

Authority for Consumers & Markets



Working paper

ACM Outcome

Method for calculating the outcome of ACM

Ron Kemp, Huib de Kleijn, Esther Lamboo, Daniël Leliefeld, Bas Postema
and Martijn Wolthoff

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Authors:

Ron Kemp

Huib de Kleijn

Esther Lamboo

Daniël Leliefeld

Bas Postema

Martijn Wolthoff

Translation: Helen Gibbons.

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Netherlands Authority for Consumers & Markets
P.O. Box 16326
2500 BH The Hague
The Netherlands

Telephone +31 70 72 22 000
Internet www.acm.nl

Summary

In this working paper we describe the method by which we determine the outcome of ACM. We define the outcome of ACM as “the in a simple manner calculated expected effects of ACM's actions on consumer welfare in the short term”. With the outcome calculation ACM openly and transparently presents the effects and effectiveness of its actions in the field of consumer protection, competition oversight and regulation of the energy, telecommunications, postal and transport sectors.

The following principles are applied in the calculation of the ACM outcome. First of all, the effects must be able to be calculated in a simple manner. The expected effects can then be presented reasonably rapidly after the intervention. Secondly, it must be possible to express the effects in monetary terms with a degree of certainty. Consequently it is not possible to include the effects of all of ACM's activities. Thirdly, the outcome calculation relates to the expected future effects for the consumer. As a result of ACM's intervention, the consumer will pay less for certain products and/or services in the future. Since we try to estimate the expected future effects for the consumer and to do so in a simple manner, the estimates are to some degree uncertain. In order to avoid overestimating the effects, we work on the basis of conservative assumptions. In this way, we can expect the presented effects to constitute the lower bound of the actual effects that occur. Finally, to increase transparency, the outcome is presented as much as possible on a per-case basis. This is not possible in all cases, however, because of confidentiality issues.

About the authors:

Ron Kemp works as a senior member of the academic staff at the Office of the Chief Economist of ACM.

Email: Ron.Kemp@acm.nl

Huib de Kleijn works as a senior enforcement officer in the Telecommunications, Transport and Postal Department of ACM.

Email: Huib.de.Kleijn@acm.nl

Esther Lamboo works as a coordinating specialist adviser in the Consumer Department of ACM.

Email: Esther.Lamboo@acm.nl

Daniël Leliefeld works as a senior enforcement officer in the Energy Department of ACM.

Email: Daniel.Leliefeld@acm.nl

Bas Postema works as a senior enforcement officer in the Energy Department of ACM.

Email: Bas.Postema@acm.nl

Martijn Wolthoff works as a senior enforcement officer in the Competition Department of ACM.

Email: Martijn.Wolthoff@acm.nl

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Translator: **Helen Gibbons**.

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1 Introduction

1.1 Background

The Netherlands Authority for Consumers and Markets (ACM) was created on 1 April 2013 by a merger of the Consumer Authority (CA), the Netherlands Competition Authority (NMa) and the Independent Post and Telecommunications Authority (OPTA). The objective of the Netherlands Authority for Consumers and Markets is to promote well-functioning markets, orderly and transparent market processes and proper treatment of consumers. ACM has formulated three core values: professionalism, independence and openness. Openness and transparency relate among other things to the effects and effectiveness of its actions (Don et al., 2013). This is consistent with previous activities in the fields of the merged authorities.

The NMa presented the outcome of its actions in its annual reports and working papers since 2004 (see for example Kemp et al., 2013). The method for determining the outcome comprises a relatively simple estimation of the quantifiable effects of NMa activities on the consumer surplus. The NMa outcome is based on decisions taken in a calendar year, with the size of the individual effects being calculated conservatively.

The NMa led the field with its approach. This has already been acknowledged by the Netherlands Court of Audit (2007), which in its report on competition oversight concluded that the NMa was leading the way internationally with its impact assessments. It recommends continuing along the same path. Similar conclusions were drawn by Kwink group/TU Delft (2010) in their evaluation of the NMa. As well as support, there is sometimes also criticism of the method used to calculate the NMa outcome (Van Damme 2012a, 2012b, CPB 2012, 2013).

OPTA also provided insight into the possible effects of its actions in the past. The various market decisions focus on the effects of its actions as part of the obligation to conduct an effect test (see for example OPTA, 2011). The effect test involves a comparison between the regulated and the unregulated situation. In the past the CA made no calculations of the effects of its actions.

Impact assessment has received increased attention in recent years, and this is consistent with the wider social context. Impact assessment is also an important theme for other regulators, such as the Dutch Authority for the Financial Markets (AFM), the Dutch tax administration, and the Netherlands Food and Consumer Product Safety Authority (NVWA). Various inspectorates have collaborated in this area in the Inspection Council's multiannual program entitled "Effects of Supervision", which assesses the possible design of impact assessment in the inspectorates. Increased attention has been devoted to impact assessment in the academic world.¹

Impact assessment is also generating strong interest internationally. Among others, working party no.

¹ See, for example, the special issue entitled 'Effectiviteit van toezicht' of the Tijdschrift voor Toezicht (2012) (in Dutch).

2 on Competition and Regulation of the OECD has included impact assessment in its work program.² The activities of foreign regulators in this field are discussed in Davies (2013) and OECD (2013). Impact assessment is also regularly on the agenda of the Network of Economic Regulators of the OECD.

This working paper describes how the ACM outcome will be calculated. The description relates particularly to regular activities. It is useful to formulate rules of thumb for these activities. There will also be activities that are 'unique'. A case-specific outcome method must be used for these cases. It is also possible that other activities will be assigned to ACM or that other instruments will be deployed in the future. For each activity it must be determined whether and how the outcome can be calculated.

We define the outcome of ACM as "the in a simple manner calculated expected effects of ACM's actions on consumer welfare in the short term". This is consistent with the central role that consumer welfare plays in the ACM strategy. The outcome calculation thus provides an indication of the order of magnitude of this effect. With the outcome calculation, ACM renders account (to society and politics) for the benefits of its actions. We calculate and present this openly and transparently.

Before describing the actual calculation method, it is useful to set out a number of general principles governing the outcome calculation.

1.2 General principles

An important principle in the calculation of the ACM outcome is that it must be relatively easy to calculate. As a result, relatively soon after ACM's action, an estimate can be given of its expected effects. The effects are reported in the Annual Report. In addition to these outcome calculations, more in-depth studies are conducted into the effects of ACM interventions. Examples are Kemp et al. (2012), Van den Broek et al. (2010) and Van Dinther and Mulder (2013). These methods usually require a major time commitment and will therefore be implemented on a more ad hoc basis. We do not use these more advanced methods for the outcome calculations.

A second principle is that it must be possible to quantify the effects with some degree of certainty. ACM's activities are very diverse. For some activities, the effects of the action will already have been examined in the case itself, while for other activities it will not be necessary to look at the effects. Moreover, for some activities the quantification is relatively simple, whereas for others it may be difficult. For the calculation we will as far as possible use information that is already available in the case concerned. If this specific data is not available, we use substantiated rules of thumb. These are based on empirical studies of comparable cases or on theoretical substantiations. If rules of thumb are also unavailable and the effects can only be calculated on the basis on numerous and/or arbitrary assumptions, we opt not to determine any outcome for these activities. This makes the outcome

² See <http://www.oecd.org/competition/evaluationofcompetitioninterventions.htm>.

calculation simple, transparent and easy to replicate.

The third principle is in line with the second principle. We base the outcome calculation on conservative estimates. The more case-specific the effect calculation, the more accurate the calculation will be. In some cases we may be able to use statistical reliability margins³. Rules of thumb are not case-specific but are often based on average effects over a large number of cases. In order to avoid overestimating the outcome, we base these rules of thumb on conservative assumptions.

In the outcome calculation we look particularly at the effect of our action on the promotion of well-functioning markets and the effects on the consumer. ACM's action usually involves eliminating a market failure (such as the creation and/or abuse of dominant positions and asymmetrical information between consumers and companies, see Don et al., 2013). We focus particularly on the resulting price effects. This price effect usually occurs immediately, as in the regulation of network tariffs for energy. In some cases, however, the effect of ACM's action will contribute to better quality or greater freedom of choice. We nevertheless present this as a price effect, as it means that equivalent quality can be obtained at a lower price.

When calculating the outcome we estimate the future effects, partly by using past data. When calculating the outcome we do not look at the detriment suffered in the past but at the avoidance of potential detriment to the consumer. The outcome is therefore not directly related to any fine issued in the case.

Finally, it should be noted that the outcome will be reported as much as possible on a per-case basis. If confidentiality is a factor, we will report aggregate data on comparable activities. Confidentiality will be a factor particularly in the activities of the Consumer Department and the Competition Department. Confidentiality will usually not lead to problems in regulatory cases.

1.3 Structure of the working paper

The working paper is structured as follows. Section 2 places ACM's outcome calculation in a broader context of measuring the effect of government policy. This is followed by a general discussion of the calculation method with detailed discussion of which effects are or are not to be included. The calculation methods used by the different departments within ACM are discussed in more detail in Sections 3 to 6.

³ These can include merger simulation models or estimates of price effects in cartels.

2 Outcome of ACM

2.1 Introduction

We define the ACM outcome as “an ex ante estimate of the relatively easily quantifiable, direct, short-term effects of ACM's action in terms of customer welfare”. The outcome calculation thus provides an indication of the order of magnitude of this effect, as part of our aim of demonstrating the benefits of ACM to society and politics.

We apply the following principles when calculating the outcome:

- simple;
- monetizable with some degree of certainty;
- future effects for the consumer;
- use of conservative assumptions;
- reporting on a per-case basis as far as possible.

In order to place the ACM outcome in a broader context, this section first briefly discusses the effects of policy. We then discuss the importance and choice of the counterfactual. In section 2.4 we consider the ACM outcome in general terms and then, in section 2.5, we discuss the effects that we include in the outcome calculation. In section 2.6 we discuss the effects that we do not include and state why we do not include them. Finally, in section 2.7 we briefly set out the general differences relative to the previous outcome calculations.

