



InSight

1. Introduction

As the market authority responsible for overseeing the Dutch economy, the Netherlands Authority for Consumers and Markets (ACM) is active in many areas. ACM's task is to ensure that the practices and activities of businesses comply with national and European regulations, and that they do not harm competition or consumers. In this way, ACM's actions help markets function better. Businesses and consumers witness the effects of ACM's oversight efforts in their everyday lives. These effects may be visible in the clarity of the charges or even in the level of the amount payable on their energy or phone bills, and also in the availability of health care in their vicinity. ACM has published this 'InSight' in order to create a certain level of predictability in its actions. It wants to prevent ACM's decisions from taking consumers and businesses, but also policymakers and politicians by surprise.

Active contributions to public debates

ACM takes part in public discussions and debates on social issues that are relevant to its work. Active participation is something that can be expected of ACM. After all, having knowledge and expertise about policy implementation provides useful information for the development of new policies. This 'InSight' publication is an example. By publishing 'InSight,' ACM contributes to public debate at national and European level in the sectors in which it is active.

The focus of InSight

In InSight, ACM draws attention to the overall theme of the regulator's role in the protection of public interests. In addition, several key trends in the markets for energy, rail, and telecommunications are explored. Finally, the interplay between civil-law enforcement and public enforcement of competition law is discussed. Following in the tradition of ACM's Market Outlook of 2013, which had a broader scope, ACM's InSight of 2014 calls for particular attention for these areas from politicians, policymakers, interest groups and businesses. Important social issues such as health care and the financial industry are also on our agenda in 2014.

2. Protecting public interests

Recently, government has been stepping back and calling on individuals and businesses to take



personal responsibility for their own affairs. Different aspects play a role in that process such as the social trend of individuals becoming more assertive, the government and the corporate sector aiming to reduce red tape, but also the fact that, because of the economic crisis, the government simply has fewer resources than before. Policymakers are encouraged to find answers to social issues such as making society more sustainable, rather than setting more rules. Recent examples include the arrangements with regard to sustainable construction and sustainable energy production. In the agricultural sector, the government encourages businesses to come up with initiatives for environmentally-friendly and animal-friendly production techniques.

Competition and other public interests

ACM welcomes joint initiatives of businesses that help achieve public goals. Cooperation may help realize more efficient production, lower prices or a higher quality of products and services. Competition law also allows cooperation. Initiatives that have little or no effect on mutual competition or initiatives that leave enough options open for the market are rarely a cause for concern from an antitrust perspective. Even arrangements that cover a substantial share of the market (or the entire market), can be allowed, for example, because consumers are willing to pay more for products that have been produced in an environmentally-friendly or animal-friendly manner.

Boundaries of cooperation

When government encourages businesses to cooperate, then it should also be clear what the boundaries of such cooperation are. In situations where the cooperation between businesses restricts competition, antitrust rules may be violated, particularly the cartel prohibition. ACM sees risks to consumers arising if the question of what is and what is not a public interest is left to businesses to decide among themselves. It cannot be entirely ruled out that, under the banner of that public interest, competition *is* restricted, thereby primarily benefiting the participating businesses. An example thereof would be if a price-fixing agreement led to an increase in turnover, yet it remained unclear in what way this would help realize the social goal that was supposedly pursued. In such a situation, it is the regulator's job to step in. Fewer rules could thus lead to more regulatory activities, and possibly to a lack of understanding among the public.

Assessments of cooperation for the benefit of public interest

When ACM gives its opinion on collaborative initiatives, it does so within the legal framework that governs its powers. Within that framework, an assessment between competition and other public interests can be made such as sustainability. When making such assessments, ACM weighs the pros and cons for the users that are affected by the arrangement in question. The room ACM has in these assessments is thus limited. There is no room in the law for a comprehensive cost-benefit



analysis in which potential costs for users can be compensated with benefits for others or for society as a whole. An example is ACM's analysis of the planned closure of five coal power plants, which was just one component of the Energy Agreement for Sustainable Growth. In its analysis, ACM was obliged to limit itself to an analysis of the pros and cons of the agreement for the energy consumers that would be directly affected, and could not take into account the possible European or global effects on CO₂-emissions reduction policy.

However, policymakers and politicians can make a broader assessment which does take into account public interests, and questions concerning the distribution of the social costs and benefits. This involves a public and democratic decision-making process at a national or European level, and falls outside the scope of the regulator's assessment framework. Only the government can adopt measures whose justification lies in the protection of general public interests. The government can promote or force socially desirable results through legislation or regulations.

