COMPETITION IN TIMES OF CRISIS: WE CANNOT AFFORD TO FORGET IT

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1. INTRODUCTION

The Netherlands Authority for Consumers and Markets (ACM) promotes opportunities and options for business and consumers. ACM was created on 1 April 2013 through the consolidation of the Netherlands Consumer Authority (CA), the Netherlands Independent Post and Telecommunications Authority (OPTA) and the Netherlands Competition Authority (NMa). The NMa had also housed the sector-specific energy and transport regulators. With the establishment of ACM, consumer protection, sector-specific regulation, and competition oversight were all placed in one single authority.²

The creation of ACM was part of the ‘Compact Government’ program of the Dutch Government.³ This program aims to contribute to an effective and less expensive Dutch public service system and the need to save costs was an important driver for the consolidation of the NMa, OPTA and the Consumer authority. In that sense, ACM is a child of the economic crisis. However, the Cabinet also felt that combining the agencies would make for a more effective authority. The rationale was that in its new form, ACM would be better able to respond to challenges posed by globalization and changing markets.⁴

In this article, we outline the importance of safeguarding competition in times of economic crisis. We begin with the economic context in which ACM and many European competition authorities are currently operating. We then specify the role that the competition authority can play to advise government and business as they fight to counter economic challenges. ACM’s strategy places a special emphasis on promoting the welfare of consumers, and we explain our approach to solving problems in the market, giving some recent examples. Finally, the article turns to measuring the

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² The Netherlands Authority for the Financial Markets (AFM) and de Nederlandsche Bank (DNB) are responsible for consumer protection and sector specific regulation in financial markets, while the Netherlands Healthcare Authority has similar responsibilities in the healthcare sector.


impact of our work. ACM’s Chief economist’s office has recently published an empirical study on the link between productivity and competition. We also explain how measuring the impact of the work of the authority sharpens its analysis and improves its efficiency and effectiveness.

2. THE ECONOMIC CONTEXT

Northern Europe seems slowly to be exiting seven years of crisis. All levels of society have been affected by the credit crunch. The ongoing economic fragility is particularly damaging to consumers. A long period of low (or negative) growth progressively erodes consumer purchasing power and consumer confidence. Consumers may try to be critical when purchasing goods and services but due to the crisis, their financial capacity may leave them particularly susceptible to special deals and offers. This renders consumers more vulnerable to unfair commercial practices. Examples include aggressive and deceptive telemarketing, delivery and payment problems at online shops, and untransparent prices and tariffs, for example in the travel industry. Naturally, this is a priority for authorities with a consumer protection portfolio, such as ACM.

Recovery from the current economic crisis is weak, and as a result of the sluggish growth, many businesses are struggling to survive. ACM strives to convince business to seek solutions in efficiency gains and product innovations, thus making sure that the economy emerges from the crisis in better shape. However, when forced by circumstances, some enterprises may look to the State for assistance, and some look for an answer in anticompetitive measures such as price-fixing agreements, market protection, and market foreclosures. The problem with such answers is that they merely offer temporary solutions. They leave overcapacity untouched at the expense of consumers and taxpayers. In addition, such answers allow relatively inefficient enterprises to survive at the expense of innovative newcomers. For these reasons, in times of economic crises, it is important that authorities overseeing the market should remain vigilant against any attempts that may undermine competitive incentives to the detriment of consumers. Joint efforts to reduce capacity permanently may be allowed only in cases of structural overcapacity. Keeping a close watch on such collective initiatives is part of the role of the competition authority. ACM has played a role in tempering such initiatives in the Netherlands, for example in the inland-shipping industry, and in commercial and private property markets.

The regulated sectors are hit by the crisis too. National and European challenges in these sectors call for major investments, in projects such as sustainable energy and the digital agenda. Funding the necessary investments, requires a sufficient degree of certainty about future regulation, and requires shareholders to share the risk. Because of the crisis, costs must be recouped at lower real growth rates, which means tariffs could rise. In situations where market-incentives are weak, regulating authorities, such as the ACM, must carefully create incentives to invest and innovate. In the current economic climate, the tension between
affordability in the short run and high quality in the long run becomes more pronounced.

