The Netherlands

A. Dutch ACM decisions, policies and market studies.

1. ACM: Arriva allowed to run three new train services.

On Sept. 16, 2021, the Dutch National Competition Authority (ACM) approved the application of Arriva—a Dutch railway company—for three new train services that the transport company wants to start operating in 2023. Based on European
legislation, such services may be offered as a so-called open access service as of 2021, provided the services do not have a significant negative impact on an existing concession. After investigation, the ACM concluded that Arriva’s proposed expansion would not have such an impact: the maximum negative impact on the profit margin of the main rail network concession, operated by National Railways, would be 0.03%. This marked the first time the ACM carried out such a test.

2. ACM legal memo: What is meant by a fair share for consumers in article 101(3) TFEU in the context of sustainability?

What is meant by a fair share for consumers in article 101(3) TFEU - in the context of sustainability - is a highly debated topic. The ACM and European Commission have different opinions with regard to sustainable agreements. EU Commissioner Vestager declared that “there is a fundamental principle that restricting competition for a product can only be justified if the consumers of that product are not worse off on balance.” On Sept. 27, 2021, Martijn Snoep, head of the ACM, stated that the ACM opposes this idea and that “a context-specific analysis always should be made.”

In this legal memo, the ACM sets out its point of view, which is intended to inform both the discussion on this issue in the context of the European Competition Network and the ACM’s own policy towards sustainability agreements. It concludes that (i) out-of-market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group; (ii) out-of-market efficiencies benefiting other consumers also can be counted toward a fair share for consumers overall; and (iii) full compensation for the negatively affected consumers is not required, just conferral of appreciable objective advantages.

3. Guidelines for network companies and alternative energy carriers on permitted activities under current legislation.

On Sept. 14, 2021, the ACM published guidelines regarding the opportunities that network companies have with regard to alternative energy carriers. These guidelines explain the statutory framework based on the rules currently in effect.

4. Electricity storage market research.

On Sept. 10, 2021, the ACM announced it had made an inventory of possible obstacles to electricity storage and will launch a follow-up investigation into possible tariff-related obstacles, as the different components of the transmission tariffs for electricity cannot be an impediment to the construction and development of power storage installations.

B. Dutch Courts.

1. The Dutch Trade and Industry Appeals Tribunal agrees with ACM in the appeal of easyJet regarding the Schiphol airport charges.

On Sept. 14, 2021, the Dutch Trade and Industry Appeals Tribunal (CBb) announced
that it agreed with the ACM in rejecting easyJet’s complaints about the rates and conditions applied by Schiphol to it since April 1, 2019. EasyJet had requested that the ACM determine that the rates and conditions conflicted with the rules of the Aviation Act. The ACM rejected that request. EasyJet appealed.

The ACM had found that Schiphol sufficiently involved users in the determination of the rates and conditions and the investment program. The CBb confirmed this opinion. The CBb also agreed with the ACM that the charges for landing and take-off and for handling passengers were not unreasonable or discriminatory, contrary to what easyJet argued.

United Kingdom

A. Green Agenda.

1. Environmental sustainability advice.

On Sept. 29, 2021, The UK Competition and Markets Authority (CMA) issued a public Call for Inputs, asking for information that will assist it in answering the UK government’s request for advice on how the tools available under UK competition and consumer laws can better support the UK’s Net Zero and sustainability goals, including preparing for climate change.

The CMA is particularly interested in examples of how competition or consumer laws impact the ability of businesses or consumers to act sustainably. It has also asked for views on changes to the competition rules that would help to achieve the UK’s green goals, and on the need for further CMA guidance or engagement. The consultation will remain open until Nov. 10, 2021.

2. Green Claims – misleading statements.

On Sept. 20, 2021, the CMA published a Green Claims Code, to help businesses understand how to communicate their “green” credentials to consumers without making misleading statements. In the meantime, the CMA will carry out a full review of misleading green claims at the start of 2022, looking at both online claims and claims made on in-store signs and product labels. Certain sectors will be prioritized—likely including textiles and fashion, travel and transport, and fast-moving consumer goods, where consumers appear to have the greatest concerns.

B. UK internal market—free flow of goods and services within the UK.

With the UK no longer a member of the EU internal market, its focus is on ensuring that the internal market across the four UK nations operates effectively. On Sept. 21, 2021, the CMA published guidance on the functions of the Office for the Internal Market (OIM), which has been newly established under the auspices of the CMA to monitor and report on the health of the UK internal market.

The OIM will provide non-binding technical and economic advice to all four UK
governments on the effect of new regulations they introduce on the ability of firms to sell their products and services throughout the UK, and on competition and consumer choice. It will have particular regard to the UK Internal Market Act’s market-access principles, which require that a product legally produced in or imported to, and that legally can be sold in, one part of the UK can be sold in any other part of the UK, with minimal if any barriers to trade, investment and movement of workers, and without discrimination. Similar principles apply to the provision of services and recognition of professional qualifications. The OIM has a duty to produce reports at regular intervals, either on its own initiative or at the request of government. To assist the OIM in fulfilling this and its other obligations, it has the power to issue notices requiring any person to provide it with documents or information.

C. PCR testing for travel.

On Sept. 10, 2021, the CMA published advice to the UK government on ways to make the PCR testing market work better for consumers. After a review of the market, the CMA identified a risk that suppliers of these tests are competing on grounds other than high clinical quality and noted consumer complaints that test kits are expensive, the kits and test results arrive late or not at all, and they are unable to contact providers when things go wrong or they want to request refunds. To help to resolve these issues, the CMA is suggesting upfront regulation, monitoring, and wider sanctions. It has made a number of specific recommendations, including improved standards, a one-stop-shop list with sufficient information to enable consumers to compare quality, approved test providers who have satisfied those standards, and a monitoring and enforcement program to ensure suppliers continue to meet those standards and are removed from the list if they do not.

In the meantime, the CMA is investigating breaches of UK consumer law by two suppliers of these tests and has written to several other suppliers about complaints it has received regarding misleading pricing of PCR travel tests, urging them to bring their practices in line with consumer law requirements.

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