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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS

-- 2013 --

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EXECUTIVE SUMMARY

1. The Netherlands Authority for Consumers and Markets (ACM) was launched on 1st April 2013, merging the Netherlands Competition Authority (NMa), the Netherlands Consumer Authority (CA), and the Netherlands Independent Post and Telecommunications Authority (OPTA). Competition enforcement, consumer protection and sector-specific regulation for energy, post, telecommunication and transport are now all housed in a single organisation.

2. The ACM is an “autonomous administrative authority” (ZBO) under Dutch law. The ACM has five mainline departments: a Competition Department, a Consumer Department, an Energy Department, a Telecommunications, Transport and Postal Service Department and a Legal Affairs Department. These departments together represent the core of the ACM’s oversight and regulatory activities. In addition, ACM also has a Corporate Services Department, an Office of the Chief Economist, and an Office responsible for corporate affairs and communication. Various cross- agency structures exist, such as detection teams; a strategic management team; a cross-agency international team; and an ACM academy for all case-handlers.

3. In 2012, the OECD launched a project called “Evaluation of Competition Interventions”. The results of this study focus on determining the impact of the activities of regulators. The international project of the OECD contains recommendations for the way in which effects can be calculated best. Starting with the 2013 annual report, ACM bases its outcome calculation on the OECD recommendations. In 2013, the benefits for consumers of ACM’s oversight activities amounted to EUR 1.85 billion, which is EUR 300 per household.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

4. On April 1st, 2013, the Establishment Act entered into force. The law simply provides for the establishment of ACM. The three-man board of ACM is an autonomous administrative authority under Dutch law. ACM does not have legal personality. The Chairman of ACM is appointed for a period of 7 years. The other two Board members are appointed for 5 years. Board members can be reappointed once. They are not civil servants. They are appointed through an open procedure by the Minister of Economic Affairs and can be dismissed only on limited grounds set out in the law. ACM’s staff is seconded from the Ministry of Economic Affairs. However, staff members can only be instructed by the Board of ACM. They are not allowed to seek instructions of the Minister, nor can the Minister give instructions to the staff. The staff is, in other words, only accountable to the Board of ACM.

5. ACM continues to enforce the different laws that were enforced by the former institutions that were merged in ACM, such as the Dutch Telecommunication Act, the Dutch Electricity Act 1998, the Dutch Act on Enforcement of Consumer Protection, and the Dutch Competition Act.

6. The Minister may issue general policy guidelines to be observed by ACM, such as fining guidelines. ACM itself may also develop general policy rules and publish them. The Minister may obstruct or annul these general policy rules but only if ACM acted beyond its legal powers and the policy rules do

not concern the Telecommunication, Transport and Energy industries (which fall under the applicable EU-rules on the independence of regulators) and the Postal Service sector.

7. Already in December 2013, the Streamlining Bill, was presented to the Dutch parliament, in order to harmonise various procedural rules and powers enforced by ACM. The Streamlining Bill was subsequently adopted in 2014, and came into force on August 1, 2014, amending the Establishment Act of the Netherlands Authority for Consumers and Markets and the laws that are enforced by the ACM. In addition to the Streamlining Act, new fining and leniency guidelines came into force on August 1, 2014. The leniency guidelines bring the ACM rules further in line with the leniency guidelines of the European Commission.

1.2 Other relevant measures, including new guidelines

8. In 2013, ACM published a policy rule with regard to the treatment of informants (including anonymous informants).

9. From July 2013, ACM was charged with the enforcement of the European Regulation on wholesale Energy Market Integrity and Transparency. The Regulation aims to prevent manipulation and insider trading on energy markets, and allows fines up to EUR 450.000 or 10% of the turnover.

10. Furthermore, in 2013, both ACM and the Ministry of Economic Affairs adopted policy rules regarding sustainability. In its Vision document on Competition and Sustainability, ACM explains to what degree sustainability initiatives of businesses are compatible with competition law. ACM shows what room there is for collaboration initiatives with regard to sustainability. The cartel prohibition does not apply if the competitive process is not significantly impeded or if sustainable production offers consumers benefits. The policy rule of the Ministry contains several guidelines regarding arrangements for the purpose of sustainability. Arrangements are agreements between undertakings, decisions by associations of undertakings, and concerted practices of undertakings. The guidelines include for example taking into account the long-term benefits for consumers when assessing a case.