2.2 Effect of policy

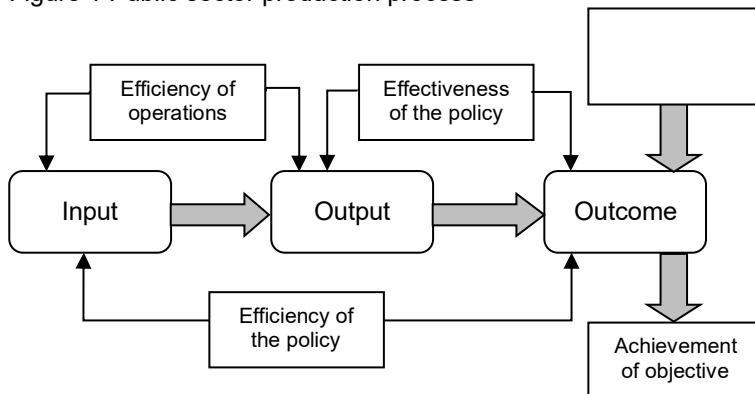
To determine the scale of the effects of ACM's actions it is useful to look at the production process of a public organization. The public sector production process is shown schematically in Figure 1.⁴

The formulated objective is crucial in determining the effects of policy. The objective of the Netherlands Authority for Consumers and Markets is to promote well-functioning markets, orderly and transparent market processes and proper treatment of consumers. ACM delivers various outputs aimed at achieving these policy objectives. In the sections that follow, these policy outputs will be discussed briefly in relation to each department. ACM's clearest policy outputs are its decisions. Other outputs aimed at achieving the policy objective are research reports, vision documents and discussions with market participants. Examples include lower tariffs for electricity networks, improved transparency enabling consumers to make better choices or access to the copper network to enable companies to enter the internet services market. Effects are often difficult to investigate because they may be hard to quantify and/or monetize. In addition, it is sometimes difficult to determine the extent to which the effects are the consequence of ACM's action or actually the consequence of other developments – the external factors. In other words, any developments in the market (such as lower

⁴ In the Order on Periodic Evaluations and Policy Information (2006) the outcome is subdivided into the categories 'Effects of policy (net effect)' and 'outcome (gross effect)'. This division has been made to reflect the difference between realizing the policy goal attributable to the policy and any exogenous factors. The ACM outcome calculation includes an ex-ante assessment of the effects. This means it is not possible to apply a correction for any future exogenous factors.

prices) must also be clearly attributable to ACM's outputs (for example granting a license to an electricity company or imposing lower connection tariffs).

Figure 1 Public sector production process



As can be seen in Figure 1, various indicators of efficiency and effectiveness can be determined. First, a relationship can be established between the input and the actual outputs, or the efficiency of operations. Second, there is a relationship between the input and the effects of policy. This concerns the efficiency of the policy or cost-effectiveness; whether the effects have been achieved in a cost-efficient manner. Lastly, there is the relationship between the output and the effects of the policy. This criterion concerns the effectiveness of the policy. Together with the external effects, the effects of policy contribute to the outcome and hence the achievement of the objective.

2.3 The importance of the counterfactual

To see the effects of ACM's actions, the causality of the intervention and the resulting effect must be clear. Anyone asking about the effects of oversight is therefore also asking this causality question. Answering this question requires knowledge of the counterfactual: 'what would have happened (to prices) if there had been no oversight (of the price to connect to electricity networks) or if no fines had been issued (for cartel violations)?' Assumptions have to be made about this counterfactual since it concerns a market situation that did not occur.

ACM's policy objective is to promote well-functioning markets, orderly and transparent market processes and proper treatment of consumers. Well-functioning markets can be achieved in various ways. As part of the assessment of the effects of competition oversight, sector-specific oversight and consumer protection, it is important to determine the level on which the analysis will be conducted, in other words which counterfactual will be used. Niels and Van Dijk (2008) identify four levels of competition policy⁵:

- effects of competition;
- effects of competition policy;
- effects of a competition authority;

⁵ We describe the counterfactuals in terms of competition policy. Comparable counterfactuals can be formulated for sector-specific regulation and consumer protection.

- effects of various individual oversight activities by the competition authority.

Increased competition can contribute to greater innovation and higher productivity (Van der Wiel, 2010), i.e. well-functioning markets. Certain forms of competition can also result in markets functioning less well due to particular forms of market failure, however. Competition policy can also absorb the impact of market failure. In addition, other types of policy can have a major effect on the degree of competition. Liberalization and deregulation can give rise to the process of competition⁶. Sector-specific regulation and competition policy then protect the competition process.

Legislation and regulation can also exist without a regulator or without the regulator taking an active stance. Companies can go to court themselves, for example, in the event of a competition dispute (private enforcement).⁷ A situation only involving legislation and regulation can be used as a counterfactual in order to compare the effects of a regulator (or of the regulator's individual actions). In the outcome calculation we use an ex ante estimate of the effects of ACM's various individual oversight activities⁸. This is related to the effectiveness of the policy in Figure 1: the level at which ACM itself has direct influence. In focusing on the individual cases we do not attribute any effects to ourselves that are actually achieved by other parties, such as the Ministry of Economic Affairs or the European Commission.

We do not claim that the outcome calculations make any statement about the effectiveness and cost-effectiveness of ACM as a whole. We do not relate the outcome to the input costs of the oversight. After all, the outcome calculation is an ex ante estimate of the possible effects, in which the effects have not yet been realized. In order to assess ACM's effectiveness and cost-effectiveness, we would have to take the (reasonably) efficient regulator as a counterfactual. The question with this counterfactual is whether ACM has taken up the right cases and whether any more significant cases have been omitted. This counterfactual is inadequate for the outcome calculation. The effectiveness and cost-effectiveness will have to be determined after a period of time and it is better if that is done by external parties, for example through a formal evaluation of ACM.

2.4 Outcome of ACM action

In order to determine the effects of ACM's activities, it is important first and foremost to look at the policy objective. ACM has defined the following mission: "The Netherlands Authority for Consumers and Markets promotes opportunities and options for businesses and consumers". ACM's actions

⁶ In telecom regulation this step is part of the regulatory oversight. The market decisions first involve an analysis of whether regulation is necessary and, if so, the regulation is fleshed out. In the case of energy regulation, the regulation itself is adopted by the Ministry of Economic Affairs and ACM fleshes it out.

⁷ This counterfactual was used (implicitly) in the evaluation of the NMa. Kwink group / TU Delft (2010: 11) concludes as follows: In the period 2005-2010 the NMa made a substantial effort to improve the functioning of the markets. The resulting picture is that markets will function better (effectiveness).

⁸ ACM also regularly conducts ex post studies into its actions. These investigations require more research time and fall outside the objective of the outcome calculations. Separate reports are issued on these studies (see for example Kemp et al., 2012; Mulder and Schoonbeek, 2013; Van Dinther and Mulder, 2013).

must lead to more efficient markets and increased consumer welfare.

In order to realize the policy objective, ACM has, briefly, three areas of responsibility: general competition oversight, sector-specific oversight in the energy, postal, telecommunications and transport sectors, and (collective) consumer protection. The economic effect occurs as a result of ACM's market intervention. This action can take various forms, such as prohibiting a merger, governing access to a telecommunications network or making charges in the travel sector more transparent. These activities can impact the markets in different ways.

ACM's action can normally be traced back to suboptimal functioning of the market, i.e. a market failure. The activities in the context of general competition oversight and sector-specific oversight can usually be traced back to the creation and/or abuse of a dominant position in a market. Collective consumer protection usually concerns asymmetric information between market participants, with the consumer generally having an informational disadvantage.

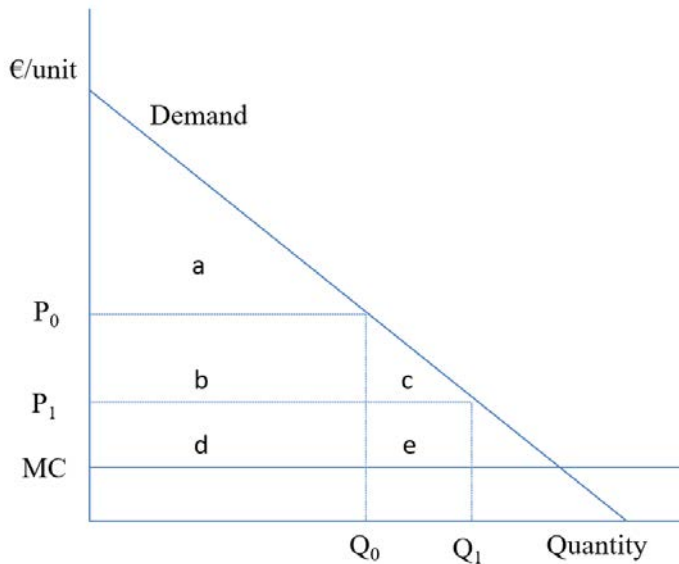
Both forms of market failure generally result in prices being higher than they would be, had it not occurred. Intervention in such a market will have a certain effect, but this does not mean there will also be welfare effects, in the sense that the allocative, productive or dynamic efficiency changes. Depending on the type of change in the market, there may be welfare effects, and at other times only allocation effects, with the welfare being divided differently among the (economic) agents. Most of ACM's activities can be expected to lead to lower prices, so a shift in welfare will take place from the producer to the customer. Such a shift in welfare from the producer to the customer is seen as a positive effect (Van Sinderen and Kemp, 2008). ACM's action will therefore generally result in an increase in consumer welfare⁹. The activities of ACM's various departments will be further explained in the sections that follow.

We illustrate the effect of ACM's action on the basis of a simple figure. We assume a linear demand function (demand) and constant marginal costs (MC). Suppose that without regulation or a cartel the situation P_0 and Q_0 were to arise. In this situation, the consumer surplus amounts to area 'a' and the producer surplus amounts to areas 'b' + 'd'. As a result of regulation or action against a cartel, there will be a lower price, P_1 , with the associated sales Q_1 ¹⁰. Here the consumer surplus amounts to the areas 'a' + 'b' + 'c'. As a result of the price decrease, the consumer surplus therefore increases by the areas 'b' + 'c'. Area 'b' is a shift of welfare from the producer to the consumer; area 'c' is the reduction in the deadweight loss. The producer surplus amounts to the areas 'd' + 'e'. Area 'e' is also a reduction in the deadweight loss, but since area 'e' is smaller than area 'b', the producer surplus decreases.

⁹ In the outcome we calculate the effects for the direct customer. This will in many cases not be the final consumer. We assume, however, that the effects for the direct customer will ultimately be borne by the final consumer. This is the case if the intermediate markets are functioning well.

