

THE DAVID HUME INSTITUTE



Discussion Document on “Competition Policy and Regulation”

Netherlands Authority for Consumers & Markets

May 2013

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Foreword

It has been a long haul, but worthy of all the effort. These latest research papers mark the final stage in our series of four ‘conversations’ on issues related to possible constitutional change in Scotland. We are most grateful to the ESRC for providing support for this venture; and to Professor Charlie Jeffery and colleagues at the Department for Government at the University of Edinburgh for being our partners in the venture. Along the way we have had a great deal of support from many people, including a number of DHI Trustees. Their input is much appreciated; and I must also acknowledge the major assistance provided by Catriona Laing and Joan Orr in the DHI office. Catriona has nobly worked with me on organising all the round tables and seminars and Joan has had responsibility for all the publications. The operation would not have been feasible without them.

To remind you all, each ‘conversation’ has followed a similar format. We have sought draft papers from a number of key and informed parties, to be discussed at a private round table. Then the papers have been re-visited and discussed at a full DHI seminar, with a main speaker and contributions to an extended Q&A/discussion session from all authors. Both round table and seminars were held, as is usual for our events, at the Royal Society of Edinburgh in George Street. The papers have been published on our web site just in advance of our seminars. Generally there has also been significant media interest.

The first ‘conversation’ covered issues related to macro-economic policies and financial regulation. Then we moved on to welfare and social security matters before tackling the energy sector – in co-operation with the Scottish Council for Development and Industry. Our final topic, for which we have worked closely with the Scottish Government, has been competition policy and regulation. The papers for this last conversation are now being published.

For conversation 4 the round table was held at the RSE on 8th April, ably chaired by DHI Trustee Kyla Brand – who also happens to run the Office for Fair Trading office in Edinburgh but was operating in a personal capacity. (I should also note that for over 8 years I have been a member of the Competition Commission, but my involvement was as DHI Director.) Papers were prepared by Martin Cave and Jon Stern – on the over-arching background and key issues; David Simpson (ex DHI Trustee and ex WICS board member) on the positive experience in the water sector; Iain Osborne based upon his experience as a senior regulator across five different sectors and at the EU, UK and devolved levels; Luis Correia da Silva of OXERA – providing an informed outsider’s view; the Netherlands Authority for Consumers & Markets; and David Saunders the Chief Executive of the Competition Commission specifically on competition matters. We owe a huge debt to them all.

It is my firm view that this set of papers, and the various discussions which have taken place, will be of major assistance to the Scottish Government as it considers the best way forward for competition policy and regulation in the event of a yes vote at the referendum next year; and also in the event of a no vote when there might well be scope for beneficial change and possibly further devolution of responsibilities. The whole series has been a great success and this last venture in particular should be seen as making a major positive and constructive contribution to informed decision-making and policy formation.

Nevertheless it is my eternal duty, while Director, to note that while the DHI welcomes the contribution made to debates of this nature, we have no view and as a charity can have no view on the policies considered. It is now for others to make best use of the fruit of our labours.

Jeremy A Peat
Director
David Hume Institute

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Netherlands Authority for Consumers & Markets

1. Introduction

The Netherlands Authority for Consumers & Markets (ACM) is the new regulatory body that is created through the consolidation of the Netherlands Consumer Authority (CA), the Netherlands Independent Post and Telecommunication Authority (OPTA) and the Netherlands Competition Authority (NMa). The ACM is created as a single authority for consumer protection and market surveillance for the purpose of optimizing consumer welfare. For effective and efficient surveillance, it is critical that the different departments of ACM have a single main objective, mission, and philosophy. ACM builds on the work of its three predecessors. In the next few years, the ACM’s approach will be adjusted, where necessary, based on real-world experiences.

This document gives insight in ACM’s main choices, given our main objectives, mission, core values and philosophy. In addition, several important topics that link the different ACM departments are discussed such as ACM’s organization and style.

2. Main activities and objectives

ACM’s activities encompass general competition surveillance, regulation of energy, telecommunication, postal and transport markets (or parts thereof), and consumer protection. The common objectives behind these activities are promoting well-functioning markets, ensuring well-organized and transparent market processes, and fair treatment of consumers.

