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Changes in the ACM outcome methodology

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1 Summary

For more than 10 years ACM (like its predecessors NMa and OPTA) has assessed each year what its work delivers for consumers and customers. An important consideration for ACM in calculating and publishing the outcome is external accountability to politics and society. The way in which ACM determines the outcome is described in Kemp et al. (2014). The ACM outcome is defined as “the in a simple manner calculated expected effects of ACM's actions on consumer welfare in the short term”.

The basis for the methodology remains as described in Kemp et al. (2014). The changes to the methodology, with effect from the 2020 outcome, are:

1. ACM no longer works on the basis that the estimated gain is a conservative estimate. We nevertheless make conservative assumptions where possible.
2. The gain from consumer protection cases is extended from two to three years.
3. The year in which the decision takes effect is used, rather than the year of the decision itself.
4. The gain from energy regulation is divided into the part due to exogenous changes in market interest rates and the part where ACM exerts influence.
5. The regulation of telecommunications will be assessed by comparing regulated tariffs with the tariffs that would have resulted if they had been raised with inflation.
6. The effects of sustainability will be reported where possible.

In this document we describe ACM’s proposed changes to the methodology. We then describe broadly the points discussed with a sounding board group regarding the proposed changes, provide a response and describe how we will deal with the comments.

2 Proposed changes to methodology

2.1 Conservative assumptions

ACM has presented the estimated gain as a conservative estimate. The communicated amount would thus be an underestimate of the gain in terms of consumer welfare due to ACM’s actions. Various bodies have criticized this.

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CPB (Netherlands Bureau for Economic Policy Analysis) (2014), for example, stated that[4] "the consequences for dynamic efficiency and the deterrent effect on anticompetitive agreements" are disregarded, whereas these "effects can be of the same order of magnitude as the outcome presented by ACM, so the actual outcome may turn out to be both much higher as well as considerably lower". Similar criticism was expressed in the plausibility test by CPB (CPB, 2015).

More recently, AEF (2020) states in its evaluation of ACM that the estimated gain is "only a rough indication of direct effects in the short term". AEF further states that "longer-term impacts on innovation and investments [...] do not form part of the calculated outcome. The outcome of the calculation may therefore be both too high and too low".

We agree that the estimates of gains focus on short-term effects. We also agree that various effects that are disregarded could have resulted in the gain being both (much) higher or (much) lower if they had been included.

AEF (2020) recommends expanding the current method to include estimates of "less well quantifiable effects relating to dynamic efficiency, such as the impact on investments and innovation". Estimating dynamic efficiency is no easy matter, however: the relationship between competition and dynamic efficiency is not clear-cut and estimates are highly uncertain (see also Kemp et al., 2014). ACM therefore believes it is inappropriate to include these effects in the estimates. It can explicitly define possible long-term effects in specific cases, however. Investments in telecommunications networks may be necessary to increase internet speeds, for example. Higher prices may then be accompanied by higher-quality telecommunications services. Another example: *ceteris paribus*, higher tariffs may be necessary for energy transmission services to facilitate the energy transition.

ACM nevertheless agrees that it should make the estimate as conservative as possible. Moreover, it has always done this: conservative assumptions have always been made where possible, and this will remain the case in the future.

It follows from the above that the estimated gain may be both an overestimate and an underestimate. ACM will therefore be more cautious in presenting its estimates: it will only refer to conservative assumptions and no longer to conservative estimates, and will place even greater emphasis on the uncertainty surrounding the estimate.

2.2 Extending the duration of the effect of consumer protection

The gain from consumer protection is included for two years, in line with the (then) OFT (Kemp et al., 2014). A study is currently being conducted by the OECD's Committee on Consumer Policy into a uniform method to estimate consumer detriment (OECD, 2020). This includes a comparison with the international approach to competition oversight, where gains are included for three years (see also OECD, 2014).

We also recognize the current difference between the oversight disciplines. To achieve greater alignment, from now on we will calculate the gain from consumer protection over a standard period of three years rather than two years. If there are case-specific reasons for deviating from this duration, the need to do so will be explained and the duration for which the gain from the intervention is included will be stated.

