change the conditions or the Basket and must adhere to the one-year notice period. This decision also leaves open the possibility of referring any claim for damages or demand for compliance with the Agreement to the civil court.

DG-Agri carcass price quotation

85. POV also includes details in its opinion of the complaint regarding the calculation of the DG-Agri carcass price quotation. Since the commitment application and hence the decision do not relate to this complaint, ACM disregards this part of the opinion in this decision. For an assessment of this complaint, see decision ACM/UIT/616738.

¹⁷ See for example CBB July 13, 2006, ECLI:NL:CBB:2006:AY3826 (KPN/Opta).

¹⁸ To the extent that the changes result from the commitment application.

8 Decision

87. Having regard to Section 12h(2) of the Establishment Act, ACM resolves to declare the commitments made by Vion in Section 6 to be binding.
88. This means that ACM no longer has the power to take further enforcement action. In the event of non-compliance with the commitments, ACM may impose an administrative fine.
89. This decision is valid for a period of two years from its publication.

Netherlands Authority for Consumers and Markets,
on its behalf:

T.M. Snoep
Chairman of the Board

The party whose interest is involved in this decision may lodge a substantiated objection to it no later than six weeks after the date of notification of this decision to ACM, Legal Department (JZ), PO Box 16326, 2500 BH The Hague. In the statement of objection, an interested party may request ACM to agree to a direct appeal to the administrative court on the basis of Section 7:1a(1) of the General Administrative Law Act.