Competition surveillance safeguards and promotes well-functioning markets in all industries of the Dutch economy. Through regulation, special conditions have been created on specific sectoral markets so that competition can exist, where the Dutch legislature found this necessary. Enforcement of consumer protection regulations ensures that, when interacting with companies, consumer rights are respected. This empowers consumers, and strengthens their confidence. By bringing together these tasks, an integral and balanced approach to market and consumer problems will become possible. ACM aims to take advantage of the synergy benefits of combining competition surveillance, regulation, and consumer protection.

The legislative context in which ACM must operate is largely based on European regulations. These rules are aimed at, among other objectives, promoting further development of the European single market, and making possible an effective approach to cross-border market and consumer problems. The ACM’s geographical scope is therefore not limited to the Netherlands alone. ACM closely cooperates with regulators outside the Netherlands and with European agencies.

3. ACM’s mission

ACM considers increasing consumer welfare its primary motivation. ACM aims for markets in which consumers have an actual choice, and in which businesses can compete freely for the favor of consumers. We have incorporated our statutory task in the following mission statement:

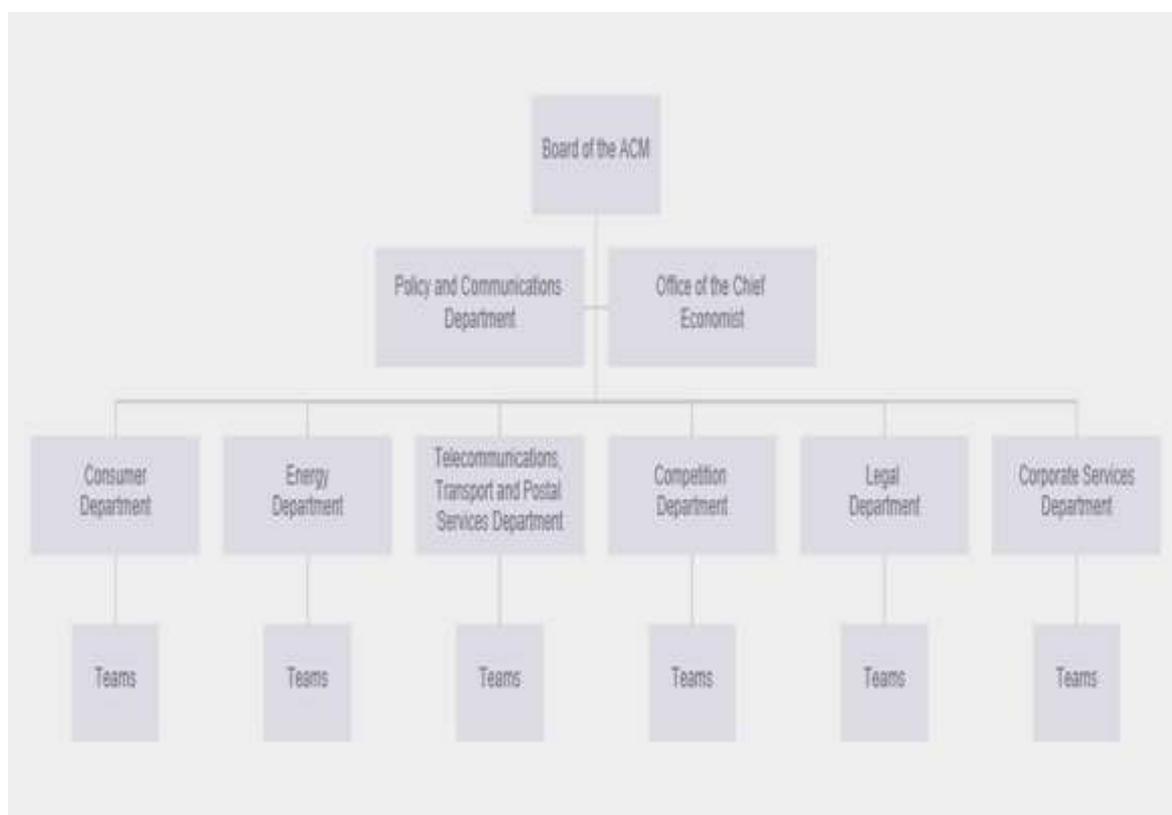
“ACM promotes opportunities and options for businesses and consumers”

ACM seeks to strengthen the position of consumers, enabling them to make well-informed choices. ACM stimulates competition, and regulates markets in such a way that the outcome for consumers is optimized. The desired result is sustainable welfare growth in a broad sense, including welfare growth as a result of financial *and* qualitative effects for consumers, in the short run and in the long run.

