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Our reference: ACM/DM/2016/207286

Case number: 15.1073.53

Decision of the Netherlands Authority for Consumers and Markets in response to an application for a decision as referred to in Section 56, paragraph 1, of the Dutch Competition Act.

I. INTRODUCTION

1. On 3 November 2015, the Netherlands Authority for Consumers and Markets (hereinafter: ACM) received an enforcement request from HBO-Advanced BV, operating under the name of Cafeteria Onder de Linde in the Dutch city of Arnhem. Cafeteria Onder de Linde (hereinafter: OdL) is a provider of fries and snacks which consumers can take away or have delivered.
2. OdL requests ACM to take enforcement action against Takeaway.com BV, which operates in the Netherlands under the name of Thuisbezorgd.nl. Thuisbezorgd.nl is an online platform on which consumers search for and compare restaurants and on which they can order meals¹. The consumer chooses a provider from a list of restaurants in the neighborhood and orders the desired meal through Thuisbezorgd.nl. The consumer pays the price of the meal plus any delivery costs to Thuisbezorgd.nl. Thuisbezorgd.nl then pays this amount to the provider. The consumer also pays Thuisbezorgd.nl a fee for the transaction costs of online payment (such as iDeal or credit card).² The provider prepares the meal and delivers it itself to the consumer. For each order, the restaurant pays a commission to Thuisbezorgd.nl. This is a percentage of the turnover which the restaurant generates with the orders.
3. Below, ACM addresses the following in turn:
 - *The content of the enforcement request from OdL;*
 - *The assessment framework, including ACM's prioritization policy and ACM's strategy and enforcement priorities with regard to vertical agreements;*
 - *The relevant facts and circumstances;*
 - *The assessment of the enforcement request based on the assessment framework;*
 - *ACM's conclusion with regard to the enforcement request from OdL; and*
 - *ACM's decision.*

¹ This also includes drinks and related items (such as desserts).

² At the beginning of 2016, ACM observed that, among other things, Thuisbezorgd.nl was overcharging for payment by iDeal or Credit card. Thuisbezorgd.nl subsequently reduced these charges. See:

<https://www.acm.nl/en/publications/publication/15217/Lower-payment-fees-for-online-purchases-after-ACM-intervention/>. [Translator's note: iDeal is a widely-used online payment method in the Netherlands].

II. THE CONTENT OF THE ENFORCEMENT REQUEST

4. According to the enforcement request, OdL joined Thuisbezorgd.nl on 2 March 2015. Thuisbezorgd.nl terminated this agreement on 1 October 2015. According to OdL, this termination was unlawful and gave rise to abuse of a dominant position in the form of a refusal to supply. Thuisbezorgd.nl allegedly also improperly retained the domain name www.cafetariaonderdelinde-arnhem.nl so that consumers could not order from OdL through its own sales channel.
5. The enforcement request also relates to a specific provision which Thuisbezorgd.nl applies in its general terms and conditions for restaurants. Initially, specifically from July 2015, this provision meant that OdL was not permitted to charge lower prices on any other sales channel than the prices on Thuisbezorgd.nl ('lowest-price guarantee'). Thuisbezorgd.nl amended its general terms and conditions with regard to this point at the end of August 2015.³ From then on, the provision stated that, on its own website and menu, OdL must charge the same prices for products, including discounts, as on Thuisbezorgd.nl ('same-price guarantee').
6. OdL rejoined Thuisbezorgd.nl at the beginning of 2016. The fact that OdL rejoined Thuisbezorgd.nl means that the alleged supply refusal by Thuisbezorgd.nl no longer applies. OdL has now also introduced a direct sales channel through www.onderdelinde.eu. OdL has stated that the problem of the retained domain name is therefore no longer relevant. OdL is also affiliated with a similar online platform, namely Hungry.nl. Until recently, OdL was also affiliated with the online platform JustEat.nl (hereinafter: Just Eat).⁴ According to OdL, however, the competition rules are still being violated by the current same-price guarantee applied by Thuisbezorgd.nl.⁵ ACM therefore focuses below on this specific provision in the general terms and conditions of Thuisbezorgd.nl for restaurants.

III. ASSESSMENT FRAMEWORK

7. ACM receives more requests for enforcement and indications of possible violations than it can investigate having regard to its investigative capacity. ACM must therefore prioritize. ACM does this on the basis of its prioritization policy.⁶ ACM uses the following criteria as a

³ See document number 2015308632, annexes '20150825-Terms_and_Conditions_NL.pdf' and '20150716 - Terms_and_Conditions_NL (3).pdf'. See also document number 2016100647. According to Thuisbezorgd.nl, the lowest-price guarantee was erroneously added to the general terms and conditions and was therefore corrected a month later by Thuisbezorgd.nl. See document number 2016308740.