[4] Original citations are in Dutch. We still present them as citations in English, to clarify that this is not the ACM's interpretation but are the translations of actual texts.

2.3 Shift in the time of allocation of the effect from the decision year to the year in which the decision will take effect

Decisions, research reports, vision documents and discussions with market operators that have an effect in the market are included in the estimated gain. Previously the gain was allocated on the basis of the calendar year. This resulted in, for example, the gain from the “Method decisions for electricity and gas transmission system operators 2017-2021” being allocated to the years 2016 to 2020 inclusive, whereas these method decisions regulate tariffs charged by transmission system operators starting in 2017.

From now on the allocation time will be the year in which the effects occur. In the above example this means that the gain from the method decisions will be allocated to the years 2017 to 2021 inclusive. This change only affects some gains from regulatory oversight.

2.4 Publication of the influence of market interest rates on the gain from energy regulation

The estimate of the gain from energy regulation has previously been criticized by CPB (2014, 2015). The comments concerned sensitivity to market interest rates. CPB (2014) reports that an (exogenous) declining interest rate in that year made a particularly large contribution to the gain from energy regulation. CPB described the effect of interest rates on the gain as asymmetric: “a decrease contributes positively to the outcome, but an increase does not reduce the outcome.” The recommendation in CPB (2014) was therefore “when reporting on the outcome calculation, to separate the passing on of the effects of an exogenous change from the efficiency effects that ACM enforces through benchmarking and tariff regulation”.
ACM stated at the time that this distinction required closer study (ACM, 2014). Since no change was made, this criticism was repeated in CPB (2015): "the question is to what extent changes in an exogenous variable (the market interest rate) can be attributed to ACM’s intervention.”

The estimate of the gain from tariff regulation of electricity and gas transmission system operators remains unchanged relative to Kemp et al. (2014): the actual (regulated) turnover is compared to the counterfactual in which, in the absence of regulation, the turnover rises in line with inflation. In accordance with the criticism by CPB (2014, 2015), ACM does draw a distinction between the gain resulting from (exogenous) interest rate effects and the efficiency effects that ACM imposes by implementing the tariff regulation.

This means that three scenarios are calculated in order to make this distinction:

a) The turnover in the counterfactual with the (expected) inflation rate;
b) The regulated turnover as described in the method and tariff decisions;
c) The regulated turnover if the market interest rate is the same as the market interest rate of the previous regulatory period.

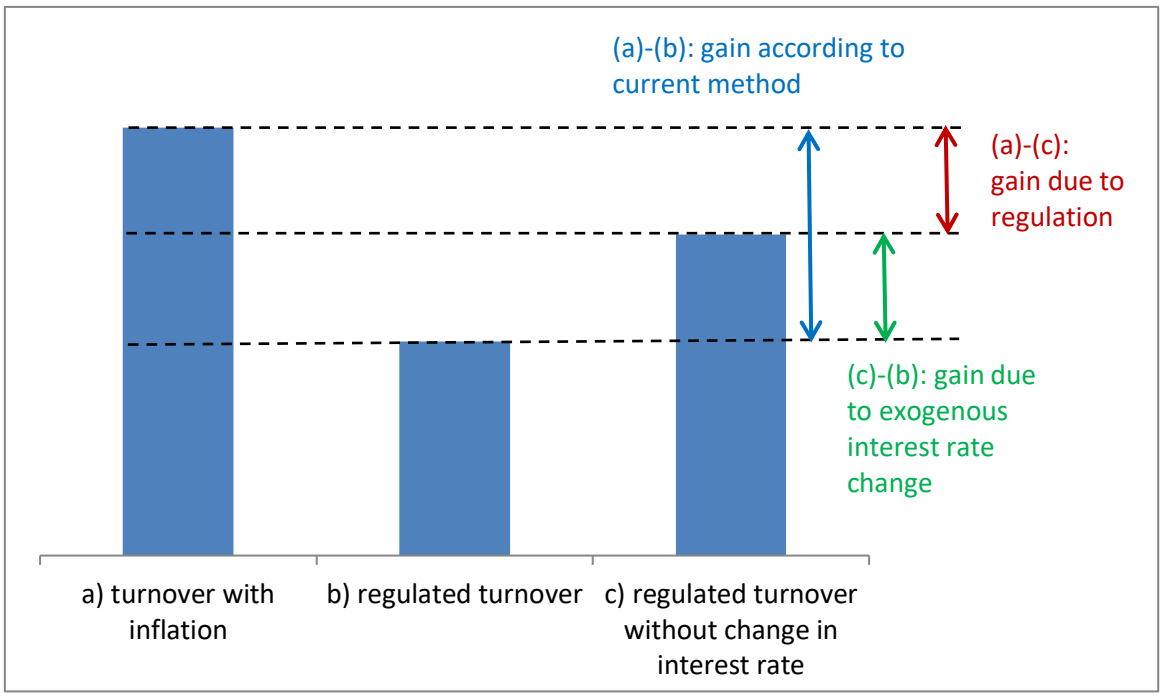
This provides the following estimated gains (see also the figure below):