The creation of ACM coincides with a broader social trend, where the free-market system is scrutinized, and the protection of public interests must meet ever stricter requirements. ACM therefore chooses to approach market and consumer problems in an integrated manner, while keeping in mind the different public interests that are at issue.

4. ACM as an organization

ACM's organizational structure follows its mission and strategy.



Firstly, all consumer tasks of the former NMa, OPTA and the CA have been brought together in a single department: the Consumer Department. This choice enables ACM to provide integrated and coherent consumer protection, and enhance its effectiveness.

ACM's regulatory tasks have been organized in two departments. The Energy Department is charged with regulation of the energy and drinking water markets; sectors with permanent natural monopolies. The Telecommunication, Transport and Postal Services Department is charged with regulation of these respective sectors. In these sectors, competition is possible between or on networks. The regulatory departments are also charged with surveillance of potential abuse of dominant positions in regulated sectors.

ACM is thus able to use its sector-specific knowledge as effectively as possible, and to tackle market failures in an integrated manner.

The Competition Department focuses on safeguarding and promoting competition, thereby providing fair opportunities to do business and to innovate, which results in consumers having actually a choice of goods and services. This department aims at solving the most important antitrust problems. It handles all concentration cases and cartel investigations. In addition, it is responsible for cases on the abuse of dominance, except for those in the regulated sectors.

The Legal Department is responsible for punitive decisions, objections, and all appeals. In addition, the department has advisory and coordination tasks such as safeguarding the quality of ACM's legal work, and ensuring uniformity when handling requests under the Dutch Act on Public Access to Government Information, and legislative matters. So-called Chinese walls between the Legal Department and the enforcement departments ensure that employees involved in the first phase of investigations are not part of the teams in the second phase.

The Corporate Affairs and Communication Department and the Office of the Chief Economist have ACM-wide tasks related to strategy, national and international cooperation, communication, and corporate affairs (BBC), and to economic analyses, quantification, and calculations on harm and outcome (EB). As such, these departments form an overarching link between various parts of ACM.

The Corporate Services Department provides corporate services to the rest of the organization such as integrated and advanced IT facilities.

ACM is led by a Board. The members of the Board are the public faces of the organization, both within the Netherlands and abroad. The Board is the executive body of ACM. The Board, which consists of three members, decides by a plurality vote.

With this organizational structure, we expect to be able to carry out our tasks effectively and efficiently, the more so since a number of important structural and cultural measures should stimulate ACM-wide cooperation, the philosophy of external orientation, and an integrated approach of market and consumer problems. To this end, ACM has, for example, created a network of detection officers. This network collects and analyzes indications and market information that is retrieved through various channels, amongst which the information gathered through our consumer helpdesk "Consuwijzer". All of that information is used as a basis for an ACM-wide prioritization of market and consumer problems.

Moreover, cross-departmental teams will be formed wherever such teams lead to effective approaches.

5. Core values of ACM

ACM acts in accordance with three core values: *independence*, *openness*, and *professionalism*. These core values form the basis of all of ACM's actions.

Independence

The independent position of ACM is formally enshrined in its legal status of autonomous administrative authority under Dutch law. ACM fulfills its tasks independent from lawmakers and businesses, in line with the requirements set by European regulations.

The independent position of ACM means, on the one hand, taking a critical attitude and exercising independent judgment, and, on the other hand, maintaining open and constructive relationships with ministries, other regulators, and stakeholders. In practice, ACM is governed by a board of three, a chairperson and two full time executive members. This board is fully independent and has a complete organization at its disposal. Employees are in service with the Ministry, but cannot take instructions other than from the board. The board is accountable to the Minister, but cannot take any instruction. The only influence the Minister has is through the budgetary process and the legislative process and thus limited to general guidance. The Minister has no powers in individual cases.

Openness

ACM wishes to be engaged in a permanent and constructive dialogue with its stakeholders. We aim to be sensitive to broader social trends that affect the areas of our surveillance. Communicating clearly and in a timely way about our actions, are all elements that are critical to that aim. ACM seeks to generate public support for its actions. Before our annual agenda is finalized, we will publish it for consultation. We plan to sit down with members of the Dutch parliament on an annual basis to explain our work. ACM and the ministries responsible for the areas in which we operate (the ministry of Economic Affairs, and the ministry of Infrastructure and the Environment) and other stakeholders will consult with one another on a regular basis in order to promote a good execution of ACM's tasks.