3. THE ROLE OF THE COMPETITION AUTHORITY

The competition authority has an important role to play in advising government and business. This role should not be forgotten in times of crisis. The competition authority’s advice can ensure that the adverse effects on competition caused by subsidisation are limited. Competition authorities can advise against short-term political solutions, such as merger relaxation or a tolerance of crisis cartels, in favour of long-term solutions to market problems that will encourage competition and benefit consumers.5

3.1 Advising government

In times of crisis, it is necessary for Government to consider the risk of harming long-term economic development. Using government protective measures to revitalize failing firms, or firms in distress, can put other, healthier firms at a disadvantage. Provided Government acts transparently and proportionately, it is entirely legitimate for Government to intervene, within the bounds of Competition law and State Aid rules, to protect the financial system, to fight poverty and unemployment and to enhance competitiveness.

The competition authority plays a role in advising Government on the appropriate choice of intervention. It can be difficult for Government to assess whether proposed interventions are compatible with Competition law, and to see which intervention is harmful and has the effect of pushing up price and reducing competition. Government is there in order to protect the common good. So is Competition law.

Let me give you an example of how ACM plays this role. In 2013, the Dutch administration published its plans to create a National Mortgage Institution (NHI). The aim of this institution was to stimulate investments in mortgage packages from large investors. The returns on these investments would be guaranteed by the State. ACM pointed out that the creation of this institution could make entry into the Dutch banking market less attractive. Only a few major banks were active in the market, and competition had decreased since the outbreak of the financial crisis. This had led to higher mortgage interest rates. If the mortgage institution were to be set up in such a way that the benefits of the State guarantee would primarily be enjoyed by incumbent mortgage providers, it could put new entrants at a disadvantage. This could lead to reduced competition in the long run. Eventually, it could result in higher mortgage interest rates.


and lower savings interest rates. As a result of ACM’s recommendations, the plans were altered. Nevertheless, the European Commission has warned that the initiative would only be permissible under State Aid rules, if the benefits gained by the bank were transferred to consumers, and the plans have been delayed.⁷

Another example is the guidance issued by ACM in September 2013, on an agreement between energy companies which was part of the Dutch Energy Agreement for Sustainable Growth.⁸ The Dutch Energy Agreement was a public-private partnership involving over 40 parties with the aim of reaching an affordable and clean energy supply, jobs, and opportunities for the Netherlands in the market for clean technologies. The deal involved a proposal for the collective closure of five old coal-fired power plants, which ACM was requested to examine for compliance with Competition law. We found that this collective closure would lead to an increase in consumer electricity prices. We examined, in several ways, whether the associated environmental benefits were substantial enough to offset the price increase, but concluded that this was not the case. This opinion elicited some criticism, most of which centred on two points. First, that ACM should have looked at all parts of the agreement, and not just the power plant closures. Second, that the benefits (environmental and other benefits) were much greater than ACM had taken into account in its assessment.

ACM’s assessment was not an extensive social cost-benefit analysis. It was not our role to give an opinion on the social desirability of the planned closures. ACM is obviously aware of the fact that the agreement to close down these old coal power plants is part of a larger whole that serves multiple public interests. However, the assessment under Competition law should address the question whether the restriction of competition resulting from the agreement is objectively speaking necessary to realize the associated desired benefits, and whether those benefits sufficiently compensate buyers, who will be paying a higher electricity price because of the restriction of competition. ACM identified the environmental benefits that benefit buyers, and assessed their value at less than half the expected price increase.