⁴ Thuisbezorgd.nl acquired Just Eat Benelux on 2 August 2016. Until that time, Just Eat was an alternative online meal ordering platform for restaurants and consumers.

⁵ See document numbers 2016201330, 2016301606, 2016301652 and 2016301653.

⁶ See: 'Prioritering van handhavingsonderzoeken door de Autoriteit Consument en Markt' [Prioritization of enforcement investigations by the Authority for Consumers and Markets] ACM/DJZ/2016/200888, Dutch Government Gazette 2016, no. 14564, 18 March 2016. [Translator's note: the English translation of that document can be found here: <https://www.acm.nl/en/publications/publication/16182/Prioritization-of-enforcement-investigations-by-ACM/>].

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basis for assessing enforcement requests. (1) the harmfulness of the conduct to which the request or indication relates for consumer welfare, (2) the social significance of ACM's action and (3) the extent to which ACM can act efficiently and effectively.

8. The same-price guarantee to which the enforcement request from OdL relates is part of a 'vertical agreement' between Thuisbezorgd.nl and affiliated restaurants. This type of agreement falls within the test of Section 6 of the Dutch Competition Act. On the basis of Section 6, paragraph 1, of the Competition Act ('cartel prohibition') agreements between undertakings are prohibited if they are intended to impede, limit or distort competition in the market or have that consequence.⁷
9. With regard to the prioritization of vertical agreements, ACM published the document 'Het toezicht van ACM op verticale overeenkomsten' [ACM's strategy and enforcement priorities with regard to vertical agreements] in April 2015. The effect on consumer welfare is central in the decision to investigate a vertical agreement more fully. In line with 'ACM's strategy and enforcement priorities with regard to vertical agreements', ACM also makes an initial assessment of the possible harmful effects on consumer welfare when it receives indications and enforcement requests concerning vertical agreements. This has the character of an 'initially substantive investigation'.
10. There are specific provisions in vertical agreements for online and other platforms, namely 'across platform parity agreements' (APPAs).⁸ There are two types of APPAs. In the case of a 'wide APPA,' the provider agrees that the price of its product or service on the respective platform will be no higher than on any other sales channel (i.e. on other online platforms and on its own sales channels).⁹ In the case of a 'narrow APPA,' the provider limits itself to having a price on the respective platform that is no higher than on its own sales channels.

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⁷ Article 101, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU) specifically refers to: "[to fix] directly or indirectly [...] purchase or selling prices or any other trading conditions" as a prohibited restriction of competition. If specific criteria have been met, agreements may be exempted from this 'cartel prohibition' (Section 6, paragraph 3 of the Dutch Competition Act). There is also an exemption from the cartel prohibition for certain groups of vertical agreements. This 'group exemption' is set out in Regulation 330/2010 concerning the application of Article 101, paragraph 3 of the TFEU (the Regulation). The European Commission assumes that the groups of agreements which fall within this group exemption will usually fulfil the exemption criteria of paragraph 3 of article 101 of the TFEU (and Section 6 of the Competition act). This is only the case if the market share of each of the undertakings involved in the vertical agreement in the relevant market is no higher than 30%. Vertical agreements which include a 'hard-core restriction' are not covered by this group exemption. Examples of this are vertical price-fixing and absolute territorial protection.

⁸ Various authorities in Europe, however, expressed opinions in 2015 concerning APPAs of online platforms on which consumers can book hotel rooms, such as Booking.com and HRS.

⁹In this connection, see also 'Scenario 4. Laagste prijsgarantie bij platforms (APPA) [Lowest-price guarantee on platforms (APPA)]' on page 24 of 'ACM's strategy and enforcement priorities with regard to vertical agreements'.

[Translator's note: an English version of that document can be found here:

<https://www.acm.nl/en/publications/publication/14226/ACMs-strategy-and-enforcement-priorities-with-regard-to-vertical-agreements/>].

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11. As an illustration, ACM describes below the theoretical possible disadvantages of a narrow APPA, in this case a 'same-price guarantee', and what the advantages may be.

(i) *What are the possible disadvantages of a narrow APPA?*

A same-price guarantee states that there must be no difference between the prices of products on the platform and the prices on the direct sales channel of affiliated providers. As a result, the platform may have an incentive to increase its commissions for providers. Providers cannot just pass on the higher commission in the price on the platform, but only if they do so in the price on the direct sales channel as well. The passing on of a commission increase thus leads to higher prices on both sales channels. The same-price guarantee thus reduces the competitive pressure which the affiliated providers exert on the platform.