Professionalism

ACM's professionalism is reflected in the expertise, commitment, and flexibility of our staff. Further professionalization is a permanent task for all levels within the organization. We invest in training and development of our employees. To that end, we have set up a so called ACM Academy, among other initiatives, which allows our employees, but also students and researchers, to take training courses and improve their knowledge and skills. In that context, ACM seeks to cooperate with training and development programs at other regulators, government agencies, and universities.

Being professional also means that our employees know what goes on outside ACM. By gaining knowledge of a market or sector, ACM is able to determine its position in a balanced and proactive manner, and as a result able to choose an approach and a mix of instruments that is the most effective to address a particular problem. This prevents ACM's enforcement from being incident-driven. We will therefore also carry out market-wide studies, and take our detection methods to the next level.

6. ACM's philosophy

In the subsections below, it is detailed how ACM wants to make consumers central to everything we do, how we deal with questions regarding public interests, and our chosen enforcement-style.

6.1. Consumers take a central position

ACM places consumers at the center of its strategy. This principle applies to all departments of ACM, from the specific consumer-protection tasks to the application of sector-specific competition rules. The position of the consumer is reflected in ACM's prioritization, its surveillance style, and its selection of instruments. ACM thus continues the course of its three predecessors, which was also aimed at increasing consumer welfare.

In its choice of making the interests of consumers central, ACM believes first and foremost that consumers themselves generally know best what their interests are and how these can be served. The basic assumption of market economies is the sovereignty of individual consumers. This idea dovetails with the European and international views on consumers.

If this sovereignty is jeopardized, consumer welfare may be adversely affected, and so can specific groups of consumers (for example, more vulnerable consumers).

The fact that consumers take a central position has led to the structural choice to create a strong Consumer department where both general consumer protection and consumer empowerment in regulated markets are combined.

ACM safeguards and promotes competition in the Dutch markets

Competition is a tool to increase consumer welfare. In well-functioning markets, goods and services are offered at optimal price/quality ratios. However, markets do not always function as they should. Consumers can be harmed directly, for example, because companies engage in cartel activities, and, as a result, charge too high prices or restrict consumer choice. They can also be harmed indirectly, for example, because companies make mutual arrangements on costs they charge other companies for products or services, or companies share orders among each other in case of government tenders. After all, the additional costs associated with such actions will eventually be included in prices or taxes, and thus be passed on to consumers. ACM takes action, depending on the direct or indirect impact on consumer interest of such anticompetitive behavior on consumer *and* intermediate markets.

When it comes to their competitive positions, providers (new and existing ones) in *regulated industries* usually depend on a small number of vested parties (which often used to be the sole providers in those markets). These vested parties control the infrastructure (for example, telecommunications networks, grids, transmission towers, rail networks or entire airports), which cannot be replicated (partially or fully) because of the high costs involved. In order to make sure that consumers do have a choice in such markets, ACM sets prices and conditions for some of these infrastructures, to allow market entrance. In some cases, market conditions dictate there can only be one network provider (natural monopolies), for example, in the energy industry. In such markets, ACM directly sets the prices this network provider is allowed to charge its customers (consumers and/or businesses).

When assessing the potential harm of anticompetitive behavior or decisions in regulated industries, ACM also takes into account the long-term effects on consumer welfare. In the short run, consumers, generally speaking, benefit from competition and low prices, but, at the same time, investments in networks and facilities are necessary to guarantee the diversity and/or quality of services and/or products in the long run. Therefore our efforts are not only focused on the behavior of companies, but also on market structures, for example, by reviewing mergers and keeping an eye on the right incentives for innovation and investment in networks. Too low a compensation for the exploitation of infrastructures could negatively influence this. We take into consideration these conflicting interests by using a reasonable return on investment when setting tariffs. That way, we constantly try to balance the short-term and long-term effects of our enforcement actions on consumers.

The general powers to promote competition are mandated to the Competition Department. For the more sector specific issues in regulated sectors, the powers are mandated to respectively the Energy Department and the Telecommunication, Transport and Postal Services Department. In many cases close cooperation with the Consumer Department is necessary.