1.3 Government proposals for new legislation

11. The implementation of a new EU directive on consumer protection was planned in 2014.

12. In 2013, the Minister for Economic Affairs planned new legislation to increase the maximum fines that ACM can impose. In 2014, the Ministry for Economic Affairs consulted on draft legislation to increase the fining maximum from the traditional 10% of annual turnover, to 10% of the turnover over the years during which the competition breach has taken place, with a maximum of 4 years. The government and legislature want penalties to deter cartelists effectively and to encourage compliance. Changes in the legal maximum do not alter ACM's obligation to impose a proportionate fine. The new legislation is not expected to enter into force prior to 2015.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1 Summary of activities of competition authorities and courts

- ACM issued 6 cartel decisions and imposed fines totalling EUR 15 million in 2013, EUR 12.6 million of which were imposed on cartelists.

- The ACM received 9 leniency applications between 1 January and 31 December 2013.
- The ACM carried out dawn raids in 7 cases in 2013.

13. ACM's legal department concluded appeals with 89 cases being presented to the courts over this period, of which the court ruled 74% in the ACM's favour.

14. Of these cases, 17 appeals related to competition enforcement cases, of which the court ruled 50% in ACM's favour. Some of the cases in which the Court decided against the ACM relate to the issue of privacy. The District Court of Rotterdam prohibited ACM from using data which ACM had been provided by the Dutch Public Prosecution Service (OM) via wiretap. In the Court's opinion, the authorisation that ACM had been given regarding the provision of these data was insufficiently substantiated. As a result, the Court asserted it was unable to verify the assessment behind the authorisation. Since the evidence in two cases was based on the wiretap data, both ACM sanction decisions have been overturned. ACM is challenging both rulings regarding the admissibility of the data, before the Trade and Industry Appeals Tribunal, the Dutch court of final instance for competition cases.

15. The district court of Rotterdam ruled in favour of ACM with regard to its right to choose which cases to prioritise, in a case concerning a complaint of abuse of dominance by public service broadcasters. ACM found no prima facie evidence that the complaint was justified and so did not prioritise the case. According to the court ACM is free to set its own prioritisation criteria and their application in this case was justified. Based on this, ACM was judged to have taken sufficient action with regard to the received complaints. The fact that the court has been responsive to the prioritisation criteria of ACM underlines the independence of the authority.

2.1.2 *Description of significant cases, including those with international implications.*

2.1.2.1 Deal over closing down coal power plants harms consumers

16. ACM found that the agreement between energy companies to close down five coal-fired power plants, as part of the Dutch Energy Agreement, on balance, would harm consumers, and offered too few environmental benefits. The deal involved closing down approximately 10 percent of the Dutch production capacity of electricity. This would lead to an increase of consumer electricity prices. ACM examined in several ways whether the deal's proposed environmental benefits were substantial enough to offset the price increase for consumers. ACM concluded that this was not the case. Since the positive environmental benefits are not substantial enough to offset the higher energy bills for Dutch consumers, the deal as currently included in the Energy Agreement must therefore be considered to be in violation of Dutch competition rules, which prohibit anticompetitive behaviour by companies.

2.1.2.2 Manipulation of foreclosure auctions

17. In 2013, the Netherlands Competition Authority imposed a fine for cartel activity on 65 real-estate traders. This was in addition to the 14 most active traders, who were fined in late 2011. The fines given to the real-estate traders in 2013 add up to a total of EUR 4 million. The real-estate traders involved manipulated foreclosure auctions between 2000 and 2009. After the official foreclosure auctions, traders re-auctioned homes at other, secret auctions (so-called after-auctions), often at a higher price. The 'profit' (the difference between the price at the official auction and the price at the after-auction) was split among the traders involved. With these fines, the extensive investigation, which the authority launched in 2009 and which was triggered by information it had received from the Dutch Tax Administration, was completed.

18. The authority's investigation revealed that traders were able to easily manipulate foreclosure auctions. A small circle of traders dominated the auctions, and outsiders were rarely seen. This is in part because of the risks involved with buying homes at foreclosure auctions. Buyers were generally not able to view homes in advance, and it sometimes even turned out that homes were rented out. Furthermore, the costs associated with the auction process were not transparent.

19. The authority welcomed the growing trend of notaries organising regional auctions. Such larger auctions attract bigger crowds, which made it more difficult to set up cartels. The authority expected a draft bill put forward by the Dutch Ministry of Security and Justice to bring about further improvements to foreclosure auctions. This bill proposed to reduce barriers to buying homes at foreclosure auctions. Among other proposals, it enabled potential buyers to view homes in advance, and it required mortgage providers (the banks) to invoke the provision in most mortgage contracts that prohibits renting out homes without permission from the banks. In addition, it would become easier to vacate homes, and the costs thereof would be borne by the mortgage provider. More individuals would be able to place bids on homes, which in turn would lead to better prices and possibly to reduced mortgage shortfalls for the homeowners.

