Is less really more?

There are big hopes for the slimmed down Dutch competition authority

by Sarah Beeston*

Governments across Europe are, in the name of efficiency, consolidating competition authorities. In some cases, separate bodies responsible for different aspects of competition law enforcement merge. This is the case in France (since 2008) and Luxembourg (since 2012) and is about to happen in the UK. Competition authorities have merged with consumer authorities in Italy (2007), Denmark (2010), Malta (2011) and Finland (2013). Ireland is set to follow suit. The mergers in Estonia (2008) and Spain (2013) involved sector specific regulators.

The latest example in this wave of consolidation is the creation on 1 April this year of the Dutch Authority for Consumers and Markets (ACM). The ACM combines the Dutch competition authority (NMa) with the consumer authority (CA) and the independent authority for post and telecommunications (OPTA). The Dutch government, like its peers, expects the restructuring to lead to efficiencies in market supervision. The question is: are these efficiencies really likely to occur? And if they do, will they be achieved at the cost of the parties subject to the supervision of the new mega authority?

Prior to the merger

Prior to the creation of the ACM, the NMa was responsible for the enforcement of the competition rules. The NMa also had various regulatory tasks. It had two separate chambers, the Energy Chamber and the Transport Chamber, for the enforcement of specific energy and transport legislation. The competition directorate enforced the competition rules in these sectors.

The supervision of other sectors was entrusted to a number of separate bodies. One such body was the OPTA, which was set up in 1997 to supervise the post and telecommunications market. In addition, the CA was set up in 2007 to enforce provisions of consumer protection laws. Where necessary, cooperation protocols were drawn up to determine how the NMa and other supervisory bodies would exercise their partially overlapping competences.

Post merger

Structural changes. The NMa, OPTA and CA have been merged into the ACM. Other supervisory authorities remain apart. The ACM continues to divide competition and energy in separate directorates. It has an additional (again separate) directorate for consumer affairs. The tasks of the former OPTA have been transferred to a new combined telecom, transport and postal directorate. The integration of the OPTA into the existing transport directorate appears on the face of it to lead to a more material integration than the addition of the consumer affairs directorate. Departments with managerial and support tasks have also been integrated.

Functional changes. The establishment of the ACM has led to a number of functional changes including a division of the competences concerning the regulated markets. The energy directorate, which was previously only responsible for the enforcement of regulatory provisions, will also be responsible for enforcing the prohibition of abuse of dominance in the energy sector. Similarly, the telecoms, transport and post directorate will deal with abuse in those markets. Moreover, cases relating to consumer rights under the Gas, Electricity or Telecoms Acts will be dealt with by the directorate for consumer affairs.

Increase in powers. Certain powers of the former self-contained authorities will be extended across the whole organisation. The ACM can, for example, impose significantly higher fines (up to €450,000) than the CA could impose for a number of provisions of consumer protection regulation. Previously, the CA could impose fines up to €450,000 only for infringements amounting to unfair trade practices. For other infringements, the maximum fine was €78,000.

More controversial is the extension of the right to share information. The different directorates of the ACM can share information with each other. The ACM can also share information with certain other Dutch supervisory bodies (including for example the Public Prosecution Service, the Tax Administration and the Authority for the Financial Markets) and with non-Dutch market regulators carrying out similar tasks to those of the ACM. The government justifies this extension of the information exchange by saying that it will lead to efficiencies.

Efficiencies?

Greater efficiency in market supervision is the stated rationale for the merger. The government expects the mega authority to benefit from its strengthened body of expertise and to be able to intervene more rapidly in the face of changing market circumstances. The government also suggests that the merger will reduce the regulatory burden on market participants and close the gap between market regulation and consumers. Although the minister suggested that cost savings are not the principal aim of the consolidation, they are an expected side-effect.