3. Trends in the energy sector

The transition to sustainable energy supplies is a major and difficult challenge for the energy sector. It is critical to manage the financial costs of this transition. That is why regulation of the network operators will continue to be a key element of ACM's work in the next few years. European cooperation is also necessary. Integration of national markets will result in a more efficient use of both the transmission infrastructure and of the production capacity, and it will also lead to more suppliers. This will enable buyers to buy energy at better prices. Moreover, market integration helps increase security of supply: shortages in one country can be overcome by utilizing available plants in a neighboring country. This kind of solution becomes more important as the share of energy production made up by wind energy and solar energy (which cannot be easily forecasted) increases. Market integration also offers benefits for the security of supply in the long run (investments in new plants), because, on balance, it means fewer investments will be necessary.

Major differences within Europe

Major differences can be observed in the ways in which European countries promote the transition toward more sustainable energy supplies. These differences are reflected, for example, in the national subsidy systems for stimulating sustainable generation, or in the level of compensation consumers receive for contributing power to the grid. The large subsidies on wind energy production in Germany lead to lower prices when the wind blows, but also to disruption on the European market. When interconnector capacity becomes limited, wholesale prices in Germany and its neighbors sharply diverge, putting buyers in those neighboring countries at a competitive disadvantage.



Furthermore, European countries have strikingly different national policies regarding the desirability of compensating conventional electricity production (using coal or natural gas) in order to ensure capacity is available in times when sustainable energy sources supply insufficient energy.

Further European integration helps

National governments in Europe choose different solutions to solve problems on the market. This leads to disruption of the integration of the European electricity market, and may have negative effects on the affordability and the security of the energy supply. Sustainability goals may also be jeopardized. To ACM, it is therefore critical to take the European playing field into account in the decision-making process, and to choose solutions that deliver the substantial benefits that further European market integration and competition can yield.

Lack of energy-saving services

The transition to sustainable energy supplies is not just a major challenge for production and network management. It is also a major challenge to get consumers and businesses to consume energy more efficiently. To encourage businesses and consumers to save energy, new types of services are needed: energy-saving services. Based on user information from smart meters, such services offer consumers insight into their energy consumption, and can give them advice so consumers will be able to take measures to save energy. There is still a great need for innovative applications in this area. Innovation and competition should ultimately lead to a situation where consumers are truly able to save energy, and are able to choose from different energy-saving services. We have not reached that point yet.

Creating a framework for fair competition

In order to arrive at a point where we have a wide selection of energy-saving services, ACM believes it is important that companies such as energy providers and other service providers are able to compete with each other in a fair manner. This means, for example, that network operators must share information about the installation of smart meters under equal conditions with other providers. This will enable them to make projections about the feasibility and profitability of new activities. Innovative applications and mutual competition can thus help in stimulating energy-saving efforts and in the realization of sustainable energy supplies.



4. Trends in the rail sector

At present, the European and Dutch rail markets are very dynamic. The market for international passenger rail transport has been liberalized in recent years, and international freight rail transport has been given a boost with the launch of two of the three European rail freight corridors with a connection to the Netherlands. ACM's sector-specific regulation ensures that passenger rail companies and freight rail companies are able to offer services to rail passengers and shippers on equal terms. All rail companies must be treated equally with regard to the allocation of rail capacity, and with regard to access to rail-related services such as stations and travel information. In addition, ACM makes sure that the tariffs for using rail capacity and rail-related services are cost-oriented, and that rail companies are given correct information in order to be able to offer services themselves. If rail companies feel disadvantaged, they have the opportunity to file an official complaint with ACM.

Importance of the implementation of the Recast Directive

The implementation of the European Recast Directive (2012/34/EU) in 2015 will further strengthen ACM's sector-specific regulation of the rail market. A successful implementation of this Directive in Dutch regulation in 2015 is of great importance to the position of rail companies in the Dutch rail market. Under the Directive, access to services that are offered by dominant market participants must be completely transparent and in accordance with the principle of non-discrimination. The relevant tasks and powers in the Directive as well as its implementation in national regulations are crucial to ACM's ability to strengthen the position of rail companies,

Importance of the conditions attached to 2014 rail concessions

In 2014, the State Secretary of Infrastructure and the Environment will award Dutch Railways NS a new concession for the main railway network for the period of 2015 - 2025. The Ministry of Infrastructure and the Environment enforces compliance with the conditions attached to the concession. The concession grants its holder exclusive rights to commercially exploit the main railway network. For the duration of the concession, there are no market forces that can discipline the concession holder in terms of pricing or quality. That is why the concession conditions must be set out in such a way that, for the entire period, the concession holder will sufficiently meet demand, as well as the quality needs of travelers. In its Market Scan on Passenger Rail Transport (2011), ACM stated that independent measuring of performance on the main railway network, as well as transparency with regard to actual performance at a more detailed level are critical points that call for attention.

Other events that will take place in 2014 are the awarding of the management concession for the



main railway infrastructure to ProRail for the period of 2015-2025, as well as the repositioning of KeyRail. Also, with regard to these developments, equal conditions for access to the Dutch railway network, and transparency for all market participants (passenger rail transport and freight rail transport) must be the central principles.

