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Annual Report on Competition Policy Developments in the Netherlands

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This report is submitted by the Netherlands to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 November 2018.

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1. Executive summary

1. The Netherlands Authority for Consumers and Markets (ACM) is a multifunctional authority with responsibility for competition enforcement, consumer protection and sector-specific regulation in energy, telecommunications, post and transport. Consumers are central to ACM's oversight philosophy. ACM makes use of its powers to address market problems that are relevant for consumers. As a multidisciplinary authority, at ACM we are alert to interaction between different domains. We can tackle a sector from different angles. To achieve this, we have a toolkit with various instruments, allowing us to solve problems in different ways.

2. The ACM identified 6 priorities in the ACM Agenda 2016-2017:

- Energy markets in transition
- Clear prices and conditions
- Ports & transport
- Healthy collaboration in health care
- Online consumers
- Competitive neutrality

3. In 2018, a new Agenda was adopted for the period 2018-2019. The new strategic priorities are

1.1. The digital economy

4. In 2016-2017, the ACM focused on the online consumer. For the new Agenda 2018-2019, this topic has been broadened to cover more aspects of the digital economy. Consumers should be able to purchase products and services online with confidence. The ACM encourages an Internet that is open and useful for businesses and consumers. There has to be room for innovative solutions to develop. On the other hand, the ACM is cautious for a scenario in which consumers are bypassed and only one side profits.

1.2. Energy markets in transition

5. Current energy policy is heavily affected by the political and societal demand for the decrease of CO₂ emissions. The ACM is closely involved in this and aims to enable the transition to a sustainable energy system. Within this context, the ACM will keep an eye on the affordability and reliability of the energy supply and the protection and empowerment of consumers.

1.3. Prices of medicines

6. In 2017, the ACM worked on healthy cooperation in healthcare, focusing particularly on working practices of primary care providers, for example, indicating to primary-care providers that a collective boycott of care contracts is illegal. In 2018, ACM turns its attention to the price of medicines. Affordable medication is in the interest of patients and society as a whole. The ACM will address any price agreement or strategy aimed at lessening competition or preventing market entry. We will also look at excessive prices. At the same time, pharmaceutical companies should be encouraged to be

innovative. Investments in the development of new medicines should benefit consumers and businesses.

1.4. Ports and transport

7. In 2017 the ACM sent a letter explaining the basic rules regarding fair competition to over 3,500 businesses based in Amsterdam and Rotterdam that are active in the ports of those cities. In 2018 the ACM continues its efforts in increasing the awareness of competition rules and investigating possible transgressions in this sector.

1.5. Competition enforcement highlights and outcome 2017

1.5.1. Abuse of dominance decision adopted

8. In 2017, the ACM adopted an abuse of dominance decision, fining Dutch Railways NS almost 41 million for abuse of its dominant position in the 2014 tender process for the public-transport contract in the southern Dutch province of Limburg.

9. The ACM fined NS for submitting a lossmaking bid in the 2014 tender process for a public-transport contract. As a result, other bidders could not match the bid, even if operating as efficiently as NS. In addition, NS was found to have put its competitors at a disadvantage and to have given its subsidiary unfair advantages during the tendering process.

1.5.2. Multi-party hybrid settlement cases

10. The ACM issued decisions in 2 cartel cases, involving multi-party hybrid settlements. In one of these cases the ACM imposed fines totalling over EUR 16 million on importers of batteries for forklift trucks, among other vehicles, and on their trade association BMWT.

1.5.3. Commitment case KLM/Schiphol

11. In October 2017, KLM agreed that it would no longer have any contact with Schiphol about growth opportunities of other airlines. Schiphol agreed to develop its plans for investments, charges, and marketing strategy independently. This was laid down in commitments made to the ACM, to ensure a level playing field for competitors at Schiphol. KLM and Schiphol acknowledge that interactions have taken place that carried anticompetitive risks. ACM did not establish any violation. The commitments were finalised in 2018.

1.5.4. Studies on digital markets

12. In its studies on “online video platforms” and on “fintechs”, ACM gained additional insight into the functioning of competitors in these dynamic segments of the online economy.

1.5.5. Outcome

13. Similarly to other agencies, the ACM believes it is important to provide insight into the outcome of its actions. The estimated total outcome for consumers in 2017 was approximately €1 billion.

2. Changes to competition laws and policies, proposed or adopted

14. There have been no changes to the Dutch Competition Act in 2017.

15. In 2017, the Dutch government extended the application (until 2023) of special separate thresholds applying to mergers in the healthcare sector if at least two of the undertakings concerned have achieved a turnover of €5.5 million from the provision of health care in the preceding calendar year. If that is the case, the concentration falls within the scope of the Act provided that:

- The aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €55 million; and
- The individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €10 million in the previous calendar year.