A same-price guarantee may also result in a platform investing too much in the quality of the platform.¹⁰ High quality attracts consumers to the platform. The platform therefore has an incentive to invest in it, and that is good in itself. A same-price guarantee means, however, that the costs of the quality of the platform are borne not only by consumers who use the platform, but also by consumers who use the direct sales channel of a provider affiliated with the platform. As a result, consumers who buy on the platform appreciate the quality of the platform, but do not 'feel' the full costs of it in the form of a higher price. This can give the platform an incentive to invest more in the quality of the platform than is optimal from the consumers' perspective.

(ii) *What are the possible advantages¹¹ of a narrow APPA?*

Without a same-price guarantee, affiliated providers could have a free ride from the efforts made by the platform. The platform endeavors to establish a transaction between the consumers and the affiliated providers. For this, it incurs computing and marketing costs among others. Without a same-price guarantee, providers have the possibility of offering their products at a lower price on their own sales channel than on the platform. Providers thus benefit from the efforts made by the platform without having to pay for them. Hence the platform misses out on income, which may threaten the quality or existence of the platform.

Another possible advantage of a same-price guarantee is that consumers can be confident that the prices of the products on the platform will be no higher than the prices on the direct sales channel. This reduces consumers' searching costs. The platform thus enables consumers to compare providers more easily, for example in terms of price and quality¹².

¹⁰ For a detailed substantiation of this argument, see Benjamin Edelman and Julian Wright, 'Price Coherence and Excessive Intermediation', *Quarterly Journal of Economics*, 130(3): 1283-1328, 2015.

¹¹ The Regulation states that vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular they can lead to a reduction in the parties' transaction and distribution costs and to an optimization of the level of their sales and investments. See marginal 6 in the Regulation.

¹² Several platforms offer consumers the possibility of posting reviews. Visitors can take account of these reviews in their choice of provider.

IV. PROCEDURE

12. In response to the enforcement request from OdL, ACM launched an initial substantive investigation. This was based on the enforcement request submitted by OdL, including the supplementary documents provided later by OdL.
13. ACM contacted and requested information from relevant parties, including Thuisbezorgd.nl and parties with a similar concept, namely: Sneleten.nl, Just Eat and Hungry.nl. Among other things, a meeting took place with Thuisbezorgd.nl on 4 October 2016. In addition, the industry association Koninklijke Horeca Nederland (the Dutch trade association for the hotel and catering industry, hereinafter: KHN) supplied information at the request of ACM. ACM also conducted telephone interviews with franchisors of national restaurant chains concerning online and offline ordering and delivery of meals. Finally, ACM consulted 'public' sources including the GfK report entitled '*Pick up & Delivery: Channel Insights*' on meal takeaway and delivery services of March 2016 (hereinafter: GfK Report 2016)¹³ and media reports concerning developments in the field of online meal ordering.¹⁴
14. ACM informed OdL in writing of the period in which ACM expected to take its decision on the enforcement request.¹⁵ On 7 March 2016, ACM contacted OdL by telephone. On 7 and 9 March 2016, OdL provided more details by e-mail. Thereafter, ACM had further telephone contact with OdL on the handling of the submitted enforcement request.

V. RELEVANT FACTS AND CIRCUMSTANCES

15. ACM outlines the relevant facts and circumstances below. ACM addresses the following in turn:
 - *The same-price guarantee applied by Thuisbezorgd.nl;*
 - *Online platforms for the ordering of meals;*
 - *Providers of delivered meals;*
 - *Consumer behavior; and*
 - *Relevant market developments.*
16. The description below shows first of all that the same-price guarantee applied by Thuisbezorgd.nl relates only to its own (direct) sales channel comprising affiliated restaurants and is therefore a 'narrow APPA'. It also emerges that there are various online

¹³ GfK presented two screening questions to its online consumer panel. GfK asked what type of meals they ordered in the period from October to December 2015 inclusive and which meal provider(s) they used in that period. Of the (n=) 53,053 respondents, a representative group of 4,979 were then selected, to whom a more detailed questionnaire was presented. These questions concerned, among other things, the reason for ordering a meal, the way in which a meal is ordered and the performance of the meal providers. The (n=) 4,979 respondents were consumers aged 15 and over who had a takeaway or delivered meal in the period from October to December 2015. See page 137 of the GfK report 2016 and document number 2016204583.

¹⁴ See below in marginals 31-33.

¹⁵ In accordance with Section 4:14 of the Dutch General Administrative Law Act (Awb).

