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Prioritization of enforcement investigations by the Netherlands Authority for Consumers and Markets

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Introduction

The Netherlands Authority for Consumers and Markets (ACM) enforces compliance with a large number of laws concerning consumer protection, energy, competition, postal services, telecommunication, and transport. When carrying out this task, ACM is free to decide what enforcement investigations will be launched, and when. ACM receives more enforcement requests and indications about possible violations than its investigation capacity is able to handle. For this reason, ACM must prioritize. This process of prioritization is done in accordance with ACM's prioritization policy. This policy provides directions for establishing priorities when selecting enforcement investigations. ACM's prioritization policy explains why ACM launches an enforcement investigation in some cases, and not in other ones.

Indications or enforcement requests

Both indications and enforcement requests can be reasons for ACM to launch enforcement investigations. In this context, ACM considers an enforcement request to be a request for ACM to take enforcement action. If this is not the case, ACM considers it an indication. When receiving an enforcement request, ACM decides first whether the request should indeed be regarded as a request for ACM to take enforcement action, within the meaning of the Dutch General Administrative Law Act (Dutch: Algemene wet bestuursrecht, Awb). The first eligibility criterion is whether the submitter of the request is an interested party within the meaning of Section 1(2) of the Awb. The second criterion is that the request must meet the requirements stated in Sections 4(1) through 4(6) of the Awb. One of these requirements is that the submitter must provide the data and documentation that are needed for the assessment of the request, and which can be reasonably obtained by the submitter. ACM then decides, on the basis of its prioritization policy, whether the investigation of the request needs to be given priority, taking into consideration the available investigation capacity. In that assessment, ACM also takes into account the submitter's personal interest.

In this context, ACM designates all tip-offs and reports that cannot be considered requests for enforcement actions as indications. An indication may lead to ACM launching an ex-officio enforcement investigation. This decision is also made on the basis of the prioritization policy.

Definition

ACM's prioritization policy only concerns the question of whether or not ACM should launch a full enforcement investigation. The policy does not concern the question of *how* ACM should take enforcement action, should the investigation reveal that a violation has likely been committed. The prioritization policy should therefore be distinguished from ACM's policy for selecting its regulatory tools.

Prioritization criteria

When assessing the indications or enforcements requests about possible violations, ACM's prioritization policy uses three criteria:

- to what extent does the identified behavior in the indication or request harm consumer welfare?
- what is the magnitude of the public interest when ACM takes action?
- and to what extent will ACM be able to act effectively and efficiently?

ACM considers and weighs the scores on these criteria as a whole. Based on these three criteria, ACM determines which indications or enforcement requests will be given priority. The possible violations will then be thoroughly investigated. However, investigations that had been given a lower priority before could still be reconsidered and launched after all, even if these criteria have been applied.

Initial preliminary investigation

Consumer welfare

Before launching a full enforcement investigation, ACM first conducts an initial preliminary investigation. In this investigation, ACM explores, on the basis of the information provided, the question of whether, and if so, to what extent the possible violation is harmful to consumer welfare in the short term and long term. This harmfulness is not limited to purely financial harm to consumers and direct buyers. After all, harm is a much broader concept. As part of its prioritization policy, ACM also looks at any potential harm and social harm that can be avoided or limited by an enforcement action. This harmfulness is not limited to direct harm either. ACM looks at market distortions. With regard to harmfulness, it is important not to look at the effects (direct or otherwise) on prices alone, but also at the effects on innovation or on product quality and product variety, and at the spillover effect that enforcement actions can have on other market participants and/or other markets. To that end, ACM will assess in advance, based on the information provided, what results any enforcement actions can yield (directly or indirectly) in terms of short-term and long-term welfare benefits for consumers.

The public interest

In order to get an idea of the social relevance of ACM's action, ACM will, in its initial preliminary investigation, also check what public interests the legislature had identified as such. The legislature has decided that well-functioning markets, the optimal regulation of legal and natural monopolies, and consumer protection are public interests that must be protected. These interests thus play a role in the decision-making process of whether or not a full enforcement investigation should be launched. ACM will also examine whether or not the possible violation falls within the scope of one of the topics in the ACM Agenda. However, if a possible violation falls outside the scope of one of the Agenda's topics, the prioritization policy does not automatically mandate said possible violation be set aside.

Effectiveness and efficiency

Finally, ACM finds it important that its actions are effective and efficient. Effectiveness is about the assessment of whether the use of an appropriate enforcement instrument can, in the short term, lead to a desirable situation or sufficiently approach one. Efficiency is about cost-benefit analyses: can the enforcement investigation be carried out with the available resources, both in terms of staff and allocated financial resources? Furthermore, considering the fact that ACM enforces compliance with a large number of laws, ACM seeks a well-balanced distribution of full enforcement investigations over the different areas. In this distribution, ACM takes into account the number of indications and enforcement requests in each area.

Application

The prioritization policy does not work like a scoreboard. Indications or enforcement requests do not need to have “high” scores on all criteria in order to be followed up by an enforcement investigation. In cases where more than one criterion has a high score, there is often sufficient reason to launch a full enforcement investigation. However, ACM could, on the basis of a low or lower score on a single criterion, already come to the conclusion that a full enforcement investigation is not appropriate (at that point).