1) By reducing the turnover in (a) by the turnover in (b), the estimated gain according to the current method is as described in Kemp et al. (2014);
2) Reducing the turnover in (c) by the turnover in (b) gives the gain due to the exogenous

difference in the market interest rate;

3) Reducing the turnover in (a) by the turnover in (c) gives the gain from tariff regulation as implemented by ACM.

The gain from (1) will be reported as the gain. In the discussion of the gain from energy regulation this will be divided into the gains (2) and (3).



2.5 Bringing the counterfactuals of telecom and energy regulation into line

The gains from telecom regulation and energy regulation are estimated differently. CPB (2014) recommended evaluating this difference in order to obtain a uniform method for both regulatory disciplines where possible.[5] In particular, CPB states that where tariff regulation is imposed on telecom operators, the gain should be estimated as the difference in tariffs compared to previous regulation.

ACM recognizes that both types of regulation concern parties that have significant market power. If ACM takes a market analysis decision in the telecom sector, it does so when one or more parties has significant market power. Consequently, ACM can determine the tariffs in those markets. This is essentially in line with the regulation of energy transmission system operators.

Therefore, in accordance with the suggestion from CPB (2014), ACM will modify the counterfactual used in telecom regulation. This means that set tariffs are compared to the counterfactual in which the prices remain at least the same in real terms, i.e. the situation in which the tariffs rise only by the

[5] ACM also maintains oversight of transport regulation (rail, aviation, passenger transport and the pilotage service) and postal regulation. In these types of regulation the gains are based on the tariffs after intervention by ACM and the tariffs initially proposed. Although ACM advocates uniformity between the various oversight disciplines, it does not currently intend to change the estimated gains for these types of regulation. This is because this estimation method is historically more conservative than the assumption that the regulated tariffs would rise at least by the inflation rate, and this estimation method is in line with the estimation method used in safety net regulation as part of consumer protection.

inflation rate, from the year preceding the period for which the market analysis decision applies.

2.6 Sustainability effects

In 2020, ACM started taking a more open approach in assessing agreements between companies on sustainability[6], since an increasing number of undertakings set sustainability objectives. Any form of collaboration between market participants may contravene the Dutch Competition Act, which can lead to companies being fined. If market operators collaborate to promote sustainability, it is possible that the advantages of the collaboration will outweigh the disadvantages, so such sustainability agreements that restrict competition are allowed to go ahead. In such cases, market participants can request ACM to make an exemption.

Before this approach to sustainability agreements was introduced, ACM would most likely rule that such collaboration was not permitted. In such cases the companies would be fined, and the case would be included as a gain in accordance with the rules of thumb in Kemp et al. (2014). If the sustainability advantages are greater and the collaboration goes ahead, these positive gains, less any negative effects on the competition, are included as a gain. If this is not the case, i.e. if the sustainability advantages are smaller than the estimated detriment, the collaboration will not go ahead. The prevention of this detriment, i.e. the negative effects on competition less the sustainability gains, will then be included as the gain. In both situations, case-specific information will be used as far as possible in order to estimate the net gain.

2.7 Including emotional detriment in unfair commercial practices

Finally, we come to a change that was proposed by ACM but was not implemented following the discussion with the sounding board group.