¹⁰ In merger cases, the action prevents a post-merger price increase. In the case of mergers, the starting point is therefore P_1 and Q_1 and a post-merger price rise to P_0 and Q_0 is avoided.

Figure 1: Schematic overview of effects



The size of areas 'c' and 'e' is determined by the price change and the price elasticity of demand. In the case of high price elasticity, a small price reduction will lead to a relatively large increase in demand.

In the outcome calculation we look particularly at area 'b', i.e. the increase in the consumer surplus. This therefore concerns the price effect of the current sold volume. We disregard area 'c', which is also an increase in the consumer surplus. In relation to area 'b', area 'c' is very limited, so the omission of this effect will usually be negligible¹¹.

2.5 Which effects are included?

By calculating the outcome we provide an ex ante picture of the quantifiable benefits of ACM's action in terms of customer welfare. We look particularly at the direct effects on consumer welfare with the aid of case-specific information or rules of thumb. Consumer welfare is expressed as a monetary amount. Four elements are of importance for our outcome calculation:

- Price effect;
- Duration of the effect;
- Which activities; and
- Time of allocation of the effect.

2.5.1 Price effect

The outcome calculation focuses particularly on prices and price changes. Many decisions will also

¹¹ In the outcome calculations for the NMa's competition oversight, area 'c' amounted to around 1-2% of area 'b'. In addition, in the case of cartels and the regulation of transport markets, the omission of the allocation effect will lead to an underestimate of the effects (on the basis of the current volume that will rise after the intervention as a result of the lower price). In the case of mergers and telecom regulation, the omission of the allocation effect will lead to an overestimate of the effects (the current amount will have fallen in the situation without intervention).

have a direct effect on the price set in the market. The effects expressed in monetary terms will therefore be relatively easy to calculate. To this end, the price change as a result of the action is multiplied by the relevant turnover. Some decisions, however, will affect the quality and/or number of different products/services offered without directly affecting the price. In these cases we assume that this change in quality or the increase in choice will be translated into a price change. After all, higher quality for the same price is similar to comparable quality for a lower price. A wider choice will better meet customers' individual wishes, so there will be greater appreciation.

We base the calculation of the price effects, more particularly the change in price as a result of our action, as far as possible on specific data in the case concerned. Examples include the regulation of energy, merger simulations or cartels in which information is available on intercompany settlements. If this information is not available, we use substantiated rules of thumb. In both cases we make conservative assumptions with regard to the expected price effects. This is in order to obtain a conservative estimate.

2.5.2 Duration of the effect

In addition to the price effects, it is also important to look at the duration of the effect. ACM's action is aimed at having a long-term, structural effect. For example, a merger will not be blocked if its anticompetitive effect would be resolved in the relatively short term by developments in the market, for example in the form of market entry. In the case of regulation the effect will take place at least during the regulatory period. The effects will therefore be calculated over a number of years. The precise period for each activity, and its substantiation, will be discussed in the following sections.

2.5.3 Which activities

In order to gain insight into the outcome, it is necessary to determine which activities will be included and which will not. Causality between the action and the effect is a factor here. In the outcome calculation we limit ourselves to the effects of formal decisions, sanctions and other activities whose economic effect can be estimated with sufficient certainty. We assume that formal decisions have a major impact on companies' operations and that changes will therefore occur. If a company does not change its behavior (for example continues to provide misleading information to the consumer), this will lead to new action by ACM. There are also cases where no formal decision is taken but where an effect very clearly occurs in the market. For example, if a business 'voluntarily' pays compensation to misled consumers, ACM may decide not to issue a formal decision. Also, in the case of oversight of retail tariffs in the energy sector, tariff proposals by energy providers will be adjusted as a result of oversight activities without any formal decision being taken. We also calculate an outcome in cases of this type.

2.5.4 Time of allocation of the effect

In the Annual Report we calculate the outcome of the decisions taken in the year concerned. We implicitly assume that the decisions by ACM are correct. After all, decisions are serious interventions in the market that are not taken lightly. Parties can object and appeal against the decisions if they do not agree with them. There may also be new facts or a case may be open to a different

interpretation. The court will ultimately rule on this. We follow the final judgement of the court, usually the Trade and Industry Appeals Tribunal (CBb). If the court rules in our favor, the outcome can stand. If the court does not rule in our favor, or does so only partly, we will adjust the outcome. These adjustments will be clearly reported. This adjustment will almost always mean a reduction in the outcome. This choice is also consistent with the ex-ante character of the outcome calculation.

An alternative is only to include the effect once a decision has become final (or once an objection and/or appeal are no longer possible). A consideration here is that the court proceedings may sometimes be (very) long and may vary greatly depending on the type of activity. Cartel cases, for example, can often be protracted and court proceedings are uncommon in the case of merger decisions. In this approach the outcome of the decisions in any year can only be presented after a long period. This approach fits in better with an ex post calculation of the effects of a decision.

2.6 Which effects are not included?

In the outcome calculation we look particularly at the price effects, including effects on quality and choice. ACM's action will also have effects that we do not include. These effects are generally more difficult to quantify. They can include the following:

- Allocation effects;
- Dynamic effects;
- Effects on productive efficiency;
- Anticipation effects;
- Errors of first and second order;
- Effects of European activities; and
- ACM's costs and compliance costs.

We will discuss these effects briefly below.

2.6.1 Allocation effects

The allocation effect concerns the loss of welfare that arises because potential customers decide not to conduct a transaction because the price is too high. If the price falls due to ACM's intervention, a number of potential customers will buy the product. The amount sold will therefore increase. This generates a welfare gain comprising the benefit (less the price paid) that the entrants derive from the purchased product and comprises area c in Figure 1. ACM's intervention leads to a reduction in the deadweight loss. Information on the price elasticity of demand is required in order to calculate the allocation effect. In the calculation of the NMa outcome, Statistics Netherlands data is used to estimate the elasticity. The available Statistics Netherlands data usually covers a wider market than the market in the specific cases. Since the allocation effect is generally small relative to the price effect, we have chosen to disregard it.

2.6.2 Dynamic effects

In addition to the allocative effects, the dynamic effects are an important driver of consumer welfare, particularly over the long term. Dynamic efficiency concerns the improvement in existing technologies

used to make products and the development of new products and services that better meet consumers' needs. Dynamic efficiency, including innovation, therefore leads to higher future allocative and production efficiency. The relationship between competition and dynamic efficiency is not clear-cut, however, and the size of the effect may be difficult to determine on an ex ante basis. By definition, the effect only becomes visible over the longer term, with the factor of chance and/or luck potentially playing a major role. In assessing dynamic efficiency in competition cases, the examination usually focuses on the incentive structure with regard to innovation and/or whether it is sufficiently present. It is not certain beforehand whether this 'protected' incentive structure will also actually lead to more innovation.

There are studies investigating the relationship between the degree of competition and dynamic efficiency. Aghion et al. (2005), Kocsis et al. (2008) and Van der Wiel (2010) show in empirical studies an inverted-U relationship between competition and innovation. This inverted U is based on multiple product/market combinations, the majority of which are located in the rising part of the inverted U. In most (usually less dynamic) sectors an increase in competition will therefore lead to more innovation. In markets where competition mainly takes place through innovation, as in telecommunications and internet applications, it is important to take account of the effect of intervention on dynamic efficiency. This will already take place in the assessment of the case concerned. In the case of mergers, where innovation plays a role, the effect of prohibiting the merger on the degree of innovation will be a factor in the assessment of the merger. If the merger contributes to innovation (the market is in the downward part of the inverted U), that will be included in the merger assessment. In the case of regulatory cases too, attention is devoted to the effects of intervention on the incentives to innovate.

Since the effect of the intervention on dynamic efficiency is difficult to ascertain and more competition will not lead to more innovation in all situations, and hence more dynamic efficiency, we make no outcome calculation of the effect of ACM's intervention on dynamic efficiency. We implicitly assume that our action will leave the incentive structure in place and will not affect it. In this regard we are in line with the approach adopted by the OFT; OFT (2007) adopts a case-by-case approach to the assessment of merger cases but disregards the effect of its action on innovation in its outcome calculations.

2.6.3 Effects on the productive efficiency

Productive efficiency relates to the amount of costs incurred to make one unit of product. A company (or an economy) is described as productively efficient if it produces its products in the most cost-efficient way. Productive efficiency is an important source of welfare, because it enables us to produce more goods with the same amount of resources.

More competition can lead to increased productive efficiency in two ways. In the first place, competition encourages companies to operate more efficiently using existing techniques. Second, competition will make it harder for inefficient companies to survive, so these inefficient companies will ultimately disappear from the market and only the more efficient companies will survive. This

competitive selection improves the efficiency in an industry.

Many studies of the relationship between competition and productive efficiency look at liberalized sectors such as the energy sector, the transport sector, the financial sector and health care. In general, as a result of the liberalization, a positive relationship is found: an increase in the degree of competition leads to an improvement in productive efficiency. Improvement of productive efficiency is also explicitly promoted in the current regulation of the energy sector.

The question is to what extent the studies in these specific (liberalized) sectors are also relevant to cases in other sectors. Another question is within what period these possible advantages and disadvantages will be realized. Cartel participants will not immediately be more productive after the cartel. It is possible that the differences in productivity between the cartel participants will emerge in the form of greater price differentiation. The most productive cartel participants will find it easier to reduce their prices than the less productive cartel participants. The more productive companies will gain market share over time, while the less productive companies will lose market share and possibly leave the market. The question is how rapidly this process will proceed.¹² Part of the productive efficiency gains will show in the price effect. Since it is not clear when these effects will occur and how large they will be, we do not include any separate effect of the increased competition on productive efficiency.

2.6.4 Anticipation effects

ACM's oversight revolves not only around retrospective correction (issuing fines), but also around the preventive effect so that certain behavior is actually not initiated. Detecting a cartel should also stop other companies starting a cartel. The fact that there is oversight of retail and other tariffs for energy and transport services means that companies will be reluctant at the outset to introduce major price increases. Research also shows that companies anticipate ACM's work, for example by not filing a notification if a merger appears unachievable or if the costs of notification (or the expected remedy) are too high (Baarsma et al., 2012). This effect of complying (and encouraging compliance) with the various laws enforced by ACM is deemed to be several times higher than the direct effect of action against violators, for example due to sanction decisions.