Anticipating future developments

Negotiations in Brussels about the Fourth Railway Package will continue in 2014. The proposal initially suggested that, by 2023, all domestic passenger rail transport would have to be tendered publicly. Amendments passed by the European Parliament now seem to leave open the possibility of directly awarding concessions.

A timely and comprehensive analysis of the effects of the Fourth Railway Package on Dutch travelers is needed for its successful implementation. ACM recommends to take into account already any future changes that may follow from the Fourth Railway Package, when awarding the concessions to Dutch Railways NS and Dutch infrastructure manager ProRail. One such example is making sure that correct and up-to-date information is available in order to be able to analyze properly the effects on travelers and rail companies.

5. Trends in the telecom sector

In the fall of 2013, the European Commission presented its proposal for the realization of the internal market for telecommunications. The Ministry of Economic Affairs subscribes to the objective of the European Commission to further develop the internal telecommunications market, as does ACM, and supports the proposal on strengthening the position of end-users, and the proposal on net neutrality. ACM also supports a further reduction of consumer prices for roaming and international calls.

ACM sees downsides to the European Commission's veto power

ACM is critical of a number of points in the proposal. Under current regulations, the European Commission has a veto power, allowing it to force ACM to define telecommunication markets, and to determine the competitive positions of telecommunication companies in accordance with the European Commission's policy. The proposal plans to expand this power, including the obligations that can be imposed on dominant market participants in order to promote competition.

Another proposal of the European Commission is to exercise restraint in the use of obligations with regard to access to fixed networks in order to create a more conducive investment climate. ACM believes this poses a risk to the development of the national market because there is, in fact, fierce



competition in the Netherlands, thanks to the combination of having two fast networks, and having access regulation in place. This competitive pressure is conducive to smart investment in the telecommunication sector. For healthy competition, more than two players are often needed.

Insufficient attention to national circumstances

According to ACM, the European Commission's investment agenda and the related desire for greater harmonization of obligations at a European level takes into account insufficiently the national competitive circumstances. In an initial reaction to the Commission's proposal, the European Parliament proposed to strike those parts. ACM has taken note of these developments approvingly.

6. Trends in competition law: civil-law enforcement (private enforcement)

The draft version of the directive on civil-law enforcement of competition law is expected to be finalized by Brussels in 2014. Civil-law enforcement (or private enforcement) refers to the enforcement of antitrust regulations through legal proceedings with a civil-law court between competitors themselves or refers to legal proceedings of injured companies/consumers who wish to be compensated for the injury resulting from an antitrust violation. The draft version of the directive aims to promote effectively actions for damages for antitrust violations, and governs the coordination of civil-law and public enforcement.

ACM is positive about civil-law enforcement

Public and civil-law enforcement exist side by side. In practice however, emphasis to date has been on public enforcement. The directive may speed up a shift that has already started in the courts. For example, gathering evidence will become easier for the injured. ACM is positive about civil-law enforcement as a way for victims (consumers and companies) to take the law into their own hands. Strong public enforcement helps civil-law enforcement. Once ACM has tracked down a cartel, and an issued sanction decision has become irreversible, the unlawfulness of a certain activity has been established. An ACM sanction decision has binding effect on the civil-law court. It will thus be easier for victims of the cartel to be awarded damages than without any ACM action. The legal proceedings before the civil-law court then gives a final decision on any damages to be awarded. In that context, the victim still has to demonstrate the causal connection between the injury and the unlawful conduct, and he must explain what concrete injury he has suffered. The developments towards more civil-law enforcement will not reduce the frequency of ACM's interventions.

Access to information

There is a certain interplay between civil-law enforcement and public enforcement, especially with



regard to the substantiation of the injury suffered. The directive will regulate in what way national courts are to strike a balance in a uniform manner when determining if, and under what conditions, injured parties can obtain access to information gathered by a public regulator. If ACM has obtained evidence from a cartel participant as part of a leniency request, access to this information can carry a risk that companies are less willing to file a leniency request in the future. They might escape (in full or partially) the public fine, but they also might be the first target of claims filed by injured parties. That risk could reduce the willingness to file a leniency request significantly, thereby harming the effectiveness of the leniency programs, which are a vital part of public-law enforcement.

Maintaining a balance is critical

The European Union aims to adopt the directive in 2014. It is critical that the right balance is kept in the legislative process between opportunities for detection, and possibilities for damages. ACM together with the Ministry of Economic Affairs follows this process with great interest.

7. Conclusion

This year, further advancements will be taken at both European level and national level. Decisions will be taken in the various areas that ACM regulates. These processes determine in what way socially important industries will be organized, and they determine ACM's oversight work. By discussing the above issues in this InSight, ACM wishes to contribute to the protection of public interests, and to the way effective and efficient market oversight can be organized. ACM will continue to participate actively in public debates and decision-making processes with regard to these topics.