Benefits that are enjoyed by other parties than these buyers cannot be taken into account. For example, closing down the coal power plants will reduce demand for CO2 emission allowances. The price of these allowances will decrease, making it cheaper for other undertakings (national or European) to emit CO2. The same goes for benefits generated by the Energy Agreement that can also be realized without the restriction of competition such as lower electricity prices because of wind turbines at sea. At the same time, these are also the most important differences with a social cost-benefit analysis. A social assessment is


broader, and can compensate the drawbacks for buyers with benefits to others. That requires a political assessment. The government can promote or impose socially desirable results through legislation and regulations. That falls outside the scope of Competition law, but is subject to democratic approval.

That the intervention should be proportionate is key. For example, that the Government intervened in the banking sector to take over banks considered “too big to fail” is entirely legitimate. Government can limit the competitive impact of such market intervention by consulting with the competition authority before such a takeover, and also, in the planning for an exit strategy. Such consultation will not occur unless the competition authority has the maturity to act as a trusted advisor. Of course the European Commission has to approve State Aid in such cases. More general examples relate to rules governing house-rental, minimum wage etc. In each case, the balance has to be found by government between intervening to protect the common good, and allowing the market to function and create wealth.

3.2 Advising business

Secondly, the competition authority plays a role in assisting industry in understanding what they can and cannot do, in times of crisis. For example, there were some trade associations which attempted to counter the uncertainty created by the economic crisis, by seeking refuge in agreements to restrict production. In 2012, the Netherlands Competition Authority praised attempts in the inland water-transport sector to modernize and stimulate innovation within the branch, by introducing entrepreneurship courses. However, the sector was warned that attempts to fix prices or restrict productive capacity would not be tolerated.

Again following the worst of the economic crisis in the Netherlands, in 2012, we have seen many self-regulatory reform initiatives emerging within industry. These self-regulatory initiatives are often intended to have pro-societal effects, for example on sustainable development. Such initiatives may also be undertaken with the support of a government, anxious to promote security in a fragile industry. There are many examples of the competition authority taking this role in the Netherlands. Examples include advice on a proposal by shrimp fishers to manage the shrimp population, a move by poultry producers to improve living-conditions for broiler chickens, and an initiative proposing to reduce the use of antibiotics in animal breeding.

This has been an example of the type of agreement that is allowed. In 2013, cattle breeders had decided to introduce mandatory one-to-one contracts with veterinarians. The intention of the agreement was to reduce the use of antibiotics, to ensure that antibiotics are used correctly and to promote sustainable cattle-breeding, to the benefit of public health. ACM observed that cattle-breeders would continue to have enough freedom in choosing their own veterinarian and that veterinarians could continue to compete to recruit new customers. In other words, there was enough competition remaining on the market. The
benefits were being passed on to the consumer, and the restriction was proportionate. In addition, the initiative furthers competition because there is a new and improved product available on the market.  

Many such initiatives will have parts that are permitted under Competition Law, and other parts that are problematic. In relation to the proposals in the shrimp sector, the Netherlands Competition Authority responded positively to most of the plans put forward by the shrimp-fishing industry, on how to make shrimp-fishing sustainable, but at the same time, the Authority could not approve the proposals on catch limits aimed at protecting the Brown shrimp population. All the studies on the population of this crustacean reveal that the Brown shrimp population is not in danger at the moment. This means the proposed catch limits would go beyond what is necessary. In fact, it would lead to a reduced supply of shrimps, and raise the price.

Similarly, the recent arrangements between poultry farmers, broiler meat processors and supermarkets in the Netherlands, regarding the selling of chicken meat produced under their own animal-welfare conditions may be problematic insofar as it leads to the total exclusion of poultry produced in less animal-friendly ways. The higher animal welfare standards in the proposal include slightly more comfortable housing for the chickens, and the chickens live a couple of days longer. In addition, environmentally friendly measures are taken. One of the conditions for businesses to qualify for an exemption from the prohibition of cartels is that the benefits for consumers should exceed the harm inflicted on them such as fewer options for consumers and a higher price. In order to assess the proportionality of the proposed measures, ACM conducted a study which revealed that while consumers are prepared to pay more for animal welfare and environmental improvements, the arrangements proposed in this case do not go far enough in terms of improving production. In addition, the Authority questions the necessity of excluding less animal friendly products from the market. Sales volumes of more sustainably produced chicken meat have increased in recent years. For example, the Dutch Society for the Protection of Animals has a star-rating system, called the Better Life label. With regard to this label, no far-reaching agreements or production quotas have been made that restrict competition.