It is difficult to determine the size of the anticipation effect, however. DoJ (2000: 49) states, for example: "We firmly believe that deterrence is perhaps the single most important ultimate *Outcome* of the Antitrust Division's work. We are just as sure that it presents the most significant measurement challenges...". The academic literature nevertheless includes various papers and research reports that try to estimate this anticipation effect, particularly with regard to the Dutch Competition Act (see for example Gordon and Squires, 2008; Niels and Van Dijk, 2008; Werden, 2008; SEO, 2011; and Baarsma et al., 2012).

¹² To limit their potential exposure to damage claims, cartel participants have an incentive not to allow the price to fall after the cartel has ended to the level it would have been had there been full competition. The price after the cartel will then be higher than in a situation without a prior cartel (Harrington, 2004, 2011).

In 2011 SEO (2011) conducted research into the anticipation effect in cartel and merger cases. This study shows that for every 100 notified mergers five were modified prior to notification in order to forestall any objections. For every 100 notified mergers there are also 13 planned mergers that were not carried out because the companies expected the plans to lead to problems. There is also an anticipation effect in the case of cartels. The same research shows that compared to every discovered infringement of the cartel prohibition five unknown prohibited practices were modified or terminated.

The anticipation effect also arises in tariff investigations by the Energy Department. The energy tariffs are assessed to determine whether there is a reasonable relationship between the supplier's cost and the tariffs charged to the consumer. License holders take the existence of this tariff oversight into account in their tariff-setting. This probably means that the current tariffs as a whole are lower than the tariffs that would have arisen in the absence of tariff oversight by ACM. This is endorsed by The Brattle Group (2009), which concludes that the NMa's tariff oversight has a positive effect, since without it the suppliers could easily raise their prices.

In addition to anticipation, over-anticipation (business chilling) can also occur. Over-anticipation is where behavior (cooperation between companies, a merger) that is *not* harmful to society does not take place as a result of the deterrent effect of the oversight. From a social perspective, only practices that cause harm to society as a whole should be deterred. It is often difficult for a business or adviser to assess whether a particular cooperation constitutes an infringement of the cartel prohibition or whether a merger has an anticompetitive effect. If a business operator incorrectly assumes that the practice is anticompetitive, he may decide to not carry it out. This effect was investigated in SEO (2011). This research shows that in approximately 50% of cases where a company abandoned its merger plans, or amended them beforehand, companies considered that the merger would not be anticompetitive. It should be noted that even a low estimated probability of the merger being blocked by ACM may lead to companies abandoning the plan altogether. Advisers (usually lawyers) estimate the anticipation effect of mergers to be lower. The advisers estimate that there is over-anticipation in about 14% of the cancelled or modified plans. This percentage is therefore considerably lower than the percentage of companies themselves. The advisers also believe there is over-anticipation in the case of cartels. They estimate that 12% of cases where a particular cooperative arrangement was blocked involved no violation of the cartel prohibition.

Although there is a chance of over-anticipation, the SEO investigation shows that there are more cases of anticipation than of over-anticipation. We do not know, however, what the scale of the effects of anticipation and over-anticipation will be in terms of consumer surplus (or change in consumer surplus). We therefore disregard the anticipation effect in the outcome calculation. This is in line with the working method used by foreign authorities.

2.6.5 Errors of the first and second order

In its oversight activities ACM constantly has to assess whether particular behavior is a violation of a law or whether a company is complying with it. It is plausible that ACM will make occasional errors.

This concerns the question of errors of the first and second order. An error of the first order concerns the wrongful investigation and prosecution of conduct which in itself is not a violation. It is therefore about certain agreements being characterized as cartel agreements, whereas in reality they do not restrict the competition and are therefore not cartel agreements. It may also concern the wrongful refusal of a merger application or the wrongful rejection of certain cost items in the tariff regulation. These errors of the first order mean that certain behavior that has potential welfare effects will not arise.

We take this error partly into account in the outcome calculation. The outcome calculation includes an implicit assumption that the decisions are correct and therefore that there is no error of the first order (see also section 2.5.4). Should it turn out that the decision was incorrect because the court rules in favor of the company, the outcome is corrected. The calculated outcome of the specific case is cancelled retrospectively in that case. Since the court procedure leading to a definitive judgement may sometimes take a long time, it may also be a long time before the outcome is amended.

Errors of the second order relate to the erroneous approval of an activity that violates the law. These kinds of errors are also harmful to welfare; a cartel can continue to exist and lead to high prices; companies can continue to mislead customers with impunity. It is very difficult to apply a correction for this kind of error. Usually it will not be known where and when these errors have been committed.

The assessment of errors of the second order is mainly of importance if the counterfactual in the analysis is the (reasonably) efficient regulator. This is not the counterfactual that we use in the outcome calculations. The question in the case of the 'efficient regulator' counterfactual is whether the right cases have been taken up and whether possibly bigger cases have remained undiscovered. As stated in section 2.3, the outcome calculation focuses on the decisions that have been taken and not on those that could have been taken. The errors of the second order are therefore less relevant to the outcome calculation.

2.6.6 Effects of European activities

Many of ACM's activities have a European dimension. The advantages of the regulation of Dutch telecom operators' wholesale roaming tariffs will accrue to foreign providers and in turn to foreign consumers. Interconnections between different energy grids will lead to better price formation in the Western European market. These activities will lead to lower tariffs for Dutch consumers, but also, for example, for German, British and Belgian consumers. Blocking a merger can produce benefits for foreign customers. In the calculation of the outcome we concentrate on the Dutch consumer. We disregard the effects on foreign consumers. We also disregard the outcome of foreign authorities that turns out to be positive for Dutch consumers. If the European Commission detects a cartel affecting Dutch consumers or prohibits a merger between Dutch companies, we do not calculate any outcome for these cases. After all, that outcome cannot be attributed directly to ACM's actions (even though ACM may have provided advice or assistance in these cases). Regulatory cases are coordinated at European level. If the causality between ACM's activities at European level and the effect on the Dutch market can be properly substantiated, an outcome can be calculated for these kinds of

activities. This will be determined and explained on the basis of the individual case.

2.6.7 Benefit for the consumer

We present the ACM outcome as a benefit for the consumer. Not all activities have a direct effect on consumer markets, however. Various other links in the production chain must be gone through before the consumer buys the final product. For example, most consumers will not be directly impacted by a cartel for swimming pool chlorine, since they do not buy the product. Consumers will ultimately pay a higher price for the swimming pool ticket, however, because swimming pools will pass on the higher cost of raw materials. These are so-called pass-on effects. If the markets lower down the production chain are functioning well, the knock-on effects will mainly be distributional impacts. In other words, the direct effects (costs) will be passed on to other companies and ultimately the consumer. When calculating the outcome we assume for the sake of simplicity that the markets lower in the production chain are functioning well and that the calculated effect will ultimately benefit the consumer in full.

2.6.8 ACM's costs and compliance costs

ACM aims among other things to promote well-functioning markets and proper treatment of consumers. Certain costs have to be incurred to meet those objectives. These are ACM's direct costs and companies' compliance costs.

ACM's direct costs can be found in the Annual Report. These costs are met partly from general funds and are paid in part by the regulated entities. On top of these are the costs that companies incur to comply with the law; these are costs that market participants would not have to incur if they were not regulated and there were no oversight of the Dutch Competition Act. Examples are the costs for supplying information to ACM, but also legal fees in a merger or cartel case. Companies also incur costs that are separate from specific ACM cases.

Oxera (2004) has estimated these compliance costs of market participants. In the case of telecom regulation they amount to three to four times the direct costs of OPTA. A recent study by Ecorys (2013) finds a similar factor. In the case of competition oversight, Oxera arrives at a factor of 1.4 to 2.2 times the direct costs of the NMa. We disregard these oversight costs in the outcome calculation.

2.7 Differences compared to previous outcome calculations

ACM's outcome calculation builds on the outcome calculation by the NMa and the effect analysis in the market decisions of OPTA. The Consumer Authority did not calculate an outcome in the past. This section summarizes the main general differences compared to the NMa and OPTA calculations. The more specific differences will be shown in the following sections for the respective method.

2.7.1 Allocation effects and productive efficiency

Allocation effects and productive efficiency were taken into account in the outcome calculation by the NMa. As stated earlier in this section, both effects will no longer be included in the outcome

calculation. This is partly because they are relatively small but require additional assumptions and partly because the effects may already be part of the price effect (productive efficiency). This is in line with the calculation methods used by other authorities outside the Netherlands.

The market decisions by OPTA include calculations of both the increase in the consumer surplus and the welfare effect of the market decisions. In the ACM outcome calculation we examine the consumer surplus. As in the case of the other ACM interventions, we disregard the allocative efficiency in the outcome calculation.

2.7.2 Duration of the effect

In the current method we move away from calculating the effect for one year, the first-year effect. In the presentation of the first-year effect it was noted that the effect generally lasts longer than one year, but that we did not wish to select a precise period. Outcome calculations by foreign authorities are based on the duration of the effect between one and seven years (Davies, 2013).

We do take the expected duration into account in the current method. This also means that competition oversight and regulation can be compared more easily. For competition oversight we usually assume an effect of three years, in line with international outcome calculations. This means that the effects of the competition oversight increase threefold. In the case of regulation we look at the regulatory period, as in the past.

2.7.3 Allocation of the effects over time

In the case of the NMa the outcome was calculated as the three-year moving average of the first-year effect. In the current ACM method we no longer include this first-year effect and calculate the effect up to the year in which the effect will occur. For example, detecting a cartel in 2013 will lead to a lower price in 2013, but also in 2014 and 2015. A market decision in the telecom sector in 2012 has an effect in 2012 as well as in 2013 and 2014. In this case, the outcome for 2013 will comprise the effect of the 2013 cartel, but also the 2013 effect of the telecom market decision from 2012. The report concerning the 2013 outcome will include a presentation of both the new effects from 2013 and the aggregate effects from previous years.

3 Calculation method used by the Consumer Department

3.1 Activities of the Consumer Department

The activities of the Consumer Department (hereinafter DC) can be clustered around a number of themes. The first theme is transparency of commercial practices. This is about giving consumers clear insight into products and services, enabling them to find and select the offers that benefit them most. The consumer thus disciplines the market, so providers are compelled to compete on price and quality. Laws and regulations oblige companies to provide information or to maintain price transparency. One example of this is the provision of information on all foreseeable and unavoidable costs in the advertised price for airline tickets (as stated on the airline's website).

