



InSight 2015

1. Introduction

The Netherlands Authority for Consumers and Markets (ACM) actively contributes to the public debate. ACM calls for the attention of government, lawmakers, and the corporate sector whenever it believes that changes to rules (existing or planned), policy or activities can help protect public interests better than fall under its statutory duties. Such an active role also fits with current social trends. Regulators are expected to make themselves heard in the public arena, and to help create policy by providing their knowledge and expertise.

InSight is an annual publication of ACM, in which ACM discusses trends that are of importance to its oversight.¹ In this year's edition, ACM explains its role as competition authority vis-à-vis private cooperation arrangements with regard to sustainability, which is currently a hot topic. ACM will then touch upon the increasingly significant influence of innovative forms of digital services on business models of companies, questions about competition, and consumer protection. Finally, several challenging issues concerning the health care system and the energy sector are discussed.

2. Cooperation and sustainability

Businesses, often encouraged by governments, increasingly wish to help find solutions to social problems. Solutions are preferably not sought in regulation, but rather in arrangements between interested parties. The widely-shared desire to make commercial activities more sustainable is a striking example of such preference. However, mutual arrangements between businesses may pose risks to competition.

Using examples and several concrete cases, ACM has explained what the boundaries of competition rules are, and what options those rules offer.² This explanation has been met with mixed reviews from critics. This is not a bad thing, as a regulator should, in fact, publicly account for its actions, and should look forward to taking part in the discussion. Yet, because of the public interests of having a

¹ This may include social, economic or technological developments and trends.

² See the Knowledge Bank of Sustainability: <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/duurzaamheid-en-mededinging/kennisbank-duurzaamheid/>



sustainable society, and of a legitimate use of resources, ACM sets great store to drawing attention to its role in the assessment of these types of questions. First of all, it can clarify ACM's role, but it can also help in finding better solutions to social problems.

ACM warmly welcomes cooperation that helps make production more efficient, put downward pressure on prices, or make the quality of products/services higher. After all, consumers benefit from such cooperation. The Dutch Competition Act offers room for this kind of cooperation. Initiatives that do not affect (or hardly affects) mutual competition, or that leave enough choice in the market are almost never considered problematic from a competition point of view. And even if arrangements do affect a large part of the market (or even the entire market), that room can still be there: for example, because consumers are willing to pay more for products that have been made in an environment-friendly or animal-friendly manner. It is a different story if cooperation unnecessarily restricts competition. Then both competition *and* consumers lose out. It is up to ACM to warn for these situations, and to step in, if necessary. For example, ACM recently announced that the collaborative plans concerning the so-called 'Chicken of Tomorrow' in their current form restricted competition.

This does not take away the fact that, even if competition rules are violated in certain plans, lawmakers or other politicians can still approve such plans. This falls outside the scope of ACM's assessment mandate. Deviating from the existing rules requires a democratic decision-making process. Within relevant European and national frameworks, the government may advocate socially-desirable outcomes or force such outcomes through legislation and regulation.

3. Digitization

It is impossible to imagine our daily lives without the Internet or devices such as tablets and smartphones. To a high degree, digital technologies affect the way we live and work, and they are a key driver of economic growth in numerous sectors.³ New applications create new questions, or may be a reason to revisit previous discussions.⁴ Innovative digital services challenge the business models of existing services, and are putting them under pressure. Online platforms are able to offer consumers interesting alternatives to traditional services. For example, IP-platforms such as WhatsApp and Skype were already giving traditional telecom providers a run for their money. That

³ According to Nederland ICT (the Dutch trade association for IT, telecom and internet companies), a quarter of economic growth in the Netherlands comes from telecom: <http://www.destaatvantelecom.nl/>

⁴ Privacy issues will be discussed later. Questions about the security of confidential information of governments or businesses (for example, in the cloud) or the security of networks and network-dependent, public and private facilities (banks, hospitals, energy plants, and others) are not discussed here.



way, established businesses are challenged to reinvent themselves as well, or at least, that is the plan.

