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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the Netherlands --

15-17 June 2016

This document reproduces a written contribution from the Netherlands submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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1. Introduction

1. The Netherlands Authority for Consumers and Markets (ACM)¹ aims primarily to solve problems on Dutch markets that harm consumer welfare. At ACM, we have several legal instruments at our disposal in antitrust cases. These instruments include: fines on companies and on individuals, orders subject to periodic penalty payments, binding instructions, (norm-conveying) dialogue, informal opinions, monitoring, education and market scans. Commitment decisions can also be used by ACM.²

2. ACM is both a regulator and an enforcement authority. As a result of the consolidation of the three authorities that are ACM's predecessors, ACM now has a large toolbox. We can choose the instruments that we consider most suitable to solve particular market problems. This can mean fining a company for violation of the competition law, while also starting a campaign aimed at making consumers aware of their rights in that particular market. Of course ACM recognizes and takes into account the deterrent effect of fines, the signaling function ("this is where we draw the line") and the penalty function (moral dimension). However, enforcing rules is not an end in itself. Tools must be used in such a way that they effectively solve a problem that negatively affects consumers. ACM explicitly puts the impact on consumers at the centre of its actions and not, for example, the number of complaints dealt with or the number of fines imposed.

3. In this contribution, we describe the legal framework applicable to commitment decisions in the Netherlands. We also illustrate ACM's style of oversight with some recent commitment decisions. We set out the results and outcome of our interventions insofar as these have been measured, and explain the dilemmas we have encountered in adopting these decisions. Finally we summarise the lessons we have learned in this area which may be of use to others.

2. The legal framework

4. The legal basis for commitment decisions taken by ACM can be found in article 12h of its Establishment Act: '[ACM] can take a [commitment] decision (...) if it deems the declaration of a commitment as binding to be more efficient than the imposition of an administrative fine or an order subject to periodic penalty payments.'³ The article further specifies the timeframe and conditions for commitment decisions, as well as the possibilities for amendment and repeal of such decisions. The procedural steps in the article mirror those that most authorities must follow before they can accept and formalise commitments in a decision.

5. Commitment decisions can be used by ACM before a violation has been confirmed and before a report has been created. An undertaking can request a commitment decision before ACM has taken a decision on the imposition of an administrative fine or an order subject to periodic penalty payments. Three requirements need to be satisfied before ACM decides to declare a commitment made by an undertaking to be binding:

¹ The Netherlands Authority for Consumers & Markets (ACM) was created in 2013 through the consolidation of the Netherlands Consumer Authority (CA), the Netherlands Independent Post and Telecommunication Authority (OPTA) and the Netherlands Competition Authority (NMa). Consumer protection and market oversight are now housed in a single authority.

² See for more information about ACM and our strategy: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/>

³ See: <https://www.acm.nl/en/publications/publication/15445/Establishment-Act-of-the-Netherlands-Authority-for-Consumers-and-Markets/>. Prior to the establishment of ACM, commitment decisions could be issued by the Netherlands Competition authority since an amendment of the Competition legislation in 2007.

1. The commitment ensures that the undertaking will behave in line with the statutory regulation or prohibition which is the subject of the commitment.
 2. The undertaking needs to demonstrate convincingly that it will comply with the decision in a way that can be monitored by ACM.
 3. The commitment decision has to provide a more effective solution to the problem than the imposition of a fine.
6. Before commitments are declared binding, the proposed commitments are generally made public, to give third parties an opportunity to submit observations.
7. ACM's competence to declare a commitment decision binding is of a discretionary nature. This means that ACM can apply commitment decisions in cases which meet all the above conditions, but is under no obligation to do so. A refusal by ACM to declare a commitment decision binding is not a ground for objection or appeal under Dutch Administrative law. Once a commitment decision is declared binding, ACM is no longer authorized to impose an administrative fine or an order subject to periodic penalty payments on the specific undertaking concerned, in the case under consideration.
8. Like the European Commission, ACM can amend or repeal a commitment decision if:
- The facts on which the decision is based have changed substantially;
 - The decision is based on data, as provided by the undertaking concerned, that is incomplete, incorrect or misleading;
 - The undertaking acts in violation of the commitment decision.
9. In these cases ACM regains the competence to impose a fine or an order subject to periodic penalty payments on the undertaking. Like most other authorities, ACM can also decide to maintain the commitment decision and impose a fine for failing to comply with the decision.