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platforms operating in the ordering and delivery of meals. It is also clear that consumers in practice use different sales channels, buying through online platforms or directly from the restaurant itself (online or by telephone). Finally, there is a growth market with strong market dynamics resulting in new entrants and new, innovative concepts.

The same-price guarantee applied by Thuisbezorgd.nl

17. Thuisbezorgd.nl has been applying a same-price guarantee in the general terms and conditions agreed with the restaurants since August 2015. According to the current general terms and conditions, the prices on the platform must be equal to the prices which the restaurant charges for the products on its *own website and menu*, including discounts. According to Thuisbezorgd.nl, the idea behind this is that it must not make any difference to consumers whether they order through Thuisbezorgd.nl or directly from the restaurant.¹⁶
18. The same-price guarantee which Thuisbezorgd.nl applies is a 'narrow APPA' (see marginal 10). This is in contrast to a 'wide APPA,' which would also oblige restaurants to keep prices and discounts on *other online and other platforms* equal to those of Thuisbezorgd.nl. In addition, the same-price guarantee does not extend to prices which the restaurant charges to consumers for takeaway meals.¹⁷
19. Thuisbezorgd.nl carries out checks with regard to the same-price guarantee. The customer services section of Thuisbezorgd.nl tackles restaurants if a check reveals price differences between the platform and its own sales channel. In these contacts, Thuisbezorgd.nl has, on several occasions, referred to the prices on other platforms. In these cases, the restaurants possibly construed the same-price guarantee as a lowest-price guarantee, as a result of which they aligned prices on other platforms with those of Thuisbezorgd.nl.¹⁸ Thuisbezorgd.nl recently gave customer services new instructions on this point. As a result, it is being stated more explicitly in the contacts with restaurants that the same-price guarantee relates solely to restaurant prices on their *own website and menu* and that restaurants are free to charge different prices *on other online and offline platforms*.¹⁹

Online platform for the ordering of meals

20. Thuisbezorgd.nl is an online platform. It makes a transaction possible between various groups of users, namely restaurants on the one hand and consumers on the other. These are *restaurants* that are able to deliver their meals to the consumer²⁰ and *consumers* who

¹⁶See document number 2016403863.

¹⁷See document number 2016100647.

¹⁸See document numbers: 2016307602, 2016405910, 2016405911, 2016406076, 2016205400, 2016406087, 2016307681, 2016205498, 2016205796 and 2016406214.

¹⁹See document numbers: 2016308033, 2016406432, 2016205781, 2016406754, 2016406754, 2016308401, 2016308740 and 2016308816.

²⁰Recently, Thuisbezorgd.nl started delivering meals itself in a number of cities. See for example: 'Thuisbezorgd.nl gaat nu ook in eigen land zelf bezorgen' [Thuisbezorgd.nl to start deliveries in its home market], 15 April 2016 in Twinkle magazine.nl.

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want a ready-to-eat meal delivered to their home. Restaurants only pay a commission to the platform if the platform has established a transaction with a consumer. For consumers, the use of the platform is free of charge. Consumers only pay if they place an order through the platform (*order and payment function*). In addition, the platform provides a *search and comparison function* for consumers. Consumers can search for a meal or a restaurant and can read reviews of affiliated restaurants posted by users.

21. An (online) platform has specific economic characteristics.²¹ An online platform on which consumers can order meals becomes more attractive to consumers as more restaurants join. The search and comparison function on the platform increases in value as more restaurants join. At the same time, the attractiveness of the platform for restaurants increases as more consumers visit the website. These are so-called 'network effects'. Platforms such as Thuisbezorgd.nl need to retain sufficient restaurants and consumers to be valuable. Platforms try to attract a mass of users (for example through intensive advertising) as quickly as possible so as to pursue these network effects. The platforms' individual competition dynamics enable them to grow into large market players.
22. In addition to Thuisbezorgd.nl, there are other online platforms with a similar concept such as Hungry.nl and Sneleten.nl. An initial substantive investigation by ACM reveals that in August 2016, more than 6,000 restaurants were affiliated with Thuisbezorgd.nl, approximately 2,300 with Hungry.nl and around 1,800 with Sneleten.nl. Hungry.nl has been available to Dutch consumers since 1 September 2015. According to the GfK report 2016, Hungry.nl has secured a strong position.²² There are also platforms which, in addition to an ordering and payment function, at the same time offer a delivery function, such as Deliveroo and Foodora.²³
23. The various online platforms differ as far as restaurants are concerned with regard to one or more of the following factors: level of commission, other costs (such as administration), general terms and conditions, delivery function, customer reach, marketing efforts, and ease of use. Hungry.nl and Sneleten.nl, for example, do not apply a lowest- or same-price guarantee.²⁴ As far as consumers are concerned, online platforms differ, for example, in terms of ease of use, promotions and discounts and the number of affiliated restaurants.