16. Businesses increasingly make arrangements with each other concerning sustainable products or services. In 2016, the ACM published basic principles outlining how it will not prioritise cases concerning sustainability arrangements enjoying broad support from all stakeholders, in the absence of complaints. In 2017, the Ministry for Economic Affairs issued policy guidelines urging as broad as possible an interpretation of the efficiency defence in cases concerning agreements to produce goods or services sustainably. In 2017, the Ministry for Economic Affairs prepared a law to give power to the Ministry to impose generally binding rules in case of proposals for private sustainability initiatives. If parties to a proposed agreement request such a generally binding rule, the Minister can weigh the pros and cons of the initiative. The checks and balances are formed by a consultation procedure, an advisory role of the ACM and others, and of course the legislation process. If generally binding rules are adopted at the request of private parties, these rules fall outside the scope of Dutch competition law.

17. In November 2017, the newly appointed Dutch Cabinet (Rutte IV) published its manifesto. The manifesto contained several points concerning competition, for example:

- ACM was asked to establish a special team in the field of digital competition. Building up knowledge of digital innovations and digital markets will facilitate more effective and targeted intervention against abuse of dominance by dominant players in the internet economy.
- The manifesto stated that to tackle unfair trade practices and disruptive market power in the food chain, ACM would have a special team for the agri-food chain. ACM would receive if necessary, specific powers for the arbitration of disputes relating to the Unfair Trade Practices Code. This team would also arbitrate on disputes under the Unfair Trade Practices Code.
- ACM would ensure that farmers and horticulturalists receive higher prices from buyers, which demand standards above the statutory norm, for example in relation to sustainability or animal welfare.
- The Competition Law would be amended so that cooperation in agriculture will explicitly be permitted. This in order to compensate for unequal positions of market power in the chain.

18. The first of these requests sits well with ACM's current ambitions, and is a theme on the ACM agenda 2018-2019. Others relate to the Ministry's work on establishing an Unfair Trade Practices Code. <https://www.rijksoverheid.nl/documenten/rapporten/2016>

</02/01/quick-scanevaluatie-gedragcode-eerlijke-handelspraktijken>, which in turn is linked to the European Commission's Initiative on the Food Supply Chain.

2.1. Guidelines

19. In 2017, ACM published guidelines on competition rules for independent contractors, and self-employed individuals. Independent contractors are crucial for labour market flexibility. However, there are also concerns about the incomes and social security of independent contractors. In these guidelines, ACM explains what rules apply in pay rate negotiations. ACM also explains under what circumstances independent contractors are considered to have the same business relationships as employees. <https://www.acm.nl/en/publications/publication/16985/No-minimum-pay-rates-in-collective-bargaining-agreements-for-independent-contractors>

3. Enforcement of competition laws and policies

3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

3.1.1. Summary of activities of competition authorities and courts

Anti-cartel

20. 2 cases were investigated and concluded with a commitment decision and fining decisions. 1 case was closed after the issuing of a statement of objections. 2 market studies were published "A closer look at Online video platforms" and "Fintechs in the payment system". The ACM issued decisions in 2 cartel cases. In one of these cases the ACM imposed fines totalling over EUR 16 million on importers of batteries for forklift trucks, among other vehicles, and on their trade association BMWT. In the other case, a cartel decision has been issued but not yet published.

21. In a third cartel case, the ACM adopted no decision, but investigated in cooperation with the German authority, which later settled the case. In two other cartel cases, in which we had issued statements of objections, the ACM closed the cases, without a finding of infringement.

22. Commitment decisions

23. Finally in 2017, ACM found that there had been interactions between Schiphol and Dutch airline KLM, which entailed anticompetitive risks. These interactions covered, among other things, the reduction of growth opportunities of other airlines. Schiphol and KLM made commitments to ACM about eliminating those risks. ACM did not establish a violation. The commitments help create a level playing field at the airport. That will benefit passengers.

Abuse of dominance

24. In 2017, the ACM had four abuses of dominance investigations underway at one time. Three of these cases have been reported on in the media. One is a preliminary investigation into Trans Link Systems, the company that distributes the Dutch public transport travel smartcard (OV-Chipkaart). A second investigation concerns the company ECT, which is active in barge transport from the deep sea ports at Rotterdam harbour.

This case was closed in 2018 with a commitment decision. A third investigation concerned passenger rail transport in the province of Limburg; for this investigation a fine of 40,95 million euro was imposed on the Dutch Railways (NS). This decision is currently the subject of appeal.

3.1.2. Description of significant cases, including those with international implications

Courts

25. The Dutch Trade and Industry Appeals Tribunal (CBb) upheld most of ACM's cases on appeal in 2017. However in the foreclosure auctions cases, the CBb annulled the fines imposed by ACM in 2011 and 2012 on traders in the foreclosure auction case. The Court agreed that ACM acted fairly when it concluded that, in those cases that involved so-called after-auctions, the participating companies' acted anti-competitively. However, the CBb concluded that the violation could not be proven to be a continuous infringement on the facts that the ACM had put forward.