3. Recent cases

- **Buma/Stemra**

10. In 2014, ACM accepted commitments from the Dutch copyright collecting society Buma/Stemra. Under these commitments Buma/Stemra undertook to make its copyright management system simpler, more flexible and more accessible for the artists it represents. ACM had investigated the organisation during the previous year for possible abuse of dominance in music copyright management after receiving a complaint about its practices. ACM observed that composers and songwriters need Buma/Stemra for the collection of royalties from performances of their work on television and radio but, for example, not always on the Internet. Buma/Stemra effectively offered their copyright transfers in an all-in-one package, without a simple procedure to opt out of parts of the package. In practice, this meant that composers and songwriters had little choice about whether to sell their lyrics or compositions online, and basically no opportunity to do so.

11. The characteristics of this case made it suitable for a commitment decision. First of all, the possible abuse of dominance could be ended relatively easily by constructing a procedure to allow for a simpler and more obvious partial opt out to the all-in-one-package. This meant that compliance with a commitment to this effect would be easy to monitor. Secondly, since the current system likely impeded competition and innovation, a speedy solution was desired. This supported the adoption of a commitment decision over a fine or other formal instrument, since these would undoubtedly lengthen the process before a solution would reach consumers.

12. In the decision, BUMA/STEMRA committed to bring new music copyright management options to the attention of composers and songwriters through various means such as providing information on its website. In addition, BUMA/STEMRA committed to release an online calculation tool to help composers and songwriters decide whether or not to transfer all of their copyright or parts thereof to BUMA/STEMRA.⁴

- **Mobile operators**

13. In 2013, ACM investigated a possible price fixing scheme between three Dutch mobile operators active on the wholesale market. The mobile operators involved were KPN, Vodafone, and T-Mobile. The investigation showed that announcements were made in the public domain about intended market behaviour before such decisions had been finally decided upon by the companies. According to economic theory, public announcements about future behaviour can lead to a ‘common understanding’ between competitors, which lowers the intensity of competition. In economic terms the consequences of such behaviour can be just as severe as with explicit price fixing. The fact that the three players covered a large share of the Dutch retail market for mobile communication services also strengthened the argument in favour of an intervention.

14. In this case, commitments could likely solve any potential market problems effectively and in a shorter amount of time than it would have taken to impose an administrative fine or an order subject to periodic penalty payments. As such, ACM decided to address the mobile operators directly about the identified risks to competition, allowing them to work out formal commitments on this topic.

15. In January 2014, ACM issued a decision accepting the commitments made by the three mobile operators. In the decision, the anticompetitive risks of certain practices were identified and explained. The operators committed to have their senior management refrain from verbal or written announcements in the public domain concerning future prices and other commercial conditions for mobile communication services in the Dutch market, before such commercial conditions have been finally decided upon internally. In addition, this commitment will be included in the companies’ compliance programmes for senior management.⁵

An example of the behaviour by the mobile operators, which ACM observed, was a public announcement made by a director of one of the companies when he was taking part in a conference panel with competitors’ representatives. During this event the director announced that the company was planning to reintroduce connection fees for its customers. A director from a competitor later publically expressed that he hoped the company would proceed with this plan. In the days following the announcement that competitor made an internal analysis about the possibility for charging connection fees. In the end, the three mobile operators did indeed reintroduce a connection fee.

Both companies in this example are part of the commitment decision.

4. Results

16. The direct benefits for consumers in the mobile operators case are difficult to quantify. However, ACM has witnessed no new market sensitive announcements by the three mobile operators, as pledged in their commitments.

17. The BUMA/STEMRA commitment has produced very tangible results already. The organisation followed through on its commitment to make the copyright management system simpler, more flexible and more accessible by allowing artists and composers to opt-out of parts of the copyright management

⁴ See: Commitment Decision BUMA/STEMRA. <https://www.acm.nl/nl/publicaties/publicatie/13026/Definitief-toezeggingsbesluit-Buma-Stemra/> (In Dutch)

⁵ See: Commitment Decision mobile operators <https://www.acm.nl/nl/publicaties/publicatie/12526/Toezeggingsbesluit-mobiele-operators/> (in Dutch)

package through its website. ACM's Office of the Chief Economist calculated that the expected effect on consumer welfare of these commitments amounted to approximately €300.000.⁶

18. In 2015, ACM's approach in the Buma/Stemra case was supported by the decision of the Rotterdam district court, which issued a ruling on the case after a composer appealed ACM's decision to declare the commitment binding. One of the composer's arguments was that ACM should have imposed a fine for the violation for which it had accepted the commitments. The Court upheld ACM's use of a commitment decision, agreeing ACM's finding that a commitment decision would be more effective in solving the alleged abuse of dominance than the imposition of a fine. In addition, the court ruled that ACM had sufficiently demonstrated that Buma/Stemra will comply with the commitment decision in a way that can be monitored by the authority.⁷

19. Both the Buma/Stemra case and the mobile operators case received attention in Dutch national media. The tone of the coverage has been neutral to positive, with the mobile operators commitment case receiving praise with regard to the extent of the commitments.