ACM empowers consumers and enforces consumer protection laws

If there is an obvious asymmetry in knowledge about the products or services between the providers thereof and consumers, it may lead to an unbalanced market outcome. In cases where consumers (or groups of consumers) are unable to properly assess information or are insufficiently able to compare products, ACM seeks to raise consumers' awareness of their rights and options. ACM helps consumers actively exercise their rights (empowerment), not just by pointing out to consumers what their rights are, but also by explaining how they can make well-informed decisions. A specific consumer information website operated by ACM (ConsuWijzer) plays a crucial role in that context.

ACM expressly aims at strengthening the demand side of the market, which still offers considerable potential for improving competition thereon. In that effort, ACM also works together with private organizations. The basic principle here is that, whenever the market or consumers (or consumer organizations) are able to realize this aim themselves in a timely and efficient manner, the regulator should take a step back. When faced with the question of whether, in addition to providing information to consumers, any additional measures are needed, ACM will always assess whether ACM is the right party to take the initiative or whether it can be left to the market or to private consumer organizations.

The Dutch legislature has specifically acknowledged that, in a number of situations, consumers and providers have different bargaining positions. Consumer protection laws impose on providers certain obligations aimed at countering unfair commercial practices. These obligations concern, for example, the way information is provided, applicable contractual terms, sales methods, and the quality of products and services that are offered. Should collective consumer problems arise because undertakings fail to meet these obligations, ACM steps in to restore the balance of power between consumers and companies. Furthermore, this helps realize a level playing field on which companies can compete with one another for the favor of the consumer.

ACM's powers linked with empowerment and protection of consumer are specifically mandated to the Consumer Department. Herein a close cooperation with the other departments is necessary; specifically where consumer interests in regulated markets is at stake.

6.2. Public interests in ACM's efforts

One of the important questions ACM faces is how to deal with the different public interests that play a role in our surveillance efforts. The Netherlands Scientific Council for Government Policy (WRR) gave the following definition of public interests (2000):

'If the government is concerned about the protection of a societal interest based on the belief that this interest would otherwise not be properly protected, it is considered a public interest. Being concerned about societal interests as public interests therefore means that the government thus makes the protection thereof the objective of its policies.'

Well-functioning markets, optimal regulation of statutory or natural monopolies, and consumer protection are public interests that must be protected, according to the legislature. That is why OPTA, the NMa, the predecessor of the Office of Energy Regulation, the Office of Transport Regulation, and the Netherlands Consumer Authority were created. The underlying objective is that, by protecting these public interests, welfare for the Dutch consumer is increased. ACM therefore has tasks and powers to intervene in situations where public interests are jeopardized as a result of the market structure or market participant behavior.

Public interests and competition

Free enterprise can sometimes have adverse effects, for example, on the environment, which cannot be solved by the market or by consumer protection laws (so-called negative external effects). Conversely, it can also produce *positive* external effects (for example innovation), which are critical to competitiveness and long-term welfare growth. Having an arrangement between undertakings could thus be desirable in order to protect public interests such as the environment and innovation. At the same time however, such arrangements could run counter to the public interest of having well-functioning markets. They could, for example, lead to higher consumer prices, thereby reducing consumer welfare, at least in the short run. In situations of both positive and negative external effects, competition regulation offers ACM the option to allow such arrangements conditionally. ACM will thereby always assess the necessity, proportionality and effectiveness of such arrangements between undertakings, which they claim promote, for example, innovation or sustainability.

Public interests and regulation

On the basis of the specific rules for transport, telecommunication, energy and postal services, ACM additionally protects public interests relating to the affordability, quality, and availability of certain products and services. For example, the right of consumers to be connected to the power and natural-gas networks or the right to a basic service of access to the telephony and internet networks. In that regard, it is critical to safeguard the quality and reliability of networks, as well as investments therein to guarantee enough room for innovation. Moreover, it is also crucial for the power and natural-gas networks that investments are made in such a way that it becomes possible to get an increasingly larger share of energy from renewable sources. The costs that are associated with such investments must be passed on to the end user, one way or another. Insofar as the law permits, ACM will take sustainability and innovation questions into account to make the assessment of ‘clean and affordable’ coherent and consistent.

6.3. ACM’s style

Enforcement is one of ACM’s core tasks. However, ACM does not want to enforce just for the sake of enforcement. This is balanced against the impact of our actions. ACM thus takes a broader perspective, and will not merely investigate an alleged violation, but will also determine the root cause of the market or consumer problem in question. ACM subsequently selects the instrument or a combination of instruments that offers the highest probability of producing a structural solution to the problem. In that regard, it is crucial to look at the entire selection of formal and informal instruments at ACM’s disposal. ACM has a wide range of statutory powers, and in order to fulfill our tasks as efficiently as possible, we aim for swift and pragmatic solutions where possible.