The second theme is making consumers resilient and keeping companies informed. ACM's combined offering of ConsuWijzer and the Bedrijvenloket is intended to provide accessible and comprehensible information for companies and to enable consumers to stand up for themselves, thereby promoting compliance with the laws and regulations that ACM enforces.

Another theme is 'Sales methods according to the rules'. This theme refers to the way in which consumers are actively approached by companies wishing to draw products and services to their attention. When recruiting consumers, companies may carry out actions that contravene the laws and regulations enforced by ACM and that may cause substantial consumer detriment. These are violations of the Unfair Commercial Practices Act, the Distance Selling Act, door-to-door selling rules and telemarketing rules.

The fourth theme is the reliability of companies. This theme concerns the question of whether consumers get what they have paid for after concluding an agreement, what they can expect of the product or service and/or whether they get what they are legally entitled to. This theme includes ACM's oversight of the accuracy of invoices, direct debits and the handling of complaints in the energy sector, oversight of regulations on warranties and oversight of companies' compliance with statutory notice periods.

A fifth theme is digital security and protection of personal data. The growing role of the internet in consumers' day-to-day lives also means that the consumer will or may experience problems to do with computer crime, protection of personal data and protection of privacy. In the energy and telecommunications sector ACM maintains oversight of the protection of personal data and privacy. The oversight is aimed at preventing the spread of spam and malicious software (malware) and incorrect protection of personal data.

A final theme concerns obligations in the telecommunications and energy sectors that are intended to offer consumers a basic level of protection (so-called basic obligations). For example, every supplier in the Dutch market for the supply of energy to consumers must have a supply license. ACM issues these supply licenses. It also assesses the tariffs charged by energy suppliers to consumers. In the telecommunications sector there is an obligation to connect subscribers to the fixed telephony

network, to provide a subscriber information service and to supply telephone directories. ACM enforces compliance with these obligations.

3.2 DC activities for which outcome is calculated

The calculation of the quantitative outcome in consumer cases is still in its infancy – including internationally – and is a relatively new area for ACM. OFT (2010) developed an approach to determine the effect of consumer protection. We are also less able to rely on academic studies of the effects of consumer protection, as hardly any such studies exist. Hence it is not possible to formulate substantiated assumptions and rules of thumb for consumer protection. Case-by-case assessments currently have to be made in consumer cases.

As an initial step in developing the calculation of the quantitative outcome in consumer cases, ACM has chosen to develop a method for two activities. These will be further developed and refined in the years ahead. Where possible, therefore, a method will be developed for other consumer duties in which the outcome can be calculated easily and with some degree of certainty.

In the calculation of the outcome we focus in the first place on the statutory duty to assess the reasonableness of tariffs for the supply of gas and electricity to small users (safety net regulation) and cases resulting from ACM's oversight and enforcement of the Unfair Commercial Practices Act. Where possible, we also include the results achieved through rapid interventions in the calculation of the outcome.¹³

Ad hoc decisions are also taken on whether an outcome can be calculated for other activities. If so, a calculation method is determined on a case-by-case basis.

3.2.1 Outcome of tariff oversight for electricity and gas in the consumer market (safety net regulation)

ACM has a statutory duty to assess the reasonableness of electricity and gas supply tariffs for small users. License holders submit their tariffs to ACM, which then assesses their reasonableness. If ACM considers a tariff to be unreasonable, it can impose a maximum tariff on the supplier. ACM has 'enforced' tariff reductions on several occasions in the past when tariffs were deemed unreasonable. Since suppliers reduced their rates 'voluntarily',¹⁴ ACM did not have to take a formal capping decision.

¹³ Rapid interventions are aimed at establishing rapid contact with a trader in order to halt a suspected infringement and – where possible – obtain compensation for victims.

¹⁴ The suppliers thereby prevented public disclosure of the fact that they initially wanted to charge higher tariffs that ACM deemed unreasonable.

The counterfactual of the situation in which the supplier adjusts the gas and electricity supply tariffs downwards after ACM's intervention is the situation in which the supplier charges small consumers the tariff it submitted to ACM in the first place.

The tariff reductions have a directly measurable price effect. The price effect for each customer has been determined as the difference between the tariff that the license holder initially submitted to ACM and the reduced tariff that is actually charged after ACM's intervention.

In most cases ACM knows how many households have entered into a particular electricity or gas supply contract. The group of households concerned thus benefits from ACM's intervention. We assume that the number of customers remains the same in the actual situation (enforced lower prices) and in the counterfactual (the energy provider's tariff proposal). In the calculation we also assume average consumption (in kWh).

The duration of the effect depends on the contract term of the tariffs in which ACM intervened. If the tariff proposals relate to a contract with a three-year term, the intervention also has a three-year effect. The outcome is therefore allocated to the year in which the effect occurs. In the event of insufficient data, it is assumed that the effect lasts for one year, since the tariff proposals are assessed annually.

The method for calculating the outcome in the case of safety net regulation is as follows:

*Outcome = (proposed tariff per kWh – actual tariff after intervention per kWh) * average consumption by a household * duration of the product * number of customers for the product*

3.2.2 Outcome of consumer oversight of unfair commercial practices

ACM maintains oversight of and enforces the Unfair Commercial Practices Act (hereinafter: UCP Act). This Act includes a general prohibition of unfair commercial practices. The legislator has specifically identified inequalities in the negotiating position between consumers and producers. Consumer legislation imposes certain obligations on producers, which are intended to counter unfair commercial practices. These relate among other things to the method of information provision, applicable contract terms, commercial practices used and the quality of products and services offered. If collective consumer problems arise because companies fail to comply with these obligations, ACM will intervene to restore the balance of power between consumers and producers.

Cases in which ACM decides to issue a fine and/or impose incremental penalties for violation of the UCP Act are included in the outcome calculation. In addition, cases in which ACM imposes a binding instruction or adopts a commitment decision due to conduct contravening the UCP Act are included in the outcome calculation. Cases of unfair commercial practices in which ACM acts by means of rapid intervention are also included in the outcome calculation. Commitment decisions, decisions to

impose binding instructions and the results of a rapid intervention are only included if such cases have a direct effect and sufficient information is available to quantify the outcome with a degree of certainty.

ACM intervenes in the market to halt a particular undesirable situation or to prevent certain commercial practices arising that could lead to welfare losses for the consumer. When calculating the outcome we assume that ACM's action will preclude any further occurrence of the unfair commercial practice. This will usually mean that in the absence of the unfair commercial practice the consumer will not buy the product. The counterfactual in this case is the situation in which the unfair commercial practice continues to exist and the consumer continues to buy the product.

The price effect corresponds to the price of the product. If it is likely that the consumer will purchase a comparable product (such as energy), the price effect is the difference between the price of the product with the unfair commercial practice and the comparable product¹⁵.

In order to determine the total detriment, it will be necessary to know how many transactions took place as a result of the unfair commercial practice. This information will usually be available in the case file. If it is not available, it is possible to use the number of complaints received by ACM concerning this unfair commercial practice. Since not everyone who has been a victim of the unfair commercial practice also complains to ACM, the number of complaints will be multiplied by a factor. We use a factor of 20.¹⁶ As a rule of thumb we say that for every complaint filed there are 20 that are not filed.

In principle the outcome is allocated not only to the year in which the decision is taken, but also to the subsequent year. ACM follows the example of the OFT in adopting a two-year period for the effect of its action. We use this rule of thumb in the case of unfair commercial practices, unless the nature of the practice that is discontinued as a result of ACM's action means the effect of the intervention is shorter or longer.

The method used to calculate the outcome in the case of unfair commercial practices depends on the unfair commercial practice defined in the particular case. In the case of an unfair commercial practice in which the number of transactions is clear, the basic method for calculating the outcome is as follows:

¹⁵ Not all types of unfair commercial practice will lead to a price effect. No outcome will be calculated for these cases. It is also difficult to use a rule of thumb, since the price effect may differ very widely in each unfair commercial practice. Research by the OFT (2008) shows, for example, that in most cases the detriment amounts to less than 5 pounds, but that there are also outliers above 1,000 pounds.

¹⁶ OFT (2009) conducted research into the ratio of the number of problems to the number of submitted complaints. This ratio is sector-specific and goes from 14:1 in the transport sector to 59:1 in professional and financial services. Since no comparable research has yet been conducted for the Netherlands, we assume a factor of 20. Hence for each consumer who files a complaint there are 20 in a similar situation who do not submit a complaint.

*Outcome = number of transactions involved per year * amount of the average detriment per transaction * x number of years of effect*

In the case of an unfair commercial practice in which the number of transactions is unclear, the calculation of the outcome is based on the number of complaints that ACM has received on the practice concerned. Due account is taken of the fact that not everyone who encounters the unfair commercial practice actually submits a complaint to ACM. The number of complaints is therefore multiplied by a factor of 20 (see above in *iv – number of transactions*). The basic method for calculating the outcome is then:

*Outcome = number of complaints per year * factor 20 * amount of average detriment per transaction * x number of years of effect*

3.3 DC activities for which no outcome is calculated

It has already been stated above that measuring the outcome of consumer oversight is still in its infancy. As an initial step in developing the calculation of the quantitative outcome in consumer cases, ACM has chosen to develop a method for safety net regulation and unfair commercial practices. Where possible, a method will also be developed in the years ahead for other consumer duties in order to calculate the outcome easily and with a degree of certainty.

We assume that ACM's action in consumer cases has a direct effect in the sense that the consumers' confidence and self-reliance increases, so they can discipline markets. At present the effect of ACM's action in consumer cases cannot always be quantified easily and with a degree of certainty in euros. As an example, we develop this theme below for ACM's oversight of the spam and malware prohibition and the information that ACM provides for consumers and businesses.