Providers of delivered meals

24. According to KHN, there were approximately 23,000 dining establishments in the Netherlands in 2015. Between 9,500 and 13,500 dining establishments have a delivery

²¹ In the literature, platforms are described as 'two-sided markets'. See inter alia: D. Evans & R. Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms', *Competition Policy International*, Vol. 3, No. 1, 2007.

²² See page 8 of the GfK report 2016.

²³ See for example: Missethoreca, 'Bezorgservices restaurants? *'Het is absoluut lucratief'* ['Restaurant delivery services? 'They're really profitable'], 23 June 2016.

²⁴ Up to 2 August 2016, Just Eat in any case had no lowest-price guarantee, but did have a same-price guarantee that only applied to menu prices (not to discounts on the menu prices).

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function.²⁵ Of the dining establishments with a delivery function, a considerable number are affiliated with one or more online platform(s).

25. The GfK report 2016 reveals, among other things, that the volume of the meal delivery and takeaway market is 876 million portions per year. 64% of this is takeaway meals (approximately 560 million portions) and 36% is delivery meals (approximately 315 million portions).²⁶
26. There are restaurant chains that have multiple locations across the country. A considerable proportion of the orders at Thuisbezorgd.nl are intended for a restaurant chain.²⁷ Examples of well-known restaurant chains active in meal delivery are: Domino's Pizza, New York Pizza, Bezorgbeer, Spare Rib Express, Sushi Point, Taco Mundo and Sumo.²⁸ These restaurant chains have their own *online* sales channel in the form of their own website with an ordering and payment function. This in-house sales channel exists alongside any location's affiliation with an online platform such as Thuisbezorgd.nl. The initial substantive investigation by ACM shows that some restaurant chains are more or less able to [CONFIDENTIAL]. Some restaurant chains offer consumers, for example, [CONFIDENTIAL] on orders through their own sales channel.²⁹ That is one of the ways in which restaurant chains actively promote their sales channel in practice.³⁰
27. Individual restaurants with a delivery function have their own online sales channel and many of them have joined one or more platforms.³¹ The online sales channel of an individual restaurant may vary from a menu (online or paper) from which consumers can order *by telephone* to a fully integrated ordering and payment function on the *website*. There are standard online ordering systems available that certain companies (such as Zuppler, CashDesk, FoodNu and Foodticket) provide specially for restaurants.
28. In order to reach the consumer, restaurants have a choice of different marketing instruments. The intended effect of this is: more customers, more orders and hence higher turnover for the restaurant. Marketing instruments which restaurants often use are flyers, signs, word-of-mouth advertising, social media etc. At the same time, restaurants offer discounts, promotions, etc. to persuade consumers to buy. Restaurants can also make efforts to increase the loyalty of their customers.³² For restaurants, the online platforms are

²⁵ See document number 2016100950. A delivery function also includes a takeaway function.

²⁶ See page 6 of the GfK report 2016.

²⁷ See document number 2016404038. On the basis of the data provided by Thuisbezorgd.nl, ACM notes that almost [CONFIDENTIAL] orders through Thuisbezorgd.nl are intended for a chain.

²⁸ See for example: FSIN, 'Markt voor foodbezorging in ruim twee jaar verdubbeld' [Food delivery market doubled in just over two years], 6 October 2016.

²⁹ For example [CONFIDENTIAL]. See document numbers 2016204581 and 2016204120.

³⁰ Restaurant chains spend part of their marketing budget on Google AdWords, so that, when the relevant search terms are entered, an advertisement for their website appears at the top in the search results.

³¹ See for example: ABN AMRO, 'Maaltijdbezorging: een groeiemarkt vol kansen' [Meal delivery: a growth market full of opportunities], 13 April 2016.

³² See: Missethoreca, 'Scoren met loyaliteitsprogramma's in horeca' [Scoring with loyalty programs in the catering industry], 19 July 2016.

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also a marketing instrument, since the platform displays the restaurant and the menu on its own website.