Lawmakers and other politicians underline the desire for more innovative entrepreneurship. Moreover, 'sharing' scarce resources such as labor and goods fits with the Dutch administration's call for more self-reliance and enterprise among citizens and companies alike. In this context, one can alternate between a social perspective and an economic perspective.⁵

In early-2015 already, the Secretary-General⁶ at the Ministry of Economic Affairs stood up for innovative online initiatives such as UberPoP and Airbnb.⁷ ACM is also a proponent of innovative services that lead to more competition, and to more benefits for consumers. UberPOP appears to offer consumers the opportunity to save costs tremendously. However, price is only one aspect. Because of their broad and easy accessibility, online platforms also offer the opportunity to influence positively the quality of the service by providing insight into consumers' ratings of the services offered. A good online reputation is of great importance to the odds of being able to continue to do business successfully. Providing consumers with correct and clear information enables them to make well-informed choices. Online platforms are particularly well-suited for this because, through them, information can be collected and distributed on a large scale very fast. A precondition for success is that platforms process information ethically and carefully.

With these new initiatives, existing rules (and by extension, the safeguards laid down in them) sometimes do not completely fit with these new forms of service. This does not necessarily have to slow down this new development. The earlier mentioned Skype is widely used as an ancillary service next to traditional telephony. It is widely known that this IP service, as of yet, does not offer access to emergency numbers such as 112, whereas telephony services over traditional telephony networks are statutorily required to do so.⁸ Yet this did not stand in the way of Skype's launch and subsequent growth, currently having hundreds of millions of users. With Skype and similar IP services, substantial savings on international calls can be realized. Ancillary services such as video telephony have also been given a boost.

⁵ The popular term 'sharing economy' includes both the sharing of goods and services 'for nothing', as well as transactions for money or trade.

⁶ Translator's note: the highest ranking public employee at a ministry.

⁷ <http://www.economie.nl/artikel/kiezen-voor-kansen>

⁸ Future technological and/or policy developments could make an end to this distinction. In the meantime, for each service, ACM will look whether or not current legislation is applicable.



The government's aim should be to give new developments enough opportunities without losing sight of the preconditions set out by the legislature. If consumers perceive traditional and new forms of services as substitutes, it is obviously crucial that existing safeguards such as the safety and reliability of the service are not undermined.⁹

The government can play the role of facilitator. For example, at first, the city of Amsterdam prohibited the 'illegal hotels' of Airbnb. However, in 2014, the city council adopted regulations that allowed homes to be rented temporarily under certain conditions. These conditions concern aspects such as fire safety but also tourist-tax payments. Airbnb accepted these conditions, and, as a result, this seems to be an outstanding example of a win-win situation. Representatives of the hotel industry, too, have indicated that they see this new form of service mostly as an incentive to continue to distinguish themselves.¹⁰ ACM wholeheartedly supports the recently launched stock-taking exercise by the Minister of Economic Affairs of the laws and rules that may obstruct the innovative opportunities for economic growth.¹¹

Potential risks to competition and consumer protection

It must be ensured that new developments, in turn, do not cause any anticompetitive risks or undermine consumer protection. Problems in the *offline* world may obviously also arise in an *online* environment. In dynamic markets, the likelihood of anti-competitive problems is usually little. However, some characteristics of online markets such as economies of scale and network effects may result in a situation where the options for competitors to enter the market are restricted, even more so than in an offline environment. The dynamics in a market may lead to certain participants having much sooner a very strong bargaining position vis-à-vis companies that are dependent on their services.¹²

Consumers run the risk of getting 'locked in', for example if they take out services from and store a lot of information with a platform that does not communicate with other platforms. That way, their