3.3.1 Spam and malware

ACM enforces compliance with spam and malware prohibitions.¹⁷ In the last few years increased attention has been paid to the economic detriment caused by security incidents around internet use. Security incidents often affect more parties than just the direct victims of the spam – or malware – attack. Spam harms not only the recipient, but also, for example, the recipient's internet service providers (ISPs) that have to bear the cost of filtering the spam, as well as the sender's ISP, if it is subject to countermeasures from spam fighters that also affect its other customers. The detriment can thus take many different forms, such as repair costs, productivity losses, fraud costs, costs of security measures and costs as a result of infringement of data confidentiality. It is also difficult in practice to determine the scale of the detriment and whether it has a significant impact. This becomes even more difficult if it has to be linked to individual actions, which are often settled informally. An example of such informal settlement is where an ISP is approached with a report that

¹⁷ Section 11.7 and Section 11.7a of the Dutch Telecommunications Act

one of its customers is sending spam. The ISP then often takes direct action.

TU Delft (2009) conducted a detailed survey for OPTA in 2009. The survey included a method developed to quantify the estimated damage caused by spam and malware. The effect of a spam case generated 1.6 million euros and a malware case 17.5 million euros. The method is too complex and too specific, however, to distil rules of thumb that can be used generically; the effect would have to be calculated in a similar way for multiple cases. Our current choice is not to calculate an outcome for spam and malware.

3.3.2 ACM information function

If there is a clear difference between providers and consumers in terms of knowledge of products or services, this may lead to an unbalanced market outcome. Where consumers (or groups of consumers) cannot properly assess information or are not sufficiently able to compare products, ACM promotes consumers' awareness of their rights. ACM helps to ensure that consumers can actively exercise these rights, not only by drawing consumers' attention to their rights, but also by making clear how they can make an informed choice. ConsuWijzer, ACM's consumer website, plays an important role in this regard.

The aim of ConsuWijzer is to promote self-reliance and assertiveness on the part of the consumer. It does this by providing tools such as sample letters to submit a complaint to a company or terminate a subscription. ConsuWijzer's activities cover a wide range of possible problems and sectors. ConsuWijzer also supplies information proactively to consumers on the basis of the latest developments or problems.

Given the large number of visitors to the ConsuWijzer website, visitors' views of sample letters and the number of questions and reports that are received through ConsuWijzer, we assume that ConsuWijzer has a direct effect. Little if any information is yet available about the scale of this effect (e.g. the situations in which consumers use the sample letters, how often they do so and the detriment prevented by each letter) and the actual costs saved by consumers. The effect achieved by making consumers self-reliant and assertive cannot currently be determined (in euros) with any degree of certainty.

4 Calculation method used by the Energy Department

4.1 Activities of the Energy Department

One of the core tasks of the Energy Department (hereinafter DE) within ACM relates to price regulation in gas, electricity, water and heat networks. In the network component of these sectors there is little scope for demand substitution for gas, electricity, heat and water consumers and supply substitution is almost entirely non-existent. The transmission system operators thus enjoy a high degree of market power. Consequently, the market does not produce a socially desirable outcome and tariff regulation is intended to lead to reasonable, cost-based rates for end-users. The focus is not only on the price for using the network, but also on the quality of use. The price is set for a number of years in so-called method decisions, on the basis of which a tariff decision is adopted for each year and for each transmission system operator (for gas and electricity). Codes have been drawn up for the quality aspects, in which the sector undertakes to comply with certain quality and safety aspects and to coordinate deliveries in the production chain.

ACM will maintain oversight of the heat network from 2014. If consumers and businesses are connected to a heat network, such as district heating, they are tied to it. As a result of the oversight, these tied consumers will pay no more for their heat than if they were connected to gas.

Additional tasks of the DE mostly include combating various aspects of market power and other types of market failure. These basically include projects aimed at future supply certainty and necessary investments, security, voltage quality, enforcement of statutory unbundling, financial management and European integration of the internal market.

4.2 DE activities for which outcome is calculated

The main project for which we calculate an outcome in the DE is tariff regulation. Many other projects have a more ad hoc character, making it more difficult to formulate general rules for the outcome calculation. In these cases, the outcome calculation will be more ad hoc.

4.2.1 Outcome of tariff regulation in electricity and gas transmission system operation

Each year, ACM sets the maximum tariffs that monopoly transmission system operators in the electricity and gas sectors are permitted to charge their customers. Tied customers are thus protected against unreasonably high tariffs. At the same time, ACM aims to incentivize transmission system operators to operate efficiently. In doing so, it takes into account the importance of quality of service, now and in the future. To that end, ACM enables transmission system operators to cover the costs of efficient business operations. This includes allowing sufficient possibilities for useful and necessary investments.

Through its regulation, ACM determines the income of the transmission system operators. It uses national and international benchmarks to determine the costs of an efficient provider. The regulation ensures that the current income of the transmission system operator is aligned with this efficient cost

level. All the details are set out in the method decisions. The level of the tariff income follows from the application of the results of method decisions, on which basis ACM sets annual tariff discounts (x-factors). Every method decision remains in force for a period of three to five years. Since the overwhelming majority of substantive choices about tariff regulation are made in the method decisions and the method decisions thus largely determine the maximum tariff income that transmission system operators are permitted to seek for a period of three to five years, we always attribute the outcome of tariff regulation to those method decisions.

As a counterfactual we assume that if ACM did not adopt a method decision in respect of transmission system operators, they would keep their tariffs at least unchanged in real terms. That means that without regulation their turnover would rise by the inflation rate, from the year prior to the regulatory period.

We deliberately do not assume that, in the absence of regulation, turnover would go back up to the level corresponding to monopoly prices. We believe this is unlikely to happen, due to the political and social pressure that would arise if providers of a public service such as energy transmission and distribution charged excessively high prices. This is consistent with the principle that we would prefer to underestimate rather than overestimate the effects.

In general the tariff regulation will lead to lower tariffs, partly due to the built-in efficiency incentives. However, ACM may permit a tariff increase that exceeds the inflation rate. This is the case if the transmission system operators have to incur substantially more costs than previously. The current income of the transmission system operators is then below the level of the average (efficient) costs. Maintenance of the current price level (in real terms) could mean that the transmission system operators are expected to generate a lower return than the normal return throughout the period, even if they operate efficiently. Such a situation is naturally unsustainable and will ultimately lead to lower quality and security of supply. If such a tariff reduction is on the agenda, we also assume that the unregulated turnover would be increased in line with the structural increase in costs. In this situation the counterfactual is equivalent to the regulated situation.

The effects of the method decisions are calculated by comparing turnover in the regulated situation with turnover according to the counterfactual for each year of the period to which the method decisions relate. For each method decision these amounts are added together for each year and for each transmission system operator. The result is the total outcome of the method decision concerned. On the basis of this total outcome, we calculate the average effect per year by dividing the total outcome over the regulatory period by the number of years of the regulatory period. We then report the average annual outcome in as many Annual Reports, starting with the year in which the method decision was adopted.

4.2.2 Abuse in energy sectors

The DE maintains oversight with regard to abuse of dominant positions within the energy sectors under the Dutch Competition Act. A general description of the outcome calculation for these cases can be found in section 5.2.2.

4.3 DE activities for which no outcome is calculated

In the calculation of the outcome we focus only on those activities whose effect on the market we can estimate and monetize with some certainty. Although many other activities are thus disregarded, that does not mean they have no effect on the market. Those effects will usually only occur indirectly and over the longer term. We explain two activities below.

4.3.1 Quality oversight

Quality oversight occupies an important place in the overall oversight of the energy markets. The current regulatory framework comprises on the one hand an efficiency incentive (method decisions) and on the other hand a quality incentive. This quality regulation is necessary because the transmission system operators might otherwise focus more than is desirable on short-term efficiency improvement, potentially jeopardizing future quality. Investing or not investing naturally has an effect on network quality and performance, but it is unclear when these will be measurable in the form of outages. The regulation creates a balance between affordability and quality.

The current quality oversight includes a financial incentive by means of the q-factor and sets standards through oversight of the Ministerial Decree on Quality Aspects of Electricity and Gas Transmission System Operation (hereinafter MD Quality) and Technical Codes. In short, regulation by means of the q-factor means that electricity transmission system operators of above-average quality (in terms of few power outages) are permitted to generate higher income and low-quality transmission system operators have a lower permitted income level. The q-factor brings about a redistribution between transmission system operators under the restriction that it is cost-neutral for users as a whole.

The MD Quality sets more detailed rules for the quality of transmission system operation. Two important parts of this are the Quality and Capacity Document (hereinafter: QCD) and the Quality Control System (hereinafter: QCS).

Transmission system operators submit a QCD every two years, looking among other things at the quality level and how future needs will be met. The QCS also shows the minimum level of quality control whereby the transmission system operator will be able to make better and more informed investment decisions. This has a positive effect on current and future supply reliability.

Aside from the q-factor, quality changes have no direct influence on the individual consumer's energy bill. Quality of supply is valued financially by the customers, however, as high security of supply has major benefits both for the consumer and for the business market. Daily life is largely dependent on electricity. A power outage means that computers cannot be used, debit card payments are no longer

possible and for businesses a power interruption is an interruption of production, which means a loss of added value.

The outcome of this quality regulation is difficult to determine. After all, it is unclear what the quality (and investments in it) would have been without it. It is also difficult to predict the change in quality, particularly over a period of 30 to 50 years.

4.3.2 Promoting market integration

The European countries, including the Netherlands, aim to integrate the different (previously) national gas and electricity markets. The ultimate goal is a single European market in both gas and electricity. A single European market will lead to lower prices and higher security of supply, partly because there will be more competition and companies will be free to import energy from countries where it is cheapest at that time.

The DE of ACM undertook various activities to contribute to European market integration in 2013. For example, ACM set conditions under which all market participants could participate under equal conditions in auctions of cross-border transport capacity, replacing the 'first-come, first-served' principle. Research shows that contracted capacity is not always used. In addition, GTS (the owner and operator of the national gas transmission network in the Netherlands) can sell additional capacity in the event of high demand. Since more capacity is available for gas imports and exports, there is more competition between gas providers and customers have more choice, with a beneficial impact on price and service.

In addition to an improvement in the availability and use of cross-border capacity, steps have also been taken to expand cross-border capacity. TenneT (Dutch TSO) asked ACM to make a statement about an intended investment in a 380kV connection between Doetinchem (The Netherlands) and Wesel (Germany). In an informal opinion ACM stated that this connection would expand cross-border capacity and could thus be financed from previous auction proceeds. This investment will therefore allow increased use of the current low electricity price in Germany, without any impact on transmission tariffs.

No outcome is currently calculated for this and other activities whereby ACM contributes to European market integration. ACM may calculate a case-specific outcome for this type of activity in the future if it can do so sufficiently objectively.