Consumer behavior

29. The aforementioned GfK report 2016 on takeaway and delivered meals provides insight into consumer behavior.³³ Consumers stated how they had ordered their meals and which aspects they considered important. The findings included the following:
- Consumers alternate between delivery and takeaway meals (see in this connection also marginal 25).
 - Consumers order delivered meals online (63%) or by telephone (35%).
 - Consumers order takeaway meals in the restaurant itself (71%) or by telephone (22%).
 - For delivered meals, Thuisbezorgd.nl, Domino's Pizza, Hungry.nl, New York Pizza, Just Eat and Spare Rib Express are popular with consumers and for takeaway meals also operators such as McDonald's, Subway, Burger King and KFC.
 - Consumers are sensitive to promotions or special offers.
30. The GfK report 2016 also shows that the consumer in practice makes use (alternate or otherwise) of both platforms and the direct sales channel of restaurants.³⁴ It also emerges that consumers alternate between the various platforms.³⁵

Relevant market developments

31. Meal deliveries in the Netherlands and online food sales are growing. For example, FSIN expects turnover from meal deliveries to double in 2016 compared to 2014.³⁶ Rabobank also expects online food sales to grow exponentially in the years ahead.³⁷
32. That growth market is attracting new players and innovative concepts. For example, Hungry.nl entered the market in the autumn of 2015 and has since acquired a strong position (see marginal 22). In addition, other parties have entered the market offering restaurants a delivery function as well as the online ordering function. These parties, such as Deliveroo and Foodora, enable more restaurants to deliver or have their meals delivered to the consumer. In addition, Uber has recently entered the Dutch market with its 'UberEats'

³³ For the points a to e below, ACM refers to the following pages of the GfK report 2016: (a) page 41-53, (b) page 55, (c) page 59, (d) page 8, (e) page 73-74.

³⁴ See pages 41-53 and pages 55 and 59 of the GfK report 2016.

³⁵ See pages 41, 42 and 43 of the GfK report 2016.

³⁶ See: FSIN, 'Markt voor foodbezorging in ruim twee jaar verdubbeld [Food delivery market doubled in just over two years]', 6 October 2016 and 'Foodbezorging aan de voordeur is Booming' [Food deliveries to the door are booming], 12 January 2015. See for example also: ABN AMRO, 'Maaltijdbezorging: een groeimarkt vol kansen [Meal delivery: a growth market full of opportunities]', 13 April 2016.

³⁷ See: Rabobank Cijfers & Trends, 'Een visie op branches in het Nederlandse bedrijfsleven', 'Supermarkten' [A view of sectors in Dutch business, Supermarkets], January 2015.

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delivery service.³⁸ Finally, well-capitalized international players such as Google or Amazon see opportunities to enter the Dutch market.³⁹

33. Consumer behavior is also changing, blurring the boundaries between different sales channels.⁴⁰ Consider for example supermarkets that offer food-to-go or restaurants where you can also buy products for home use.⁴¹ Or think about online platforms that also include food from late-night stores, local butchers or bakers or operators such as Bol.com that also include food in their ranges.⁴²

VI. ASSESSMENT

34. ACM first determines whether OdL is the interested party. It then assesses the enforcement request on the basis of the prioritization criteria described in marginal 7. This first involves an assessment of the harm to consumer welfare caused by the same-price guarantee. ACM then addresses the question of whether any action in response to the enforcement request from OdL will be efficient and effective.

Interested party

35. When ACM receives an enforcement request, it first considers whether the request should be considered as a request for enforcement action within the meaning of the Dutch General Administrative Law Act (Awb). This is determined partly by whether the party submitting the request is the interested party within the meaning of Section 1:2 of the General Administrative Law Act. ACM considers that OdL is the interested party. OdL has an objective, personal, individual, direct and current interest, since it is affiliated with Thuisbezorgd.nl and is also a competitor of Thuisbezorgd.nl with its own (direct) sales channel.

Assessment of damage to consumer welfare

³⁸ UberEats also provides a connection between restaurants and consumers. See inter alia: 'Uber gaat maaltijden bezorgen in Amsterdam' [Uber to deliver meals in Amsterdam], 27 September 2016 in Het Parool and 'UberEats is vastbesloten de bezorgmarkt op te schudden' [UberEats determined to shake up the delivery market], 28 September 2016 in Het Financieele Dagblad.

³⁹ See inter alia: 'Duitse markt voor bestelwebsites wordt bloedbad' [German market for order websites turns into bloodbath], 15 September 2016 in Het Financieele Dagblad and 'Amazon begint met maaltijdbezorging in Londen' [Amazon starts meal deliveries in London], 7 September 2016 in Het Financieele Dagblad.

⁴⁰ See: Rabobank Cijfers & Trends of March 2016 concerning 'Eetgelegenheden' [Dining establishments]. Here Rabobank refers to the increasing integration between retail and catering with an increasingly blurred boundary and intertwining as one of the trends in the food chain. See also: FoodService Institute, 'Blurring, een trend die doorzet' [Blurring, a continuing trend], 26 June 2013. See also the report entitled 'Blurring' of June 2015 by Lexence Advocaten & Notarissen and Bureau Stedelijke Planning.