20. In its publication 'Market recommendations for foreclosure auctions of real estate', the Netherlands Competition Authority called on all parties involved to improve the functioning of foreclosure auctions. The authority also published 'Guidelines for foreclosure auctions of real estate' in order to make clear what is and what is not allowed at foreclosure auctions.

2.1.2.3 Investigation into mobile operators concluded

21. In 2013, ACM concluded its investigation into possible cartel activities in the mobile-telecommunications with a commitment decision. The authority did not determine any price-fixing agreements. However, ACM did establish that public statements about future market behaviour could carry antitrust risks. These statements were made in public (for example, at conferences or in trade journals) by mobile providers about planned price increases or reductions in commercial conditions for consumers, which was not based on a final decision. If competitors took note and followed such publicly-made statements, it could lead to collusive behaviour, which is harmful to consumers. The three major mobile-telecommunication providers in the Netherlands, KPN, T-Mobile and Vodafone, therefore made a commitment to ACM that they will refrain from making such statements in public to avoid any risk of illegal collusive behaviour in the future. The mobile operators promised to incorporate this commitment into their compliance programs. In addition, they promised this matter will be given special attention in employee training workshops. ACM accepted the proposed commitment, but will keep a close watch on the mobile operators to make sure they comply with these proposed commitments. With these commitments, the investigation was concluded.

2.2 *Mergers and acquisitions*

2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

22. ACM received 91 merger notifications between 1 January and 31 December 2013.

Table 1

Decisions on notifications	85
Withdrawn notifications	8
Exemptions from the waiting period (derogation requests)	2
Approved due to remedies	1

License applications	2
License applications withdrawn	0
<u>Decisions on license applications</u>	<u>2</u>

23. In 2013, 2 merger cases were reviewed under the in-depth procedure. This can be broken down as follows: 2 mergers were granted a license (including roll over from previous year); 1 merger analysis rolled on into 2014.

24. The ACM employs a two-tier system of merger analysis. All mergers, above a certain threshold, must be notified to the authority. The one exception to this threshold is mergers involving the healthcare markets. The legislator has lowered the threshold for all such cases in order to ensure rigorous enforcement in this area. The ACM reviews the merger in the notification phase (phase I) and passes judgment as to whether the proposed merger ought to be challenged. If the merger is challenged, parties must then apply for a license in phase II.

2.2.2 Summary of significant cases

2.2.2.1 Hospital mergers

25. In 2013, ACM cleared several hospital mergers. ACM cleared a merger between two hospitals in the Dutch province of Noord-Brabant. These hospitals are St. Franciscus Ziekenhuis in the city of Roosendaal and Lievensberg Ziekenhuis in the city of Bergen op Zoom. After the merger, health insurers claimed they would continue to be able to negotiate good deals for their clients.

26. One of ACM's considerations in its decision to clear the merger was that requirements for hospital care quality are becoming increasingly stricter, and that each of these two hospitals would likely not be able to meet those requirements on their own. As a result of the merger, certain types of hospital care in the area of Bergen op Zoom and Roosendaal are able to continue to be offered such as oncology. Various patient organisations, apart from NPCF, indicated that they do not object the merger. Health insurers were predominantly positive about the merger because it would create two hospital groups in that region that compete with one another. ACM attaches great value to the opinions of patient organisations and health insurers. It carefully weighed the different positions against each other.

27. ACM also cleared the merger between hospital groups Medisch Centrum Haaglanden (MCH) and Bronovo in The Hague. In the post-merger situation, health insurers would continue to have enough opportunities to make arrangements with hospitals that are beneficial to their clients and patients would continue to have enough options with regard to hospital care.

28. A majority of health insurers believes the merger would not have any negative effects, because they would continue to be able to negotiate successfully about price and health care quality with the different hospitals. The patient advisory councils of both Bronovo and MCH were positive about the merger.

2.2.2.2 Stake in HTM by Dutch Railways NS

29. ACM announced that Dutch Railways NS would be allowed to acquire a 49% stake in HTM, the municipal public transport company in The Hague. All shares of HTM were owned by the city of The Hague. HTM operated tram and local bus services in The Hague.