Most interventions in consumer protection concern ACM's action aimed at countering unfair commercial practices (hereinafter: UCPs). In a number of cases the regulator acknowledged in the UCP Act that there were inequalities in the negotiating position between consumers and producers. These include obligations in areas such as the means of providing information, applicable contract terms and sales practices.

More specifically, providers must not use misleading or aggressive sales methods. Research has shown that detriment is not limited to monetary loss (IPSOS, 2006, 2007), such as allowing a subscription to run beyond the legally permitted period. Consumers also report emotional detriment caused, for example, by irritation, stress and anxiety *(*Australian Productivity Commission, 2008; OECD, 2020). In such cases it is conceivable that the consumer will place less trust not only in the specific provider that is guilty of UCPs but also in the market as a whole or markets where other products are supplied.

There is little substantiation of the scale of emotional detriment in the literature. OECD (2020) reports that only the Australian Productivity Commission (2008) has investigated this. The report states that the scale of emotional detriment is probably at least 25% of the estimated monetary loss, on the basis

[6] See https://www.acm.nl/en/publications/guidelines-sustainability-claims and https://www.acm.nl/en/publications/rules-thumb-sustainability-claims-have-been-finalized-serving-basis-acms-enforcement or in Dutch see https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/duurzaamheid-en-concurrentie/acm-beleid-en-duurzaamheid and https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/concurrentie-en-afspraken-tussen-bedrijven/duurzaamheid-en-concurrentie/uitgangspunten-toezicht-acm-op-duurzaamheidsafspraken.

of lawsuits and questionnaire research. We are also unaware of any more recent research estimating the scale of the effect. In view of the limited substantiation and the negative response from the sounding board group, this change has not been implemented.

3 Vision of sounding board group and conclusion

A meeting took place in January 2021 to exchange views on the potential changes in the outcome methodology. The sounding board group comprised economic experts from CPB, the Ministry of Economic Affairs and Climate Policy and the world of economic consulting. In this section we provide an overall summary of this meeting.

The objective of the outcome was discussed. As described above, the aim is to provide insight into the effects in the short term. On the other hand, various long-term effects are important: examples include investments in energy infrastructure, stopping predatory pricing or improving the quality of telecommunications networks[7].

With effect from the 2020 outcome we are highlighting this distinction more clearly. The objective of the outcome remains to look at short-term effects, and in the case of telecom regulation we will make clear, for example, that we are abstracting from (quality) effects over the long term. In the case of energy regulation it is known that more investments are required due to the energy transition: this would lead to a reduction in the outcome because tariffs would rise in the short term. The long-term effects on sustainability are certainly important here. We will explore how we can take greater account of the sustainability effects in energy regulation.

Various members of the sounding board group said it was also important to carry out (case-specific) impact assessments. Such investigations allow more specific investigation of the effect of ACM's actions.

We fully endorse this point: impact assessments are important in providing greater insight into market-specific developments. ACM is currently also conducting impact assessments, which will be communicated directly once the investigations have been completed. They are also included frequently in the Annual Report, but they will not be included as part of the outcome.

It has also been stated that the work of the Energy Department and Telecommunications, Transport and Postal Services Department is of a different nature than the work in consumer protection and competition oversight. Doubts have therefore been expressed as to whether the gains from the various oversight disciplines can indeed be added together. After all, the gain in each case is uncertain, and some gains are more uncertain than others. The addition of the various gains is thus more uncertain than the gain from each individual oversight discipline.

ACM will nevertheless continue to add together the gains in the different cases and different oversight disciplines. After all, a euro saved in consumer protection is worth as much as a euro saved in competition oversight or regulation. We do agree, however, that the total figure is more uncertain than the gains from each oversight discipline or case, but we will also state this when publishing the outcome.

[7] Internet speed is something that is not quantified, for example, in the ACM outcome, but it is a development that may be affected by ACM's regulation of market participants.

The sounding board group criticized the inclusion of emotional detriment in unfair commercial practices. It was argued that emotional detriment was of a different nature than financial detriment, and emotional detriment may be (although not necessarily) of shorter duration than the effect of financial detriment. It was also noted that the evidence was poor, namely one study more than ten years old and based on cases in another country. Moreover, the research was largely based on stated preferences and not on revealed preferences. Following this input, ACM decided not to implement this change.

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