⁴¹ See: Rabobank Cijfers & Trends, 'Een visie op branches in het Nederlandse bedrijfsleven', 'Supermarkten' [A view of sectors in Dutch business, Supermarkets], January 2015.

⁴² See: FoodService Institute, 'FSIN Food 500 2015', page 9.

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36. ACM has conducted an initial substantive investigation to assess the possible harm to consumer welfare caused by the same-price guarantee. If restaurants and consumers have insufficient alternatives to Thuisbezorgd.nl, this can lead to harm to consumer welfare in the form of higher meal prices. If there are insufficient alternatives, Thuisbezorgd.nl may, for example, be in a position to increase commissions without restaurants being able to discipline it.⁴³
37. In the initial substantive investigation, ACM defined no relevant market and therefore makes no precise statements about the market share of Thuisbezorgd.nl. Various relevant markets are conceivable. In any case, ACM does not believe it is plausible to speak of 'a possible market for online food ordering platforms', because it is clear that online platforms compete with the direct sales channels of restaurants/restaurant chains (see marginals 26, 27 and 28). There could be 'a possible market for delivered meals'⁴⁴ or 'a possible market for delivered and takeaway meals'⁴⁵. ACM points out that it is a growing and dynamic market. As mentioned above under 'relevant market developments,' there is growth, entry of new concepts, and a blurring of boundaries. As a result, defining a relevant market is less helpful in this case, and any current market positions in such a market are less robust.
38. The analysis below by ACM shows that (1) restaurants and consumers can enter into transactions with each other through other sales channels, and (2) restaurants affiliated with Thuisbezorgd.nl have some margin to differentiate in terms of the price of delivered meals despite the same-price guarantee. According to ACM, this means that harm to consumer welfare as a result of the same-price guarantee is not substantial.

1) Restaurants and consumers can enter into transactions through other sales channels

39. First, the same-price guarantee does not extend to other online platforms and restaurants and consumers can enter into transactions through other online platforms. This also happens in practice (see marginals 22, 25 and 30). For example, the facts and circumstances have shown that consumers alternate between different online platforms. By means of marketing, discounts or different payment and delivery costs, online platforms can also attract consumers and entice them to make a purchase decision. On the other hand, it is clear that restaurants are free to join other online platforms and that they also do so in

⁴³ Media reports appeared in 2015 in which restaurants complained about the high and continually rising commissions charged by Thuisbezorgd.nl. See media reports appended to document number 2016200869. The commission is a fee for the services provided by Thuisbezorgd.nl and results from supply and demand.

⁴⁴ In a possible market for delivered meals, Thuisbezorgd.nl has a market share of 25-35% according to FSIN. See FSIN, 'Markt voor foodbezorging in ruim twee jaar verdubbeld' [Food delivery market doubled in just over two years], 6 October 2016. The article entitled 'Beurgang Takeaway.com gaat niet om groeien maar graaien' [Takeaway.com flotation is about grab not growth], 26 September 2016 on the website *Follow the money* states that Thuisbezorgd.nl has a 20% share of the total home delivery market.

⁴⁵ In 'a possible market for delivery and takeaway meals' the position of Thuisbezorgd.nl looks weak in any case. According to the GfK report 2016, [10-20]% of consumers order through Thuisbezorgd.nl (see pages 8 and 41). This percentage is based on a monthly screening by GfK among more than 53,000 consumers. According to ACM, this reflects the market share of Thuisbezorgd.nl in a possible market for delivery and takeaway meals.

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practice. Thuisbezorgd.nl does not apply any exclusivity clauses with regard to affiliated restaurants. If a restaurant does not wish to accept the same-price guarantee applied by Thuisbezorgd.nl or is dissatisfied with the level of commissions, it can opt for a different online platform. ACM sees this as a real alternative because, in addition to Thuisbezorgd.nl, there are other online platforms with an ordering and payment function for meals (see marginal 22).

40. Second, the same-price guarantee applied by Thuisbezorgd.nl does not extend to the price of takeaway meals (see marginal 18). This means that, by charging lower prices or offering discounts for takeaway meals, restaurants can focus on this sales channel rather than orders for delivered meals, such as through Thuisbezorgd.nl. ACM believes this is a real alternative. The relevant facts and circumstances have shown, among other things, that providers of delivered meals simultaneously offer a takeaway service. In practice, consumers alternate between the delivery and takeaway channel (see marginal 29). In addition, it has emerged that consumers choose takeaway more often than delivery (see marginal 25).
41. ACM also notes that restaurants have the option of focusing solely on their own online or offline sales channel (see marginals 26, 27 and 28). They can terminate their agreement with Thuisbezorgd.nl at any time. A restaurant ultimately makes its own cost-benefit assessment and must optimize its sales across the possible sales channels.
42. As part of the aforementioned arguments, ACM points out that network effects (see marginal 21) strengthen substitution in favor of alternative sales channels. Thuisbezorgd.nl needs both restaurants and consumers for its existence. The conduct of Thuisbezorgd.nl is limited by the possible reactions of both restaurants and consumers. If the conduct of Thuisbezorgd.nl caused restaurants to leave, consumers would leave too, and vice versa.