5 Calculation method used by the Competition Department

5.1 Activities of the Competition Department

The core activities of the Competition Department (hereinafter DM) concern concentration control and competition oversight. Concentration control involves blocking or remedying anticompetitive mergers. Competition oversight is about detecting cartels or tackling abuse of a dominant position. In both situations the aim is to prevent or resolve market and consumer problems, such as higher prices and/or lower quality.

Apart from formal decisions, the DM also uses other (informal) instruments, such as (informal) opinions (for example on the Energy Agreement and flood risk insurance), market scans (for example in the mortgage market), strategic communication (such as the position paper on sustainability and the vision of the care sector) and norm-transferring discussions.

A new activity of the DM is oversight of the Dutch law on competitive neutrality, the Dutch Act on Government and Free Markets (hereinafter: M&O), which has been part of Dutch competition law since 1 July 2012. This Act contains four rules of conduct that are intended to create a level playing field between governments and companies (Ministry of Economic Affairs, Agriculture and Innovation, 2012).

5.2 DM activities for which outcome is calculated

The outcome calculation for the DM activities includes three activities. These are concentration control, competition oversight and oversight of the Dutch law on competitive neutrality, the Dutch Act on Government and Free Markets. The calculation methods for these three activities are discussed below.

The calculation is based mainly on formal decisions. The effects of using other (informal) instruments with regard to these three activities are generally more difficult to estimate and will usually occur indirectly. These possible effects may be considerable, however. If the effects of these activities can be monetized with a degree of certainty, they are included and explained on an ad hoc basis.

5.2.1 Concentration control

The outcome calculation in the case of concentration control depends on the type of decision taken with regard to merger notifications and license applications for mergers. An outcome effect is calculated if ACM's intervention has clearly affected the completion and/or form of a merger. An outcome is calculated in the following situations (see Kemp et al., 2010):

- A negative decision in the second phase (prohibition decision): 100% of the effect is included;
- Positive decision in the first or second phase where remedies have been deployed to prevent a negative decision: 100% of the effect is included;
- A negative decision in the first phase after which no license application is filed: 70% of the

effect is included¹⁸;

- No decision, because the parties withdrew in the first or second phase: if it can be assumed that the withdrawal of the notification/license application was largely due to ACM's action, 70% of the calculated outcome is included in the first-phase cases and 100% in the second-phase cases.

In the outcome calculation for mergers we include as counterfactual the situation in which a merger that would have led to competition objections goes ahead with a situation in which the merger is blocked or remedied through ACM's intervention. This therefore concerns the expected effect of preventing a price rise¹⁹. In this situation, we need information about the situation in which the anticompetitive merger would have taken place without ACM's intervention. Since that situation is not observable, we must make assumptions.

To estimate the effects we use information from the cases themselves as far as possible. Price effects in the case of mergers can thus be based on simulation estimates or upward pricing pressure calculations. If this information is not available or is not suitable for use, we use rules of thumb.

In the case of mergers, the rule of thumb is an expected price rise as a result of the merger of 3% of turnover in the relevant market. This is a change compared to previous years when we based it on a price effect of 1%.²⁰ A 1% price effect appears to be on the low side, because it is unlikely that a merger with such a small price effect would have been blocked.²¹ In this regard ACM is in line with the draft OECD guidelines of 2013.²²

For mergers we also use turnover in the market as a whole. In the case of mergers it is known that companies outside the merger generally 'free-ride' on the merger because to some extent they follow the higher price calculated by the merging parties. The modelling in merger simulations is carried out on the same basis. If a merger is blocked, the companies outside the merger are also unable to raise their prices in line with those of the parties wishing to merge. In merger cases, good data is generally also available on the market as a whole, due to the nature of the research, so the outcome can be determined with sufficient certainty.

In principle we assume that the effect will last for three years (i.e. the current year plus the

¹⁸ In this situation an examination is made to determine whether the decision not to apply for a license is related to ACM's action or whether there are other reasons (such as lack of agreement between the parties). In the latter case no outcome is calculated.

¹⁹ If quality is the main competition parameter, we assume that it can be translated into a price effect.

²⁰ It should be noted here, however, that in previous years we also assumed a 1% effect as a result of productive efficiency. We no longer calculate these separately.

²¹ See also the EU decision *Unilever / SaraLee Body Care* where the parties submitted remedies for markets with an estimated price effect of 2% (at market level) or higher.

²² The OECD guidelines are largely based on research by Prof. Stephen Davies (2013), who analyzed best practices in various Member States (OFT and CC in the UK, NMa in the Netherlands, FTC and DoJ in the USA and DG Comp in the EU).

subsequent two years). We thus opt for the middle position as proposed in the draft OECD guidelines of 2013. If the effect is expected to last only one year because there are no barriers to entry, the merger is likely to be authorized. A period of six years seems fairly long and is not consistent with our approach based on conservative assumptions. The three-year effect is a change compared to previous years when the outcome was only calculated for the year in which the decision was taken (only the first-year effect).²³

5.2.2 Competition oversight

In the case of competition oversight the outcome calculation is based on decisions to issue fines for violations of the Dutch Competition Act. Cartels and abuse of a dominant position drive prices higher and/or have a negative effect on quality. Decisions in cartel and abuse cases are therefore included in the outcome calculation.

Binding instructions and commitment decisions can be broad in scope, for example including information sharing or calls to pass on cost increases. In these types of decisions market participants give a commitment to refrain from certain types of anticompetitive behavior in the future. For the outcome calculation an assessment is made for each binding instruction and commitment decision to determine whether it has a direct effect on the price and/or quality, and whether sufficient information is available to quantify the effect with a degree of certainty.

As a counterfactual in the case of cartels and abuse of a dominant position we compare a situation in which the cartel or abuse continues with a situation in which the cartel or abuse is discontinued as a result of ACM's intervention. This therefore concerns the expected effect of a price decrease. In order to estimate this effect, we will have to make assumptions about the situation in which there is no cartel or abuse.

As was the case last year, the rule of thumb for cartels is a price effect of 10% of the turnover of the cartel participants. Some authors consider this to be a conservative estimate (see, for example, Werden, 2008, and Davies, 2013). We draw no distinction in terms of the type of cartel (agreements on price, amount or information exchange, for example) or the seriousness of the violation, as described in the decision accompanying the fine. If it is likely that the price effect in the specific cartel case is less than 10%, we will state our reasons for assuming a lower value.

We base the outcome calculation only on the turnover of the cartel participants in the market concerned ("contaminated turnover"). Here too companies outside the cartel can 'free-ride' on

²³ The NMa does not state in the working paper (Kemp et al., 2010) that the effect only lasted one year, but it chose to calculate the effect only for the first year due to its aim of calculating conservatively. This also meant it was not necessary to estimate for each individual decision how long the effect would continue; that was left to the reader.

the higher price that the cartel participants are able to charge. However, this connection cannot be established as strongly and clearly as in the case of concentrations. In addition, in these cases there is generally less or no data available on turnover in the total relevant market. Hence, we limit ourselves to the turnover of the cartel participants.

We are also making an adjustment compared to previous years for abuse of a dominant position. We no longer assume a 10% price effect, but a 5% effect, thus also aligning ourselves with the draft OECD guidelines of 2013. In abuse cases we assume a lower price effect than in the case of cartels, because in cartels it is generally assumed that negative effects will arise. In abuse cases, attention is drawn to the fact that there may also be positive effects in situations where there are no pure exclusion effects. The price effect is calculated on the basis of the turnover of the company with a dominant position in the relevant market. This method is also used in the abuse cases dealt with by the Energy Department and the Telecommunications, Transport and Postal Department.

With regard to the duration of the effect we assume that in the case of both cartels and abuse cases the effect will in principle last for three years (i.e. the current year plus the two subsequent years). We are thus aligned with the draft OECD guidelines of 2013.

5.2.3 Markets and government

In M&O, the outcome calculation will be based on incremental penalties for violations of the M&O Act. One of the rules of conduct in the M&O Act states that when performing economic activities, governments²⁴ must at least pass on the full cost of their goods or services in their tariffs. This is because when performing economic activities a government organization would be able to use its public funds and thereby offer goods or services below cost. The difference between the cost and the price that the government charges in the market would be charged to public funds. This behavior would then distort the competition relative to private businesses. This could have considerable impacts, because a private company that does not have public funds may be able to perform the economic activity more cheaply than the government. These efficiency effects will be included in the outcome calculation if they can be quantified with a degree of certainty.

In M&O we will compare the situation in which the government continues to offer the service below full cost with the situation in which this is prevented through ACM's action. This concerns the expected effect of an efficiency improvement by the government in order to be able to compete with private businesses on a full-cost basis. In order to estimate this effect we require information on the market price that would have prevailed in conditions of fair competition. This can best be explained by means of an example. Suppose the government initially offers the

²⁴ There are some exceptions, however, such as a public school, educational institution, research institution or public broadcasting institution.

service for 20 euros, but the full cost of the service for the government is actually 25 euros. Also suppose that a private company is able to offer the service for 22.50 euros. As a result of ACM's intervention, the government, if it wishes to remain active in the market, must reduce its full cost by at least 2.50 euros (25 euros minus 22.50 euros), for example by means of an efficiency improvement, in order to provide a competitive service. After all, if the government charged the full cost of 25 euros, it would not sell anything, because the private company can offer the service for 22.50 euros. The price effect resulting from an efficiency improvement is then 2.50 euros divided by 25 euros, or 10%.

We base the total effect on the actual turnover that the government has generated in the market. Commercial companies will be able to meet this demand in future.

5.3 DM activities for which no outcome is calculated

In addition to the formal decisions in the field of concentration control and competition oversight and oversight of the Markets and Government Act, there are activities carried out by the DM for which no outcome can easily be calculated. Examples include market studies and vision documents.

5.3.1 Market studies

ACM has conducted various market studies in the past. Some of them were conducted as part of the Financial Sector Monitor. These studies often require a thematic approach in which a particular subject is explored in greater depth. Examples are studies of mortgage interest rates, barriers to switching and comparison websites. It is not clear beforehand whether there is a problem (for example under competition law) in the investigated market. This contrasts with a cartel investigation in which there are specific indications before an investigation is launched. The market studies can highlight any undesirable situations that do not necessarily violate the Dutch Competition Act. Such undesirable situations will be identified and described. In some cases, market participants will be called upon to change their behavior (without any subsequent formal sanction decision), while in other cases other parties such as ministries or other regulatory authorities will be called upon to deal with these undesirable situations.