Cover pricing

26. The ACM established that two demolition companies used cover pricing during tender processes for several demolition contracts in the greater Rotterdam area. Based on ACM's conclusion that the process was anticompetitive, the CBb concluded that there was no independent market behaviour of the two companies. The CBb also agreed with the ACM on the application of the *de minimis* provisions in the Dutch Competition Act, and the companies' behaviour was therefore considered to be illegal.

Digital data inspection procedure

27. In 2 rulings of the District Court of The Hague, the court examined the question of what data fall within the investigation (its scope), and what data cannot be selected.

Selection of digital data

28. In the first ruling on ACM's digital-data inspection procedure, the court examined the multi-stage selection process of the data that ACM can use in its investigation. During a dawn raid at an undertaking, ACM seized a large amount of digital data that, using ACM's procedure for the inspection of digital data. With respect to a portion of the digital data, the undertaking in question claimed that it fell outside of the scope of the investigation, and that the investigation was therefore disproportional.

29. The judge held that in principle, it is up to ACM to decide on how to structure its investigations. The digital-data inspection procedure and the specific search terms were sufficiently careful and focused, according to the court. The undertaking filed an appeal with the Court of Appeal of The Hague against the District Court's ruling. In 2018, the ruling of the District Court was upheld on appeal.

Mobile phones

30. The Court handed down a second ruling regarding ACM's procedure for the inspection of digital data, and rejected a complaint against the ACM. During accompany inspection, the ACM requested access to a company's senior staff's mobile phone data. The company argued that the ACM exceeded its investigative power by making complete

copies of the mobile phone data, which possibly included private data. The Court concluded that the size of the data copied made it impossible to make a distinction on-site between business data and private data, and did not deem ACM's actions unlawful.

3.2. Mergers and acquisitions

3.2.1. Statistics on number of mergers notified and/or controlled under competition laws

Table 1.

Actions	Number
Decisions on notifications	103
Withdrawn notifications	1
Exemptions from the waiting period (derogation requests)	1
Approved with remedies – phase I	1
Licence applications – phase II	1
Licence applications withdrawn	0
Decisions on licence applications	2
Total	109

3.2.2. Summary of significant cases

Enforcement

- Once again, in 2017, hospital mergers attracted a lot of attention. ACM cleared several concentrations in the hospital sector such as the acquisition of the Admiraal De Ruyter Hospital by Erasmus Medical Center, and the merger between Academic Medical Center (AMC) and VU University Medical Center (VUmc) in Amsterdam. Furthermore, we attached remedies to the planned merger between two hospitals, Catharina Hospital and Sint Anna Hospital. In late-2017, we announced that ACM has intensified its attention for anticompetitive risks of hospital mergers. An important reason for this was that the results of our studies into the effects of approved hospital mergers on quality, price, and volumes did not indicate any improvements. The public debate about mergers predominantly centres on the question of what mergers mean to the hospital's manageability and to the 'human dimension.' As part of our 'intensified attention' for the anticompetitive risks of hospital mergers, we argued that, if lawmakers wish to have other public interests play a role in hospital merger assessments, they could be incorporated into the health-care-specific merger assessment. Clear and concrete standards are critical if this route is chosen. 'Healthy collaborations in health care' was one of the key priorities in ACM's 2016-2017 Agenda.
- In 2017, 2 merger cases were reviewed under the in-depth procedure. In one of these cases, the notification dated from December 2015. In the other, the notification was received in 2017. This can be broken down as follows: 1 merger was approved unconditionally (VUmc-AMC), and 1 was approved with remedies (Parnassia-Antes).

- During the VUmc-AMC merger investigation, the ACM received indications that these hospitals could use their position in high-end care to strengthen their hands in the negotiations with health insurers about basic care. Unique care concerns, for example, difficult, expensive, or uncommon treatments for patients. In this highly-specialized care market, competition between these two hospitals, is either limited or non-existent. These indications are therefore not specific to the merger between AMC and VUmc. Together with the Dutch Healthcare Authority (NZa), the ACM will launch a preliminary investigation into this anticompetitive risk.
- On 12 June 2017, two mental healthcare institutions were allowed to merge under strict conditions. The proposed merger between Parnassia and Antes would create a near-monopoly for mental-health care in the greater Rotterdam area. That is why several clinics, treatment centers, and patients had to be transferred to a competitor, GGZ Delfland, before the merger could proceed. In that way, patients and health insurers will continue to be able to choose between different mental-health care institutions.

4. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

31. ACM keeps track of the latest trends and developments for consumers and businesses. ACM looks at competition and consumer protection law and policy, and also specifically at trends and developments in the energy, telecommunication, transport and postal services industries.