2) Despite the same-price guarantee, affiliated restaurants have some margin to differentiate in terms of the price of delivered meals

43. First, restaurants can opt not to levy payment charges for transactions through the direct sales channel. Consumers who order a delivery meal through Thuisbezorgd.nl pay transaction costs for online payments (see marginal 2). Restaurants thus have the option of distinguishing themselves from Thuisbezorgd.nl with their direct sales channel for the benefit of the consumer.
44. Second, it is clear that some restaurant chains, despite the same-price guarantee, have a margin to differentiate in terms of discounts and promotions in direct orders (see marginal 26). The freedom of each restaurant or restaurant chain depends on [CONFIDENTIAL]. [CONFIDENTIAL]. ACM believes that restaurant chains thus put direct and indirect

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competitive pressure on Thuisbezorgd.nl, making harm to consumer welfare less plausible.⁴⁶

Conclusion of assessment of harm to consumer welfare

45. On the basis of the foregoing, ACM does not believe it is likely that same-price guarantee applied by Thuisbezorgd.nl will harm consumer welfare. The same-price guarantee is not in a position to weaken the competitive pressure from alternative sales channels to such an extent that Thuisbezorgd.nl can increase its commissions for restaurants with impunity. Restaurants and consumers can enter into transactions through other sales channels. In addition, restaurants affiliated with Thuisbezorgd.nl still have some margin to differentiate in the terms of price despite the same-price guarantee.
46. Since ACM believes that harm to consumer welfare from the same-price guarantee is unlikely, there is no reason to investigate the possible advantages of the same-price guarantee which Thuisbezorgd.nl applies in the case of affiliated restaurants.

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Efficiency and effectiveness of ACM action

47. ACM also believes it is not efficient and effective to take action against the same-price guarantee which Thuisbezorgd.nl applies in the case of affiliated restaurants. This is due to the market developments described in marginals 31, 32 and 33. Since there is a growing and dynamic market, the facts and circumstances may change to such an extent that market forces and/or consumer welfare will not or cannot (actually) be an issue in this case. The main starting point for action on the part of ACM then ceases to apply.
48. ACM believes action with regard to the other elements of the enforcement request would also not be efficient and effective. These are the alleged refusal by Thuisbezorgd.nl to supply by excluding OdL from the platform, the retention of an OdL domain name by Thuisbezorgd.nl and the original 'lowest-price guarantee' included in the general terms and conditions for restaurants. As stated in marginal 6, ACM considers that these practices no longer form part of the enforcement request. These elements would have also have been of short duration and have now been discontinued.

VII. CONCLUSION

49. Against this background and on the basis of the current facts and circumstances which have emerged from the initial substantive investigation, ACM concludes that harm to consumer welfare is not likely and that any action on the part of ACM would not be efficient and effective. ACM has therefore decided not to conduct a more detailed investigation into this

⁴⁶ The *indirect* competitive pressure arises as a result of the competition between restaurant chains and individual restaurants. This competition means that restaurants that are more tied to the same-price guarantee will less readily raise their prices as a result of any increase in commission on the platform. Any loss of customers thus also limits the extent to which the same-price guarantee provides incentives for increasing commissions.

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matter. The interest of a more detailed investigation in response to the enforcement request from OdL weighs less heavily than the interest of investigating other cases, including the deployment of personnel and resources.

VIII. DECISION

50. ACM declines the request to take a decision within the meaning of Section 56, paragraph 1, of the Dutch Competition Act.

Date: 18 November 2016.

The Netherlands Authority for Consumers and Markets,
on its behalf,

original signed

M.A. Schueler,
Team Manager
Competition Department

The party whose interest is involved in this decision may lodge an objection, supported with reasons, to it no later than six weeks after the date of notification of this decision with the Board of the Netherlands Authority for Consumers and Markets, Legal Department, PO Box 16326, 2500 BH The Hague. In the objection, an interested party may request the Board of the Netherlands Authority for Consumers and Markets to agree to a direct appeal to the administrative court on the basis of Section 7:1a, paragraph 1, of the General Administrative Law Act.

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