It is difficult to determine an outcome for these activities. Often the relationship between the publication of a market study and a change in the market or a change of behavior will be difficult to demonstrate: the causality is difficult to prove. No outcome will therefore be determined in general for these market studies.

5.3.2 Vision documents

The oversight of the Dutch Competition Act is based on the assumption that companies themselves will assess whether certain behavior is or is not permitted. In some cases it is difficult for companies to make such an assessment, for example if the sector is covered for the first time by the Dutch Competition Act (as in the case of the care sector, for example) or if it concerns a relatively new subject (such as cooperation in the field of sustainability). ACM issues vision documents in an effort to provide greater clarity on the interpretation of the law; vision documents are a form of general

information on how businesses should interpret and use the law in their self-assessment. This information is important because it prevents companies from knowingly or unknowingly violating the Dutch Competition Act or interpreting it too narrowly. The latter is referred to as over-anticipation: companies wrongly refrain from certain behavior because they expect it not to be permitted (see also section 2.6.4). An example is a partnership of general practitioners. In some situations such a partnership may be anticompetitive, but that will not necessarily be the case and the partnership may lead to cost savings. It would be a shame if the initiative did not come to fruition due to a lack of clarity on the interpretation of the law. Information can dispel the uncertainty. As stated earlier, the effect of these information activities may be difficult to gauge. Therefore the effect is not included in the outcome calculation.

6 Calculation method used by the Telecommunications, Transport and Postal Department

6.1 Activities of the Telecommunications, Transport and Postal Services Department

The Telecommunications, Transport & Postal Department (hereinafter TVP) regulates the sectors indicated in its name. This includes in the first place oversight under sector-specific laws, such as the Telecommunications Act, the Aviation Act, the Railways Act, the Passenger Transport Act 2000, the Registered Pilots Supervision Act and the Postal Act.

ACM's market oversight enables it to monitor competition in the telecommunications market. The competition contributes to lower prices, new products and services and freedom of choice. Market analyses are conducted to investigate whether the competition has developed sufficiently or whether certain measures are required to support it. Markets that are currently regulated include fixed and mobile telephony and internet and business network services. In addition to oversight of network providers, ACM also enforces compliance with the rules on cookies and net neutrality.

In the regulated transport sectors there is often only one provider. This provider could make unfair demands or charge high prices to customers. After all, customers have no choice. As a result of this oversight, it is possible to ensure that the prices charged are cost-oriented and that different customers are treated in a similar way. This ensures that these providers compete fairly with each other in their market.

In the postal market, ACM enforces the provision of the universal postal service by PostNL (speed of delivery, number of service points, etc.). ACM also checks whether postal companies are handling the post sufficiently securely.

Finally, under the Dutch Competition Act, the TVP maintains oversight with regard to abuse of dominant positions in the services covered by the aforementioned sector-specific acts.

6.2 TVP activities for which outcome is calculated

Below is a list of the activities for which outcome is calculated. The calculation of the outcome only includes those activities where it can be assumed that there is a direct effect and that this effect can also be quantified with a degree of certainty.

6.2.1 Significant market power regulation of telecommunications markets

Significant market power regulation is intended to bring about sustainable competition in the telecommunications markets. To this end, ACM analyzes at least once every three years the markets specified by the European Commission in its Recommendation on Relevant Markets. If there is no effective competition in those markets and hence a provider has significant market power, obligations are imposed upon that party in order to stimulate competition in the market. An example is the obligation on the party with significant market power to allow other parties to access its network on the basis of cost-oriented tariffs.

ACM already estimates the effect of significant market power regulation in its market analysis decisions imposing such regulation (OPTA, 2011, 2012a/b/c, ACM, 2013). The counterfactual for that outcome is the situation that would have existed without the significant market power regulation.

ACM estimates the price effect on the basis of the method used to calculate the effects of regulation in the respective market analysis decisions. In the market analysis decisions the outcome is generally calculated for two values of the price effects of the imposed regulation. The price effects are within a range of 2.5% to 10%. For the outcome, ACM takes as a conservative estimate in each case the low price effect stated in the market analysis decisions. Depending on the market in question, these are price effects of 2.5% to 5%. For the market analysis on unbundled access (which involves the highest outcome in euros), this means a price effect of 5%. A recent empirical study by Ecorys (2013: 28) finds an average European price effect of the regulation of unbundled access of 7.4%. An estimated 5% price effect is therefore on the safe (conservative) side. A minimum 2.5% to 5% higher price in the unregulated situation is consistent with the conclusion that without regulation there would be an ineffectively competitive market in which the regulated party has significant market power. In view of the latter, price effects of 2.5% to 5% are also in line with the estimated price effects of 3% and 5% for concentrations and abuse, respectively.

The turnover on which the price effect is calculated is the turnover in the market as a whole. After all, the regulation makes the entire market more competitive and the price in the market as a whole becomes lower. In general, the market analyses directly estimate the price effect in the retail market. Given the specific characteristics of significant market power regulation, this method is more appropriate than estimating the price effect on the regulated wholesale service itself, and then the impact on the price of downstream retail and wholesale services of unregulated competitors. The only exception is the market analysis for fixed and mobile call termination. The latter market analysis (ACM, 2013) uses a model produced specifically for that analysis that calculates how the price effect on the regulated wholesale services – which providers purchase from each other – impacts the retail prices of fixed and mobile telephony.

The outcome is calculated for the period over which obligations are imposed in the market decisions, i.e. three years. The first year in which the effect of a market analysis decision is included is the year in which the decision was taken. Unlike in the market analysis decisions, the allocation effect ('deadweight loss') is not included in the calculation, in line with the general method (see section 2.6.1).

6.2.2 Other regulation of telecommunication markets for which outcome is calculated

For the other regulation of telecommunications markets, whenever decisions have a direct effect on market tariffs, their outcome will be included. This may be the case in disputes concerning interoperability, regulation of access to base stations, or regulation for calls to non-geographic numbers.

In the case of interoperability, it concerns the ability of end-users having different providers to establish end-to-end connections with each other. Refusing access to a network, or charging high access tariffs, may jeopardize interoperability, with the result that customers of different providers can no longer contact each other. In such a case, ACM can settle a dispute between parties and, for example, set maximum tariffs that parties are permitted to charge each other.

In the case of access to (possibly shared) base stations, this would involve the setting of tariffs for access to base stations. These may be, for example, tariffs for joint use of base stations (including radio masts), antenna systems and antennas.

The regulation of tariffs for calls to non-geographic numbers means that tariffs for calls to non-geographic numbers (such as 0800 or 090x numbers) cannot in principle be higher than those for calls to geographic numbers.²⁵ If higher tariffs were permitted for non-geographic numbers, the use of such numbers would be less attractive.

The counterfactual in all these cases is the situation before ACM's intervention. The price effect is then the difference in the price before and after intervention. The turnover on which the price effect is calculated is the turnover on the services regulated by the respective decision by ACM. The duration of the effect depends on the case and will be determined on a case-by-case basis without using a rule of thumb.

6.2.3 Oversight of the postal sector for which outcome is calculated

The oversight of the postal sector can only be quantified to a limited extent: an effect can only be calculated relatively easily in cases where intervention has a direct effect on prices. This may be the case, for example, if a mail carrier having a network that can deliver mail at least five days a week to all addresses in the Netherlands breaches the non-discrimination obligation.²⁶ By intervening, ACM can then lower the prices of excessively high discriminatory tariffs. As in the oversight referred to in the previous section, the outcome in this case is calculated on the basis of the price difference before and after intervention. The same principles apply to the relevant turnover and the duration of the effect as those referred to in section 6.2.2.

6.2.4 Regulation of the transport sector

The regulation of transport sectors refers to rail, aviation, passenger transport and the pilotage service. According to the method used in these cases, the regulated parties develop cost allocation systems based on regulatory provisions and on that basis issue proposals for the prices to be charged. ACM assesses those proposals. ACM does this on the basis of the provisions in the various acts. ACM will generally accept these tariff proposals or adjust them downwards if the rules have not

²⁵ The tariff for the information service behind the non-geographic numbers is not regulated.

²⁶ Section 9 of the Postal Act.

been correctly applied. The assumption here is that in the absence of regulation the pilotage service, Schiphol or Prorail would charge at least the tariffs they propose. As a result of ACM's intervention, for example lowering the proposed tariffs, the users of the services will pay a lower price and thus have an immediate benefit. The difference between the proposed tariff and the regulated tariff is then the price difference due to the regulation.²⁷ This regulated tariff concerns total turnover in the product concerned.

6.2.5 Abuse

Under the Dutch Competition Act, the TVP maintains oversight with regard to abuse of dominant positions in the sectors that fall within the scope of the sector-specific acts. In cases of abuse (Section 24 of the Dutch Competition Act) dealt with by the TVP, the method to be followed is as described in section 5.2.2.

6.3 TVP activities for which no outcome is calculated

For a large part of the TVP's activities, the effect cannot be quantified easily and with a degree of certainty. That applies, for example, to the:

- issuing of telephone numbers;
- registration of operators in the postal and telecommunications sector;

and oversight of:

- abuse of information numbers (0800 and 090x numbers);
- correct tariff notifications for calls to information numbers;
- portability of telephone numbers;
- net neutrality for internet access services;
- obligations for international roaming for mobile services, including maximum tariffs for those services;
- the universal postal service obligations, including oversight of quality (such as delivery times), availability (such as the number of postal outlets and postboxes) and price;
- the allocation of railway capacity.

For all these activities the oversight ensures that the market can operate efficiently, but it is very difficult to determine the effect it will have on the price that prevails in the market.

²⁷ It could be argued that the regulated parties have an incentive to set their proposed tariffs at a higher level than the tariff that would be optimal for them in order to create room to negotiate with ACM. That appears to be mainly a theoretical possibility, however, as parties cannot simply issue any tariff proposal they wish. It must be based on the legal standard that the tariffs must fulfil, and that legal standard is a type of cost basis. When a proposal is to be assessed by ACM, the regulated parties must demonstrate that they fulfil that standard. If there were no regulation, these parties would have an incentive and the possibility by virtue of their market position to charge much higher tariffs than those based on cost.

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