Imposing sanctions is an important instrument. In addition, ACM will use, among other instruments, norm-transmitting discussions, commitment decisions, monitoring, and market scans, whenever circumstances allow. We also intend to use strategic communication, aimed at increasing the willingness to comply, as an instrument to find solutions to market problems. In that process, ACM expressly has an eye for the safeguards for stakeholders, and for the care it must exercise in its actions.

External orientation

To firmly embed external orientation into our organization and operations we have, for example, created detection teams in the operational departments. These teams are constantly on the lookout for the most important consumer and market problems. Our consumer information desk ConsuWijzer plays a crucial part in that respect too. It provides ACM with real-time information about the markets we oversee. In addition, we wish to engage in a dialogue with stakeholders by sitting down with them on a regular basis, discussing critical topics. Above all, external orientation is a guiding principle for our employees in all ACM's operational areas.

Thematic, sector-based and chain-based approaches

Problems we identify are dealt with in an integrated manner as much as possible, thereby either adopting an ACM-wide thematic, sector-based or chain-based approach. ACM-wide teams will assess what interventions and/or instruments that we have at our disposal under the different legal powers and responsibilities are needed to find solutions. Such integrated approaches are relevant for, for example, the housing market (construction, supply, financing) and health care market (care providers, health insurers, patients and the insured).

Prioritization

ACM cannot solve every problem consumers or companies face, given our limited resources. Realistic expectations about what ACM can or cannot do must be managed carefully. That is why we constantly will have to prioritize. In this process, some of the most important criteria we use are the potential harm to consumers that the behavior of companies might inflict (quantitatively and qualitatively, directly and indirectly), the public interest that is at stake (for example, taking away concerns among consumers or giving clarification of a statutory norm), and whether ACM is able to take action effectively and efficiently. Prioritization is a key process in the weekly strategic meeting between board and directors. Here the most optimal allocation of resources is discussed and decided upon.

Cooperation with other regulators

Since problems usually do not follow the way surveillance is organized, ACM seeks to cooperate, where needed, with other Dutch and international regulators. In that area, there is much untapped potential when it comes to achieving more results with fewer resources. ACM has been given statutory powers to share information with other regulatory bodies, for example with the Dutch Tax Administration. This can have added value when detecting, analyzing, solving, and preventing problems. We plan to take actively part in the Consultation Forum of Regulatory Bodies (MTB), which is a forum where Dutch regulators work together towards more effective and more efficient surveillance. ACM aims to be a thought-leader in process innovation, and in the development of best practices for solving market problems.

The effectiveness and efficiency of this collaboration can be further enhanced, for example by launching a joint investigation with fellow regulators into the state of play in certain markets, following up with a joint strategy for those markets.

International ambitions

ACM is an internationally-oriented regulator. We aim to be a leading and pioneering thought leader in market surveillance processes, both within Europe as well as in the world. ACM will build on existing collaborations and will take advantage of the networks of the merging authorities. By helping harmonize and implement European legislation and regulations, consistency in surveillance processes is increased. Consumers are thus given confidence, and firms that want to do business internationally are given clarity.

Advocacy

ACM takes part in the public debate. We spread our knowledge about those areas we are concerned with, for example, through questions regarding industrial organization. We do so by conducting market studies, and by identifying problems or shortcomings with our toolkit or with the regulation.

ACM will release a Market Outlook every year, in which we outline the trends in our field, and highlight specific topics and problems. Whenever our own toolkit proves to be insufficient to solve identified problems and protect relevant consumer interests, ACM will raise these concerns in its Market Outlooks.

7. In conclusion

We build on the work of ACM's predecessors: the NMa, OPTA and the Netherlands Consumer Authority. However, ACM wishes to be more than just the sum of its parts. By bringing together the powers and expertise of the three regulators, and by reorganizing the new authority, we aim for a higher level of effectiveness and efficiency. Consumer interests are the common thread in all of our work: that is what is central. The ACM's strategy is not absolute and unchanging. In the next few years, we will anticipate new developments and changing circumstances. We are thus open towards our stakeholders, and will include them in finding solutions to problems.

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