32. In 2017, the ACM met with members of the Dutch parliament to provide information on its views regarding the legislative review of the Heating Act. The ACM also participated in a consultation on Dutch legislation regarding the transition to sustainable energy. Furthermore, the ACM advised the Dutch parliament regarding the Dutch railway system and organized a technical briefing for members of the Parliament about the postal market.

33. The ACM issues an opinion on the enforceability and implementation of each legislative proposal that attributes new tasks and responsibilities to the ACM, or amends existing legislation concerning such tasks and responsibilities. These opinions are sent to Parliament together with the legislative proposal. In 2017 the ACM issued its opinion regarding the legislative implementation of the ‘Network code regarding harmonised transmission tariff structures for natural gas (NC TAR)’ in various presentations and publications.

34. ACM board members regularly meet with top level civil servants in the relevant ministries and other agencies. The board consults twice a year with the Minister of Economic Affairs and Climate Policy. Regular meetings also take place at both director and staff level. In addition to publishing an annual report, the ACM publishes annually an open advocacy letter (‘Insight’) to the Minister, in which it contributes to public debate at national and European level on developments in the sectors in which the ACM is active. Insight 2018 focused on digitalisation.

35. Among other platforms, ACM participates in European and international collaborations of competition authorities (ECN and ICN), of telecom regulators (BEREC), or electricity and gas regulators (ACER and CEER), consumer authorities (CPC and ICPEN), and rail regulators (IRG-Rail).

5. Resources of competition authorities

5.1. Resources overall

5.1.1. Annual budget

- The 2017 budget from the Ministry of Economic Affairs was approximately EUR 68 million.
- **The competition-related budget was approximately: EUR 17 million, (excluding a share in overhead/general expenses).**

5.1.2. Number of employees

36. There are 190 employees involved in competition enforcement. Of these, 130 work in the Competition Department, 37 in the Legal Department, 10 in the Office of the Chief Economist, 10 in the Strategy and Communication Department; and 3 Board-members. Not all people work full-time on competition enforcement. For example, employees of the Strategy and Communications Department, and the Board-members do not spend all of their time on competition issues. Of the 190 employees working on competition enforcement, 160 are actively involved in competition enforcement.

37. As of January 2017, Cateautje Hijmans van den Bergh joined the board. Ms Hijmans van den Bergh had been interim director at APG Pension Firm prior to joining the ACM. Her background is in the financial sector and in strategic consultancy. She replaced Anita Vegter who left the ACM in 2016. In December 2017, ACM Chairman, Chris Fonteijn announced that he would leave ACM on 1 May 2018. Chris Fonteijn was replaced by new ACM Chairman, Martijn Snoep on 1 September 2018.

Table 2.

Department	Total
Competition Department	130
Office of the Chief Economist	10
Legal Department	37
Members of the Board	3
Strategy & Communication	10
Total	190

Note: ‘Other’ includes: Business, Mathematics, Accountancy, Political science, and Communication studies.

5.2. Human resources¹

38. It is difficult to specify how many staff deal specifically with competition, because at ACM, we use mixed teams in appropriate cases. In addition, we have experts in the regulatory sectors who work on merger and dominance cases in the regulated sector. Therefore the numbers presented below have to be considered as approximations.

- Anti-cartel: 88 fte
- Abuse of dominance: 38 fte

¹ These figures represent FTE, as some people work half time on projects.

- Mergers: 32 fte
- Other (e.g., advocacy): 22 fte

6. Summaries of or references to new reports and studies on competition policy issues

6.1. Reports and Studies

6.1.1. Study “*Fintechs in the payment system*”

39. New providers, using innovative technologies, called ‘fintechs’, are the driving force behind modernizing the financial sector. In 2017, ACM published a study about the position of fintechs in the payment services system. One of the conclusions is that there is a genuine risk of foreclosure of these new providers. ACM presents several recommendations for reducing this risk. As a result of the study ACM will keep a close watch on whether or not banks offer providers of new payment products access to payment information. (<https://www.acm.nl/sites/default/files/documents/2018-02/acm-study-fintechs-in-the-payment-market-the-risk-of-foreclosure.pdf>)

6.1.2. Study “*online video platforms*”

40. In 2017, the ACM conducted a market study into online video platforms such as YouTube, Facebook, and Dumpert, focusing on competition on advertising markets. The study gives the ACM more insight into the competitors in, and the dynamics of this segment of the online economy. The ACM did not find any indications for anticompetitive risks on the online advertising market and the online video market. However, the ACM did discover possibly unfair general terms and conditions for users, which it will tackle under consumer law rules together with its European partners. (<https://www.acm.nl/en/publications/publication/17575/Report-Taking-a-closer-look-at-online-video-platforms>)

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