

Joint Comments of the American Bar Association  
Section of Antitrust Law and Section of International Law  
on the “Strategy Document” of the  
Netherlands Authority for Consumers and Markets

May 2013

The views contained in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Netherlands Authority for Consumers and Markets (“ACM”).

The Sections appreciate the opportunity to present our experience and views on the central issues in the Strategy Document, in particular on the unique challenges created by merging three independent agencies into a single agency for consumer protection and market oversight. The Sections commend the ACM both for making its strategic goals transparent and for allowing others an opportunity to comment early in the process. This effort will enshrine good-government principles in the ACM’s constituent texts, and will benefit both Dutch consumers and other agencies worldwide that are face similar challenges.

The Sections have substantial experience with the competition and consumer protection laws of the United States and other jurisdictions, and the application of these regimes to specific, sometimes highly regulated industries including health care, energy, and telecommunications. The Sections’ comments reflect this expertise as well as expertise in the economics underlying the analysis and the implementation of policies in these areas.

1. EXECUTIVE SUMMARY

These comments make the following main points:

- The Sections commend ACM for focusing on consumer welfare as its main guiding principle. We agree that consumer welfare is a useful guiding post for policies beyond competition policy. We believe that it will be beneficial for the ACM to strive to ensure that all of the offices and departments in the ACM have consistent conceptions of consumer welfare and how it might be affected by policies under the control of ACM. In this respect, we hope that the ACM will assist other policy makers by taking advantage of the integration of the competition and economics capabilities of the Netherlands competition authority to evaluate the extent of regulation in some areas of public interest.
- The Sections appreciate the balancing that was required to develop the organizational structure of ACM and believe that the draft Strategy Document describes an agency well-suited to the challenges it faces. The Sections share the concern that the separate histories

of the different departments might deter staff in each department from taking advantage of the strengths of the new agency, and therefore applaud ACM's creative efforts to ensure integration within the agency. Our comments note where we believe further detail could be useful, and provide additional examples of techniques for cross-pollination that have succeeded elsewhere.

- The Sections commend the draft Strategy Document's discussion of process innovations. In particular, the draft's discussion of openness and its indicated willingness to evaluate alternative policy and remedial options comport with best practices elsewhere in the world. Additional detail in each of these areas, as well as in the area of procedural fairness, will help the agency and the parties that interact with the agency.
- The Sections believe that the breadth of the new agency make it important for it to consider its relationships with other regulators, such as the Dutch Data Protection Authority, and to the extent possible provide additional detail on how those relationships will function, particularly in the areas of information exchange and cooperation with various agencies.

## 2. THE STRATEGY DOCUMENT PROPERLY FOCUSES ON CONSUMER WELFARE AND ON ORGANIZATIONAL AND PROCESS INNOVATIONS TO INTEGRATE THE THREE AGENCIES

### 2.1. FOCUS ON CONSUMER WELFARE

The draft Strategy Document emphasizes that increasing consumer welfare is ACM's primary goal. The document notes that this goal applies across all of the missions of ACM – not only to the competition and consumer protection missions but also to the regulation of specific sectors.

The Sections agree that consumer welfare is and should be the core value for both competition and consumer protection enforcement. The US experience demonstrates that it is possible to improve the execution of many regulatory regimes by making consumer welfare the touchstone.<sup>1</sup>

While recognizing the benefits of using consumer welfare as a core value, the Sections note that the application of consumer welfare analysis can be difficult in some circumstances. For example, the draft Strategy Document asserts that the ACM's goal is to balance consumer welfare in both the short term and the long term. Enforcement decisions that seem likely to improve consumer welfare in the short run may often reduce consumer welfare in the long run. For example, in the competition context, an enforcement action that eliminated market power

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<sup>1</sup> See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (referring to “the antitrust laws’ traditional concern for consumer welfare and price competition”); Comments of the Fed. Tr. Comm’n on Federal Energy Regulatory Commission (FERC) Notice of Proposed Rulemaking “Wholesale Competition in Regions with Organized Electric Markets,” Docket No. RM07-19-000, *available at* [www.ftc.gov/be/v070014b.pdf](http://www.ftc.gov/be/v070014b.pdf) at 1-2 (Apr. 17, 2008) (discussing FERC’s move toward competition to determine prices in wholesale electric power markets and encouraging the development “as part of the ongoing effort to improve consumer welfare and economic efficiency through vigorous competition in the electric power sector more generally”); Timothy Muris, “Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy,” Address Before the Milton Handler Antitrust Annual Review (Dec. 10, 2002) (FTC Chairman at the time noting that “The Commission should forestall the greatest threats to consumer welfare. This principle captures the basic direction of FTC practice over the past two decades.”).

arising from intellectual property rights could, in the short run, improve allocative efficiency in that market by allowing producers who were excluded by the intellectual property from entering the market. However, in the long run, the dynamic efficiencies created by the incentives to innovate could be weakened by a perception that intellectual property rights might not be enforced.