⁹ For example, with regard to UberPOP, it is pointed out that the lack of insurance coverage is a risk for the driver, because such rides are considered business use for tax purposes. However, it should be noted that it can only be a matter of time before insurers spot this gap in the market. <http://amweb.nl/schade-724356/verbond-ziet-brood-in-deeconomie-huidige-polis-voldoet-niet>

¹⁰ <http://www.sprout.nl/artikel/deeconomie/grote-hotels-halen-schouders-op-over-airbnb>

¹¹ http://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/kamer_in_het_kort/ez#0. Examples in this context are the Dutch Passenger Transport Act 2000, the Fixed Book Price Act, the Dutch Sunday Observance Act, the Dutch Act on Driving Hours, and the cookie provision in the Dutch Telecommunications Act.

¹² For example, the European Commission is carrying out an investigation into practices of Google such as in connection with its position on the search engine market.



options are limited, or they may be forced at a later stage in the process to make choices or incur costs they had not anticipated. One example of the latter is the transfer or provision of personal details.¹³

Such potential risks call for a more active attitude from ACM, including educational efforts towards businesses and consumers. When assessing possible anticompetitive problems, consumer harm is the primary criterion for ACM.

4. The health care sector

ACM's oversight of the health care market is based on the Dutch Competition Act and the health care system in which a major role has been reserved for health insurers. The basic principle of that leading role is that health insurers do their best to attract consumers by purchasing health care services that meet their needs as much as possible. The government focuses on having more reliable, easy-to-compare, objective information about quality aspects so that health insurers are able to fulfill that envisaged role. By purchasing health care services selectively, health providers are stimulated to take into account patient interests when composing their health care plans. As a result, public interests such as accessibility, efficiency and health care quality can be safeguarded.

ACM has noted that there is public unease about the balance of power between health insurers and health care providers. For example, several hundreds of GPs refused to sign a contract with health insurer VGZ. And in late-2014, a majority in the Dutch Senate turned out to be against abolishing the mandatory compensation by health insurers for health care offered by non-contracted health care providers.

However, the aforementioned envisaged leading role of health insurers calls for a solid buyer's role, one that is aimed at looking after the interests of the insured. ACM considers buyer power of health insurers less of a problem if the benefits of lower prices (after tough negotiations) are passed on to consumers.

When assessing mergers and acquisitions among health care providers, ACM wishes to find out whether health insurers are really able to discipline providers so that the price and quality of health

¹³ <http://www.nrc.nl/nieuws/2014/11/14/facebook-past-privacyvoorwaarden-aan-diensten-gaan-gegevens-delen/>



care do not deteriorate. If it turns out that the health insurers involved are unable to fulfill their leading roles as envisaged, it may increase the odds of ACM blocking a certain merger or collaboration.

At the same time, a critical prerequisite for a well-functioning health care system is that health insurers do not become too powerful themselves, for example, through mergers or acquisitions, cartel agreements, or abuse of a dominant position. That would have direct harmful effects on consumers. In its oversight, ACM therefore specifically targets the market where insurers compete with one another for the favor of the insured. ACM makes sure that joint efforts by health insurers are not at odds with competition rules.¹⁴

Another aspect of a well-functioning health insurance market is that there are no barriers for the insured to switch insurers if they are dissatisfied with their insurer's buying policy. By 'voting with their feet,' the insured choose the health insurer that best meets their needs. In order to help consumers switch, ACM in late-2014 launched the consumer awareness campaign 'Gedekt of niet gedekt?' ('Covered or not covered?') through its consumer information portal ConsuWijzer. And, 'Switching barriers in the health care market' is one of the themes of the 2014-2015 ACM Agenda.

In February, the Dutch government sent a letter to the Dutch House of Representatives about health care quality and affordability.¹⁵ One element of the letter was the plan to transfer market oversight of the health care sector [from the Dutch Healthcare Authority] to ACM, and to step up these oversight efforts. For ACM to be able to perform its duties effectively, it is essential that lawmakers set clear objectives and targets for this specific oversight, and that ACM's oversight instruments are capable of realizing these objectives.

