



InSight 2016

1. An active regulator

The Netherlands Authority for Consumers and Markets (ACM) is an active participant in the public debate. ACM calls on government, lawmakers, and the corporate sector whenever it believes that rules (existing or planned), policy or activities should be adapted to improve the protection of public interests that fall under its competence. In the 2016 edition of InSight, ACM draws attention to problems that may generally arise when the government's commercial activities are intertwined with the protection of public interests. ACM will then specifically discuss the organization of the energy industry and that of the health care industry.

2. Government and free markets

Governments, engage in commercial activities. These activities are focused on the protection of public interests, while also being a source of income. There are various ways in which the government operates on the market. Sometimes, the government *itself* performs the role of business owner, for example by commercially exploiting land, marinas or sports centers. Other times, the government influences private undertakings that are active on the market, through so-called state ownerships. Some state-owner enterprises are the only provider in the market (like transmission system operator TenneT, railway infrastructure manager ProRail, and Amsterdam airport Schiphol). Other state-owned enterprises (Dutch Railways NS, and Dutch airline KLM) have to compete with other undertakings. ACM recognizes that the government's role as market participant can create dilemmas.

Public interests and commercial activities

Dilemmas arise when the protection of public interests is made dependent on the success of the commercial activities. If their market positions are at risk, undertakings may start exhibiting behavior that is disruptive to the market process. When a certain public interest is at issue, undertakings, while invoking that public interest, may insist on some form of exclusivity or preferential treatment. Various interests will thus conflict with each other. This was the case, for example, with the tender process of the HSL-Zuid line, which is the Dutch high-speed rail line to Belgium. The parliamentary committee of



inquiry into the Fyra (which was a much-maligned and short-lived high-speed rail service running over the HSL-Zuid) reached the conclusion that transport over the HSL-Zuid line was never realized because other interests were given priority over the interests of passengers. Dutch Railways NS was primarily interested in maintaining its position (a monopoly position on some lines) on the Dutch rail market, whereas the government was mostly interested in the financial revenues.

The committee also pointed at the lack of clarity surrounding authority over NS. NS is expected to function as a regular undertaking, aiming to maximize profits. Yet at the same time, as a state-owned enterprise, NS must also comply with the wishes and the demands of the Dutch administration and the Dutch House of Representatives. Actions aiming at the protection of one interest may result in the impediment of other interests such as the antitrust interest or consumer interests.

Besides rail transport, conflicts of interest may also arise in other areas where the government has an interest. Because of its extensive network of connections, Amsterdam airport Schiphol is one of Europe's most important hubs. The government believes that this high level of connectivity with the rest of the world is crucial to the Dutch economy, for instance, for its effects on the business climate and on employment. Dutch airline KLM, as the home carrier, greatly helps maintain this network. At the same time, competing airlines, too, help maintain that network. Therefore, if the interpretation of the public interest of network quality were narrowed down, in practice, to the protection of just the home carrier's interests, it would be at odds with antitrust and consumer interests.

If an undertaking is also expected to protect a public interest, ACM argues for laying down such interests explicitly and unequivocally. In that way, whenever there is a conflict of interests, it is clear how the different interests relate to each other. As a result, political and policy discussions about the legitimacy of activities can be avoided. This will, of course, also benefit regulatory oversight.

Clear rules when choosing between public or commercial activities

Clear rules are also needed in situations where the government leaves room for choosing between public or commercial activities. The objective of the Dutch law on competitive neutrality, the Dutch Act on Government and Free Markets, is to fight unfair competition between government-owned businesses and private businesses. The Act allows the government (local or otherwise) to designate an activity as a public interest. If they do, that activity no longer falls under the scope of the Act. This process may be legal from a democratic point of view, but it does result in situations where private businesses are sometimes able to offer certain activities under equal competitive conditions, and sometimes not.



This leads to uncertainty for businesses, and may result in businesses not seizing on opportunities for entrepreneurship, innovation, efficient spending of public funds, and better price-quality ratios for consumers.

What is missing is a comparative assessment between these benefits of a level playing field and the possible drawbacks for the public interest that is protected by the public activity.

3. The energy sector

The energy sector is faced with a large number of challenges. Below, ACM offers a number of suggestions in order to do justice to user interests in the search for solutions to current questions with regard to investments in energy infrastructure, transmission tariffs, and the security of supply.