In summary, the initiatives referred to above can only be permitted where they provide a sufficient benefit to consumers and do not over-restrict competition. The problem is that these initiatives are often introduced by the

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sector with the intention of serving the public interest. The competition authority that opposes them can have difficulty in highlighting the importance of competition as a driver for growth and innovation in such sectors. Moreover, real benefits from the initiatives can only support a restriction of competition if they compensate the users for the increase in prices. If that condition is not met, the initiative may still be legitimate if it is legally founded, for example in a government decision, on the basis of a broad cost-benefit analysis.

3.3 Problem-solving approach to promoting consumer welfare

The economic crisis has taught competition authorities the importance of having hardship provisions, advocacy strategies and inter-agency contacts already built in to the competition authority’s set of available instruments. The crisis also highlights the importance of remaining flexible and innovative, as an authority.

ACM’s aim is to find the problems in the markets that are damaging to consumer welfare, not just in the short-term, but in the long-term, and then to use our combined expertise, and sector specific knowledge, to solve these problems. We will use the most appropriate tools available to solve the market problem, and that may involve a fine, or it may not. As a result the authority is investing in tailor-made solutions, which may involve fines, commitments, advocacy and/or communication strategies, depending on the case. This does not mean that fines are on the way out. Indeed, fines often are highly effective because of their deterrent effect. A study published in 2012 showed that for every sanction decision taken by the Netherlands Competition Authority, there are almost 5 cases in which, unbeknown to the Authority, a prohibited act has been terminated or modified in response on competition law.12

As a result of this problem-solving approach, when ACM consulted on our new priorities for 2014 and 2015, we used social media, in an attempt to develop interaction with stakeholders and improve our sector knowledge. Also, when we observed stagnant competition in the energy sector, where consumers are slow to switch providers, we developed an Energy coach to empower them. We launched the coach, with a campaign entitled, “You snooze, you lose”, explaining to consumers how much money they could save by switching. Subsequently, switching greatly increased in the energy market, with a consequent sharpening of competition between market players. Similarly, in the travel sector, ACM received complaints from enterprises claiming that competition was being restricted by the failure of some enterprises to comply with consumer protection rules. ACM coupled fines on airlines for displaying untransparent prices, with a campaign to empower consumers facing problems in the travel branch more generally, with holiday bookings and vacation rentals. In addition, in May 2013, ACM issued

guidance for companies, to help them to comply with the rules on price display.\textsuperscript{13}

Another example, is that when we see a sector (such as the construction sector), where fines have been imposed many times, but practices still have not changed, we try to develop a dialogue with the parties that leads to new practices. This could be termed responsive regulation, or problem-solving oversight.

We are also trying to improve the transparency of the regulatory system, by aligning the different applications of general principles used within the different regulatory systems. So we set about aligning our framework of reference, for example, in our assessment of the Weighted Average Cost of Capital. An internal working group evaluated the WACC calculation methods of the three formerly separate agencies, in order to come to a more generally applicable framework of reference for the calculation. This was not an easy exercise at first, however, a year later, whereas certain parameters remain sector specific, we have been able to align the general parameters (such as the risk free rate and the market risk premium) and thereby our calculation models. This makes, in our view, our methods more robust, also when challenged before the Courts. These aspects of case coordination and alignment of principles are important benefits that come with a merger such as ACM.