5. The energy sector

ACM is committed to realizing an internal European energy market, where European and national energy policies enhance one another. For industrial buyers and consumers, it is critical to have a well-functioning European energy market, where natural gas and electricity are able to flow between countries freely, and where cross-border competition between market participants takes place in a fair and equal manner. That way, security of supply can be safeguarded in a more cost-efficient

¹⁴ <https://www.acm.nl/nl/publicaties/publicatie/13132/ACM-wijst-zorgverzekeraars-op-mededingingsrisico-bij-uitvoering-gezamenlijke-plannen-spoedeisende-zorg/>

¹⁵ <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2015/02/06/kamerbrief-over-verbeteren-kwaliteit-en-betaalbaarheid-zorg.html>



manner, and users are able to choose the best offer in terms of price and quality.

With regard to natural gas, a lot of attention is focused on security of supply, especially since the recent crisis in Ukraine. As yet, security of supply in the Netherlands is more than sufficient. However, both because of security as well as the decreasing gas supplies over the longer term, a reduction of the gas production in Groningen may also affect security of supply in the Netherlands, particularly with regard to low-calorific gas, also with regard to our neighboring countries. In those European countries where security of supply may become critical in the short term, governments face a lot of pressure to take measures. In that dynamic, ACM sees a tendency towards uncoordinated national measures that harm the internal market, and thus further reduce European security of supply. After all, a government intervention that is not market-based in one country reduces security of investment in other countries, while security of investment is an important condition for safeguarding security of supply.

ACM is therefore of the opinion that any government intervention in European countries in order to enhance security of supply must at least be coordinated at a regional level (for example within the European North-West Region), and should help the market function better. ACM calls on all parties involved to use the consolidation of the internal market as an important prerequisite in the discussions and finalization of the announced revision of the regulation concerning measures to safeguard security of gas supply.

In part because of the phasing out of nuclear plants, combined with the growth in volatile, renewable electricity (solar and wind power), concerns about security of electricity supply are also emerging in the rest of Europe. In 2014, many gas-fired power plants in Europe were temporarily closed ('mothballed'), because they were unable to compete with the injection of renewable power and coal plants due to a relatively high gas price compared with the coal and CO₂ price. The gas-fired plants, however, are considered important back-ups, for times when no power is generated by the sun or the wind. That is why different neighboring countries are currently working on introducing so-called capacity compensation mechanisms with which gas-fired power plants in particular receive additional compensations. In practice, foreign producers are usually not eligible for these.

There is a huge risk that each Member State will care of their own markets by introducing their own national mechanisms. Such uncoordinated national mechanisms run counter to the principle of the internal market. The emergency measures that TenneT, together with other neighboring system operators, took last December in order to be able to supply Belgian consumers with electricity that winter illustrate the importance of international coordination with regard to security of supply.



In its recent communication about the European Energy Union, the European Commission states that the challenges with regard to security of supply and the current uncoordinated development of capacity mechanisms call for an adjustment of the current 'Energy Only' market design. ACM wholeheartedly supports this plan. By adjusting the existing market model (in a coordinated fashion) in such a way that new products can be added that meet the growing demand for flexibility, market participants that supply such flexibility are able to recoup their investments on the market. This creates more opportunities for gas-fired power plants, electricity storage facilities, and users, which are also able to offer flexibility by adjusting consumption.

According to ACM, the proposal to adjust the market model offers an opportunity to give a boost to the internal market, and to prevent market-disrupting interventions such as national capacity mechanisms. If regional analyses of security of supply reveal that capacity mechanisms are needed, such mechanisms must be open for power from neighboring countries.

6. Conclusion

In this edition of InSight, ACM draws attention to several trends that are of importance to its oversight duties. ACM will continue to take active part in the public debate and in the policymaking process of these topics, but obviously also in other themes that fall within the scope of its regulatory duties.