With this in mind, it would be helpful for the ACM to clarify in the Strategy Document what it means by consumer welfare and how it intends to incorporate consumer welfare into its analysis in each enforcement area. This would increase the usefulness of the Strategy Document to outside parties and help unify the ACM's various missions.

## 2.2. ORGANIZATIONAL INNOVATIONS IDENTIFIED IN THE DRAFT STRATEGY DOCUMENT

As the Sections understand the integration of the three agencies into ACM, the Consumer Department of ACM will take on the consumer protection mission of each of the original agencies while the Competition Department will handle much, but not all, of the competition mission, with the relevant regulatory department handling abuse of dominance in the regulated industries. It further appears that the Office of the Chief Economist and the Legal Department will operate separately from the other departments. To ensure that ACM takes advantage of the synergies made possible by this combination of functions into the new organization, the draft Strategy Document identifies a number of innovative processes designed to ensure that the ACM approaches its missions in an integrated fashion. Among these innovations are the development of the consumer and business information desks, the creation of a network of detection officers, and the liberal use of ad hoc cross-departmental teams and thematic, sector-based and chain-based approaches when it appears that they would be effective.

This organizational approach has several positive features. By keeping largely to pre-existing organizational structures between the Competition Department and the regulatory departments, while at the same time consolidating consumer protection into one department, the draft Strategy Document lays out a scheme that will permit current work to continue while providing for increased integration of functions over time. Further, by separating the Office of the Chief Economist, the organizational structure encourages economic analysis to be applied consistently across each of the agency's missions. The US Federal Trade Commission and the Department of Justice's Antitrust Division (the US agencies) have found that an independent and well-resourced economist's office or department is very important to accomplishing the agency's mission. Ensuring that the Chief Economist has input into enforcement and policy decisions across the agency will improve cross-pollination between the missions, allow for an independent point of view that is often different from those of the case team handling the investigation, and is the best way of ensuring a consistent methodology and tool kit across agency functions with a focus on consumer welfare.

Nevertheless, the decision to continue to maintain many of the existing organizational boundaries between the Competition Department and the regulatory departments, although likely necessary in this context, has some limitations. The principal danger, which the ACM's draft recognizes, is the possibility that historical divisions will, by inertia, hinder integration. The experience of the US agencies as well as of agencies in other countries, notably the Australian Competition and Consumer Commission, is that, absent active effort, team members tend to

work within and apply their own department's priorities rather than work with and learn from other departments. Given the ACM's structure and the independent histories of many of the departments, the Sections believe that it will be critical for the agency to actively develop strategies and tactics to encourage integration and idea sharing among the agency's components.

The resource-sharing and cross-agency initiatives identified in the draft Strategy Document demonstrate that the ACM has given significant thought to this issue, but the Sections believe that more detail would be productive. In this regard, the draft could be more specific regarding when and how these integration processes are to be used. For example, it would be helpful if the ACM were to develop a procedure for identifying candidates to fill cross-agency teams designed to ensure that potentially conflicting views on significant points are considered during the investigation. Because of the potential for conflicting standards for abuse of dominance in investigations in regulated sectors compared to the rest of the economy created by the allocation of abuse of some dominance cases to the regulation departments, the Sections also suggest that cross-agency teams be created as a matter of course, and early in the process, for abuse of dominance investigations in these areas. It would also be useful for the draft to specify the extent to which the Office of the Chief Economist will be able to participate in other departments' decisions and processes, and when in the enforcement process the Office will become involved.

Finally, there are other potentially useful tools that can ensure that synergies leveraging the three agencies' expertise are recognized, including some tools that a similar agency has found useful. In particular, the Canadian Competition Bureau has used a formal personnel rotation program to reduce silos and ensure that departments understand each other's perspectives. They have also held cross agency workshops focusing on a specific issue such as telecom regulation. It might be useful for the ACM to stage, early on, an internal conference on standards for abuse of dominance in the regulated industry sectors, relying on experts from across the agency, including the Competition Department and the Office of the Chief Economist.