There are new market dynamics emerging. New business models can lead to the consumer becoming a producer. This is happening for example, on a small scale, in the energy market in the Netherlands, where consumers are feeding the extra energy they produce through solar panels, into the grid. More generally, we see with the advent of companies such as Uber and Airbnb, whole new business models. As Fingleton has observed, these dynamic markets that rely on the availability of a network of personal data, may require a different, more innovative approach from competition authorities.\textsuperscript{14} In order to ensure that the economy benefits from the dynamism of new market forms, we need to develop ways of co-ordinating consumer protection and competition enforcement. This will require flexibility to ensure that standard rule enforcement does not unnecessarily impede new services – for example, the popular Skype service does not provide access to emergency services, which is a legal requirement for standard telephone service providers. Another example is that ACM has an online consumer portal, Consuwijzer, which helps us to identify the main problems that consumers face, but the degree to which we can make use of the portal was limited by a Cookie Law, which itself is designed to protect consumers. Indeed, new techniques and business models challenge existing rules, which must be reassessed to see to what degree they really are necessary to achieve the norms they aim to uphold.


4. MEASURING IMPACT

Syverson defines productivity as efficiency in production, and explains how competition (among other factors) drives productivity. At ACM, we have conducted an empirical investigation of the impact of cartels on productivity in the Netherlands. While many economists acknowledge the detrimental effects of cartels on productivity, there are few empirical studies which actually examine the consequences of cartels on productivity growth. Part of the problem is the lack of data, as most studies only have access to data on detected cartels. In the Netherlands, we have an interesting cartel database at our disposal. Until 1998, the Netherlands had a permissive attitude towards cartels, and cartels were registered in the national cartel register. This cartel register provides an opportunity to study the effects of cartelization on productivity growth.

ACM’s Chief economist, Jarig van Sinderen, and his team have been analyzing these data and their research results suggest that cartel presence, such as that registered in the cartel register, indeed curbs productivity growth. The research inspects 27 industries in the Netherlands’ economy in the period from 1982 to 1998. By using cartel and sector data on productivity growth, the research estimates the impact of cartel formation, cartel presence and cartel termination on the total productivity growth in the Netherlands during those years. In order to model the productivity effects, a framework is used similar to that of Nicoletti and Scarpetta and Buccirossi et al. The research indicates that a cartel presence in the industries led to a 2% reduction of Total Factor Productivity growth, in the period analysed (1982-1988). It also shows that the impact of a cartel on productivity is not immediately evident at the moment a cartel is created, nor at the moment it exits the market. Rather the effect on productivity growth is present during the life-time of the cartel.

ACM places a lot of emphasis on measurement. Regulation and enforcement are not an end in itself and we invest in finding ways to measure the effects of our interventions in the short term and in the long term. We also invest in estimating the outcome of our activities in terms of consumer welfare. For 2013, the benefits of ACM’s general competition oversight were estimated at EUR 668 million. However, this estimate relates only to the direct effects of cartel prohibitions and merger control. It does not include the deterrent impact of our interventions.


addition, in the energy, telecom, and transport sectors, consumers and businesses benefited from ACM’s actions: with regard to energy, their benefits amounted to EUR 780 million, and with regard to telecom their benefits were EUR 360 million. In the transport market, the benefits resulting from ACM’s oversight activities in 2013 exceeded EUR 25 million because of the reduction of the pilotage tariffs and the tariffs of Amsterdam airport Schiphol. We are also developing ways of assessing the impact of our actions in the field of consumer protection. ACM is working with competition authorities internationally, with the European Commission, and with the OECD to develop common measurement techniques. Assessing the impact of the interventions of regulatory and competition authorities is not merely a useful advocacy tool, but it serves to sharpen our analysis and increase our efficiency and effectiveness. This in turn, enhances the positive effects of competition on productivity and on the economy.

5. CONCLUSION

In conclusion, we cannot afford to forget competition. We need improvements in productivity and innovation if we are to emerge from the crisis stronger than we went in. There is a temptation for market parties and for governments, hoping to spur growth, to try to control production and restrict competition. This will prove counterproductive in the longer run. In times of crisis, we simply cannot afford to forget competition.