Use social cost-benefit analyses to be able to make efficient decisions when building new energy infrastructure

The government sets objectives for a sustainable and secure supply of energy. The Energy Report (in Dutch: Energierapport) explains the choices that The Netherlands needs to make in that process. This includes the decisions regarding future investments in infrastructure for electricity, heat, and natural gas. According to the Report, these issues require an integral approach, more so than in the past.

Decisions about investments in infrastructure for electricity, heat, and natural gas should not be made separately but as a whole, with an eye to their effects on the entire energy system, which consists of the supplies of electricity, natural gas, and heat. The investment costs will, unavoidably, be high, and will, eventually, have to be paid by the users. It is therefore important that the investments are made on the basis of thorough social cost-benefit analyses. As part of that process, the various options for achieving the social objectives of sustainability and security of supply can be weighed against each other. This will also give a clear idea of the consequences for affordability.

Pay attention to the effects of a revision of the transmission tariff structure for users

In the future, buyers may play a bigger role in balancing supply and demand in the electricity market. The supply of sustainable energy generated from solar power and wind power depends on the time and weather conditions, and can therefore vary greatly. Smart meters make it possible to charge different tariffs for the consumption and injection of electricity at different times of the day. This may stimulate buyers to shift their consumption from times with limited supply (and therefore higher tariffs) to times with greater supply (and thus lower tariffs). This will also lead to a decrease in the total



costs, because less production capacity is needed.

Flexible transmission tariffs could, in the same way, help create a more efficient use of the network, for example, because they are different according to the time of network utilization and/or the location in the network. Furthermore, discussions on flexible supply tariffs may give rise to the question of whether it is desirable also to use flexible transmission tariffs or other financial incentives to stimulate efficient utilization of the infrastructure.

The transmission tariffs in the Netherlands are determined in accordance with the 'cascade model'. This means that buyers pay a contribution towards the costs of all networks that are needed for the transmission of electricity from a power plant to their connection point. However, it cannot be ruled out that this model will be less applicable in the future, when decentralized generation will play a bigger role. The choice for sustainability may thus, in time, also necessitate a revision of the cascade model.

For ACM, when adjusting the transmission tariffs and the cascade model, a critical point of attention is the possible redistributive effects between consumers. Another point of attention is the protection of those connected to the network against extreme tariffs set by the system operators. After all, consumers cannot switch system operators.

Strive towards a market-oriented and European approach to guarantee security of supply

In Europe, the energy transition leads to increasing concerns about the security of supply of electricity. These concerns are not just the result of increased fluctuations in the supply of electricity from sustainable production sources, such as solar power and wind power, but are also the result of decisions made by various countries to take coal-fired power plants and nuclear power plants out of operation. Such decisions heighten the risk of insufficient availability of capacity (and back-up capacity). Various countries around the Netherlands are working on the introduction of so-called capacity remuneration mechanisms. These mechanisms offer remunerations to power plants for the availability of production capacity, in addition to the remunerations for the actual supply of electricity. In practice, foreign electricity producers often do not qualify for these remunerations.

The European Commission adopts a critical attitude towards such capacity mechanisms, as the additional remunerations influence the pricing of electricity on the internal market. Electricity producers in Member States that receive such remuneration have an advantage over competitors in member states that only receive the remuneration for the supply of electricity.



The European Commission prefers coordinated improvements to the current market design, known as the 'energy only' market, because this design is based on remunerations for the supply of electricity only.

In the Netherlands, gas-fired power plants are the chief suppliers of back-up capacity required in situations where little or no electricity is being produced from sources such as solar power or wind power. Over the past few years, a number of these power plants have been permanently or temporarily taken out of operation for commercial reasons. Although, so far, there is no acute problem with the security of supply, the Netherlands still risks losing critical back-up capacity.

Along with the European Commission and the Dutch Ministry of Economic Affairs, ACM sees considerable benefits of an 'energy only' market, since such a market does not disrupt competition and leads to more efficient results, thus resulting in lower costs. However, the current market design does need to be adjusted to make place for the increasing need for flexibility. This can be realized through the introduction of new standard products that will meet this need. If the pricing of these products is left to the market, periods of peak tariffs will enable parties that provide the required flexibility to recoup their investments. In this way, not only gas-fired power plants and electricity storages, but also flexible end-users are able to contribute to the security of supply.