### 2.3. PROCESS INNOVATIONS IDENTIFIED IN THE DRAFT STRATEGY DOCUMENT

The draft Strategy Document identifies several process innovations intended to ensure the ACM's effective operation, including a commitment to "core values" such as openness and a willingness to evaluate all policy and remedial options to choose the one best suited to the situation. The draft correctly identifies the importance of openness to the agency's missions. Open and frequent engagement with parties under investigation enhances the ability of agencies to gather relevant information, increases efficiency by focusing the parties on the issues in which agencies are most interested, and can strengthen the agencies' internal deliberations, enabling them to better understand parties' arguments and supporting facts. Similar engagement with complainants and other interested parties (while maintaining the confidentiality of the targets' information) yields similar benefits. It would be useful for the ACM to provide additional details on these procedures, either in the Strategy Document or other guidance, particularly with regard to the opportunities for outside parties to comment on agency actions and decisions.

Regarding the draft Strategy Document's discussion of the ACM's willingness to evaluate all policy and remedial options to choose the one best suited to the situation, the US agencies' experience suggests that, within reason, flexibility in the use of policy making and remedial powers can improve their ability to help American consumers without unduly restricting efficient

business behavior. The US agencies have long understood that the use of powers in addition to direct enforcement can both extend the reach of their enforcement powers and improve their focus. For example, the US agencies routinely advocate for the application of competition principles in other contexts and to other agencies, including issuing major reports on competition issues within different aspects of the patent system, the health care system, telecommunications, agriculture, and many others.<sup>2</sup> Such reports can be used internally by ACM staff, staff of other agencies, and policy makers to better understand the competition and consumer protection issues facing industries in key sectors of the economy.

With respect to the creative use of the ACM's powers to protect consumers by looking for customized solutions to market problems, it will be useful for the ACM to provide additional information regarding how the agency will decide which tools it will use and whether the process of coming to that decision should be made public. Given the ACM's broad powers and jurisdiction, there is a danger that similarly situated parties might be treated differently because their cases are heard in different parts of the agency that use different tools. The Sections believe it will be important for the ACM to develop clear and public procedures outlining when it will use alternative procedures to promote consistency across the organization. The Sections understand that not every situation can be predicted beforehand; however, the more open and regular the process for the use of alternative policy tools, the more effective those tools are likely to be.

In addition to these values, an official, public commitment to procedural fairness and to confidentiality as core values can help ensure cooperation from the parties and that all parties respect the ACM's decisions. It will be helpful for outside parties to better understand what measures the ACM will take to ensure procedural fairness, such as internal controls that prevent the development of a systemic or specific bias to reach a particular conclusion in any investigation, the review of staff's preliminary decisions by experienced and independent managers, and an explanation of likely charges and opportunity for the parties to respond to both the staff and the leadership before enforcement actions are decided or announced. More information regarding the ACM's plans to protect confidential information submitted by the respondents and relevant third parties will help ensure that the ACM has access to information and that complainants cannot misuse ACM processes to harass rivals or to gain access to information inappropriately. In this way, providing more information on procedural safeguards and confidentiality can strengthen decision-making and increase public confidence in agency decisions.

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<sup>2</sup> See, e.g., Dept. Of Justice Antitrust Div., *Competition And Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward* (May 2012), available at <http://www.justice.gov/atr/public/reports/283291.pdf>; Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (March 2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>; Dept. Of Justice Antitrust Div., *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers* (November 2008), available at <http://www.justice.gov/atr/public/reports/239284.pdf>; Fed. Trade Comm'n & Dept. Of Justice Antitrust Div., *Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition* (April 2007), available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>; Fed. Trade Comm'n & Dept. Of Justice Antitrust Div., *Improving Healthcare: A Dose of Competition* (July 2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>; Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance Of Competition And Patent Law And Policy* (Oct. 2003), available at <http://ftc.gov/os/2003/10/innovationrpt.pdf>.

### 3. OTHER OPPORTUNITIES

The Sections note that the integration of the three agencies into the ACM may increase the potential for overlap and information-sharing with other agencies. Because ACM has economy-wide jurisdiction over consumer protection and competition enforcement, it seems likely that it will need to cooperate with other regulators, including in the financial and health care sectors, and with the Dutch Data Protection Authority. The Sections believe that it will be useful for ACM to specify certain aspects of the process for this cooperation, including how investigations will be allocated between agencies and what sorts of information will be shared. Although we understand that there are protocols relating to the cooperation between other regulators and the predecessors of the ACM, the Strategy Document presents an opportunity for the ACM to review and clarify the principles in the protocols, taking account of the ACM's broad statutory right to exchange information.

### 4. CONCLUSION

The Sections greatly appreciate the opportunity to comment on the Strategy Document and hope that the ACM finds these comments useful. We would be pleased to respond to any questions that the ACM may have and to provide any further assistance that may be appropriate.

**Respectfully submitted,**

**Section of Antitrust Law**

**Section of International Law**

**American Bar Association**