20. More generally, an external review of ACM's work in 2015, commissioned by the Ministry of Economic Affairs, supported ACM's oversight strategy and its use of instruments. According to the report ACM has ended a significant number of both proven and suspected violations. This has been accomplished by imposing fines or orders subject to periodic penalty payments, but also by means of other instruments. The report concluded that ACM's strategy of matching the instrument to the problem under consideration contributes to the effectiveness of its work.⁸

5. Dilemmas

21. As extensively covered in the background paper for this session, commitment decisions come with a number of possible risks, including, but not limited to: a lack of deterrent effect, limited judicial review, a reduction in legal certainty and predictability, and concerns about proportionality.⁹

22. ACM is well aware of these concerns. These were discussed recently during the bi-annual Consultation Forum of Regulatory Bodies (MTB), a collaboration between ACM and five other Dutch regulatory and enforcement authorities. In order to minimise these risks, ACM adheres to a number of cautionary practices.

23. First of all, when constructing our portfolio of activities ACM takes the deterrent impact of its enforcement decisions into consideration. In its decisions, ACM aims to find a balance between solving consumer problems and having a deterrent effect, so that we prevent problems from emerging in the first place. As such, not all potential violations will be considered suitable for a commitment decision. In 2015 for example, ACM imposed a total of 24,5 million in fines and also imposed more fines on individuals than the year before,

⁶ See: 2014 ACM Annual Report. <https://www.acm.nl/en/publications/publication/14113/2014-ACM-Annual-Report/> (p.96)

⁷ See: <https://www.acm.nl/nl/publicaties/publicatie/15157/Uitspraak-rechtbank-Rotterdam-in-zaak-Buma-Stemra/> (in Dutch)

⁸ See: Report evaluation ACM by Kwink. (in Dutch)

⁹ See Commitment decisions in antitrust cases - Background paper by the Secretariat (2016) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2016\)7&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2016)7&docLanguage=En) and Jenny, F. (2014) Worst decision of the EU Court of Justice: The Alrosa judgment in context and the future of commitment decisions <http://fordhamilj.org/articles/worst-decision-of-the-eu-court-of-justice-the-alrosa-judgment-in-context-and-the-future-of-commitment-decisions/>

while also using (informal) commitments, public campaigns and other instruments regularly. Measuring the effects of these instruments has our continuing interest and as such ACM organised a number of research projects and conferences about the topic in the past year.¹⁰

24. In order to address concerns about the legal characteristics of commitment decisions, ACM provides carefully reasoned commitment decisions, both in the public documents and in its internal decision making process. Furthermore, Dutch administrative law requires ACM to provide adequately reasoned commitment decisions and honour the principles of ‘détournement de pouvoir’ and proportionality. Naturally, these considerations form part of our analyses.

6. Lessons Learned

25. The main test which ACM uses for commitment decisions is whether the benefits in terms of an earlier end to the violation and increased consumer welfare, can be balanced against the benefits of imposing a fine or an order subject to periodic penalty payments. Such benefits may relate to deterrent effect and the facilitation of follow-on actions for compensation. This is something Dutch administrative law requires ACM to establish before issuing a commitment decision.

26. As the examples above have demonstrated, ACM does not confine its use of commitment decisions to specific sectors or specific types of cases. In our experience the nature of the problem dictates the approach taken rather than the sector in which the problem occurs. Our oversight strategy focuses on finding the most effective solution to problems which harm consumer welfare. In the same way, the choice for behavioural and/or structural commitments depends fully on the problem which ACM aims to solve and the most effective way to do so.

27. ACM recognises that simple violations are more suitable for a concrete commitment, since compliance in these cases is easier to monitor. However, this does not deter ACM from using commitment decisions in more complex cases.

28. ACM is a ‘learning organisation’ and internal evaluation and discussion forms an important part of our style of working. Based on the experiences described above, we can formulate a few important lessons learned on how to be effective whilst preserving institutional legitimacy.

- It is important to analyse the various options to solve a problem. Commitment decisions should be used only when they are the most effective and appropriate way to solve the problem in the individual case at hand.
- At the same time, we have to be mindful of the importance of the deterrent effect of the authority’s interventions.
- Substantiate the reasons for issuing a commitment decision, to aid both the formulation of suitable, justified commitments and the deterrent effect on others in the sector.
- Communicate externally about commitment decisions. This can create public attention for the market problem and may stimulate other parties to adjust their behaviour or request their own commitment decision.

¹⁰ For example: in September 2015 ACM co-organised the conference ‘Deterrence and macroeconomic impact of the work of competition authorities’ with the European Commission and the UK Competition and Markets Authority. <http://ec.europa.eu/competition/information/macroeconomy/index.html>