4. Health care

The Dutch health care system is a regulated market. The government leaves certain activities to the market, while it plays more of a guiding or regulatory role in other activities. Government policy is aimed at safeguarding the public interests in health care. This concerns accessibility, affordability and quality of health care.

Free markets and self-regulation in health care

ACM oversees competition in the health care sector in order to protect public interests. ACM ensures that care providers collaborate in a healthy manner. Also, ACM offers room for collaborations between care providers in the interest of consumers, for example if collaborations have a positive effect on the affordability of health care or on the quality of treatments. By safeguarding competition, ACM also ensures that supply is sufficiently diverse, so that patients and the insured are able to make the right choices. This will keep health care providers and health insurers on their toes, reminding them always to act in the interests of consumers.

In practice, ACM sees that certain questions arise, which had not been foreseen by the legislature,



and for which the market is not able to provide the best solution. In some of those situations, the government chooses the instrument of self-regulation, meaning that market participants need to come to a solution by mutual agreement. In some situations, this may work very well. However, self-regulation has its drawbacks, and, as a result, does not necessarily lead to the best outcome for patients and the insured. In many cases, self-regulation will also entail a restriction of competition. If self-regulation concerns matters such as price and quality, problems may arise, because these are exactly the kinds of parameters that market participants should be able to compete on.

One such example is the government's desire to reorganize the hospital landscape (as stated in the 'Global Agreement for hospitals,' or *Hoofdlijnenakkoord ziekenhuizen* in Dutch). It is not the government that sets out the specific framework within which said overhaul needs to be realized, and what norms market participants should use. Instead, market participants themselves need to do this together, while taking into consideration the Dutch Competition Act. Based on scientific insights and their experiences, health insurers drew up a plan for quality standards and the concentration of emergency medical services. However, hospitals and scientific associations of medical specialists challenged these plans. They argued that the drawbacks of this regional approach outweighed the potential benefits.

ACM tests such plans against the Dutch Competition Act, for example if an interested party files a complaint with ACM. The moment when various parties disagree about what quality standards to use, it becomes impossible for ACM to determine whether the potential benefits for patients and the insured outweigh the potential drawbacks, for example a price increase due to a reduction of competition. After all, it is not for ACM to set quality standards. These are medical and socio-political questions, and not objectifiable choices (either by ACM or anyone else). ACM finds that, in this way, situations may emerge in which ACM cannot verify the benefits (which may well exist), and will therefore have to rule negatively in the interest of 'competition.' This may not necessarily lead to the best outcome for patients and the insured. And that is an undesirable situation from a social point of view.

Clear policy frameworks for a better starting point for self-regulation

ACM is of the opinion that clear frameworks set out by the government are important for the success of self-regulation in the health care industry. Self-regulation is organized by the industry itself, while serving the industry. It should be mostly seen as an addition to or as an interpretation of legislation from the government. The rules and basic principles need to be clear, or else it will be impossible for the industry to use self-regulation effectively.



Self-regulation should logically be in the service of the public interests that the legislature aims to protect. This often requires an assessment of the various public interests (and perhaps also private interests).

ACM believes that the legislature should make these policy decisions and assessments. As such, the government sets the frameworks within which market participants are able to organize self-regulation, and which ACM can use to assess the benefits of self-regulation.

Confirmed outcomes of self-regulation

It is not possible in all situations for the government to set out clear frameworks in advance, due to the complex and dynamic nature of the health care industry. In those situations, ACM believes it is important that the outcomes of self-regulation are tested and confirmed by the government. In practice, ACM comes across examples where the government already does so. For instance, the National Health Care Institute fulfilled its duty of defining the quality standards for emergency medical services together with patients' organizations, care providers, and health insurers. Once such quality standards, confirmed by the government, are in place, ACM will be able to use them in their assessments. This allows ACM in specific situations to determine whether the benefits of concentrating medical services outweigh the drawbacks for consumers, such as the elimination of options. ACM stimulates such initiatives from public bodies. With such initiatives, it will be easier for the industry to come to an efficient and effective design of self-regulation. And ACM will subsequently be able to oversee more efficiently and effectively the healthy collaborations in health care in the interest of patients and the insured.

5. Conclusion

In the 2016 edition of InSight, ACM draws attention to several dilemmas 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 topics that fall within the scope of its regulatory duties.