30. NS and HTM currently do not compete with each other for the right to operate tram services in The Hague. The tram service contract had been directly awarded to HTM by the The Hague Region, the contracting authority. NS' acquisition of HTM's shares as such does not change the current situation. Since early 2013, the urban regional authorities of Amsterdam, Rotterdam and The Hague (the three largest cities in the Netherlands) are free to decide for themselves whether or not they put out to tender the public transport contracts in their regions. In the case of The Hague, it means that the 'The Hague Region' must make this decision no later than 2017. If it decided to put out to tender the tram services, public transport companies would be able to compete with each other for these tram services. The merger was found not to create additional competitive issues with regard to local bus and train services.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

31. ACM keeps track of the latest trends and developments for consumers and businesses. ACM looks at competition and consumer protection law and policy, and also specifically at the energy, telecommunication, transport and postal services industries. ACM participates at an appropriate level, where necessary, in discussions concerning the formulation and implementation of other policies. For example, in 2013, ACM advised of possible problems in the proposals for a National Mortgage Institution (NHI). The aim of this institution was to stimulate investments in mortgage packages from large investors. The returns on these investments would be guaranteed by the state. ACM pointed out that the creation of this institution could make entry into the Dutch banking market less attractive. Only a few major banks were active in the market, and competition had decreased since the outbreak of the financial crisis. This had led to higher mortgage interest rates. If the mortgage institution were to be set up in such a way that the benefits of the state guarantee would primarily be enjoyed by incumbent mortgage providers, that could put new entrants at a disadvantage. That could lead to reduced competition in the long run. Eventually, it could result in higher mortgage interest rates and/or lower savings interest rates. As a result of ACM's recommendations, the plans were altered.

4. Resources of competition authorities

4.1 Resources overall (current numbers and change over previous year):

4.1.1 Annual budget (in your currency and USD):

32. The competition related budget was EUR 15.4 million in 2013. This is approximately USD 19.4 million. The total budget of ACM was EUR 65.5 million in 2013, which is approximately USD 81.3 million. The competition budget is a combination of the competition related budget of the last three months of the NMa (January to March 2013) and the first nine months of ACM (April – December 2013).

4.1.2 Number of employees (person-years):

33. 524 people work at ACM (including temporary staff). This figure includes staff who deal with aspects other than competition, such as those who deal with the regulation of Energy, Telecom, Post and Transport; as well as those who work on Consumer Protection and the support staff who cover all of these areas from within the legal; communication and strategy departments; and the economic bureau.

Table 2

	Legal	Economic	L & E	Other	Total
Competition Department	54	25	3	28	110
Office of the Chief Economist	0	5	1	1	7

Legal Department	32	2		1	35
(Office of) Board of Directors	2	1			3
Strategy & Communication	3	3		2	8
Total	91	36	4	32	163

Other includes: Business, Mathematics, Accountancy, Political science, Communication studies and Engineering physics.

4.2 *Human resources (person-years) applied to:*

- Mergers: 15
- Anti-cartel: 70
- Dominance-related issues: 5
- Other (e.g., advocacy): 15

34. These figures only represent the 105 FTE who work in the Competition Department. FTE rather than people have been used as some people work half time on some projects.

4.3 *Period covered by the above information:*

35. 1 January 2013 to 31 December 2013.

5. **Summaries of or references to new reports and studies on competition policy issues**

5.1 *ACM's strategy (<https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets/>)*

36. In 2013, the Netherlands Authority for Consumers and Markets (ACM) published its strategy. Its strategy document explains who ACM is, and what ACM stands for. ACM enforces compliance with the rules on consumer protection, antitrust, and sector-specific regulation. ACM seeks to be an open, independent, and professional regulator with a well-developed ability to sense what is happening in the world outside its walls. Its mission, promoting options and opportunities for businesses and consumers, is central to all of its actions. While preparing its strategy document, ACM held interviews and round-table discussions with scholars, trade organisations, and consumer organisations. A draft version of the strategy document was put up on its website so interested parties could comment on it. The insights ACM gained from these comments were incorporated into the final version.

5.2 *Study into behavioural economics and competition policy*¹

37. In 2013, ACM published a study that it carried out into the implications of behavioural economics on competition policy. Behavioural economics is a field of study that looks at how individuals and businesses make choices in the real world. Such insights help in answering the question of what instruments ACM should use to achieve effective enforcement. In the report, ACM concluded that the existing analytical frameworks are sufficient to take into account consumer behaviour in its competition policy. According to ACM, insights from behavioural economics emphasise the importance of sound empirical research into consumer behaviour in real-world cases. Sometimes, businesses cleverly take

1. <https://www.acm.nl/en/publications/publication/11610/ACM-publishes-study-into-behavioural-economics-and-competition-policy>

advantage of the fact that consumers do not always make consistent and 'rational' choices. Whenever necessary, ACM steps in to inform consumers of their rights, and protects them. By enforcing consumer protection laws, ACM is able to deal with behaviour of businesses that is harmful to consumers. In addition, ACM stimulates consumers to take on a more self-confident and active role when dealing with businesses. It does so in various ways such as through its consumer information desk ConsuWijzer. ACM's conclusions are based in part on a study that was commissioned by ACM and was carried out by research firm Oxera. ACM will continue to keep a close watch on developments in the field of behavioural economics.