Given the continued existence of separate directorates and the division of competence between them, largely along the lines of the previously existing separate authorities, it is difficult to envisage how the anticipated strengthening of expertise will occur. Possibly as a result of the enforcement of the abuse of dominance rules by directorates with knowledge of the sectors concerned? Perhaps at the level of the joint legal affairs directorate and the single directorate of economists?

If such strengthening of expertise is a realistic prospect, then the question arises why other sector-specific supervisory bodies have not simultaneously been brought under the auspices of the ACM. This question was raised by the Dutch Confederation of Industry and Employers (VNO-NCW) and the Royal Association MKB-Nederland (which protects the interests of small and medium-sized enterprises) in the public

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consultation preceding the creation of the ACM. They expressed regret that other related supervisors have not been integrated into the ACM.

Potential synergies seem most likely from the integration of the Dutch healthcare authority (NZa). The NMa has for several years had a focus on the healthcare sector. Its performance in this sector has, however, been controversial. Its clearance of mergers has on occasions given rise to criticism, particularly where such clearance has been subject to behavioural conditions. None of its cartel decisions in the sector has, in the absence of sufficient market analysis, survived the scrutiny of the courts. In his recent thesis on the application of the competition rules in the health sector, Dr Marc Wiggers suggests that the ACM would benefit from the sector-specific knowledge of the NZa.

The head of the ACM, Chris Fonteijn, has acknowledged that the decision not to integrate the NZa into the ACM at this stage is based on practical grounds: “The merger of three authorities is an enormous task. We have our hands full. But I do not rule out discussion of a further merger involving the NZa in a couple of years”. However, such a merger is hotly disputed by the minister for health, who argues:

“The healthcare market is very specific and cannot be compared with the market for telephones, for example. You need specific knowledge to supervise this sector adequately and therefore a separate supervisory body. Of course this supervisory body must co-operate with other supervisory bodies. The healthcare sector is however so complex and is in such a difficult situation, that an independent supervisory body is justified”.

This line of argument does not seem to recognise potential synergies from the pooling of expertise. There seems in any case to be little room for synergies between the activities of the competition directorate and the consumer directorate. It is also unclear how consumer protection and market regulation will become more aligned. The ACM makes a valiant attempt to suggest that alignment is possible by underlining that its priorities will largely take account of the expected impact on consumer welfare. However, consumer welfare resulting from competitive markets is very different from the consumer protection falling within the ambit of the consumer directorate. Despite the name of the authority, which seems purposely to overstate the importance of the role of the previous consumer authority in the new mega authority, there is a risk that the modestly-sized consumer authority may be subsumed into the much greater whole.

It is clear that the creation of the ACM will lead to cost savings. The government is expecting to save €3.3m annually as a result of combining human and material resources. Whether more costs savings are possible may only become apparent when the provision of the new law relating to the procedures and competences of the ACM (the streamlining law) are determined. This law is expected to come into force in 2014.

Cost to those falling under supervision

The government sees in this supervisory merger a benefit to market participants: a reduction in regulatory burden. Presumably this will result from the sharing of information within the ACM and with other supervisory bodies. This may however come at a cost. The checks and balances on the information exchange leave much to be desired.

The law establishing the ACM (Instellingswet) states that data or information obtained by the authority may be used for the performance of the task it was originally obtained for or other legal duties of the ACM. The law suggests that the information should only be exchanged if it is “necessary”. It is not evident when this necessity criterion would be fulfilled. The minister has committed to clarification of this issue in the anticipated streamlining law.

Furthermore there appears to be a lack of transparency in the proposed information exchange, also as concerns the undertakings concerned. In the consultation relating to the proposed creation of the ACM, the Confederation of Netherlands Industry and Employers and the Royal Association MKB-Nederland expressed their concerns in this respect. They submit that increased information exchange may lead to efficiencies, but that it is necessary to (1) determine which information may be exchanged between which divisions and for what purpose; (2) take due regard of the interests of the undertakings concerned; and (3) inform the undertakings concerned of the legal basis on which the ACM exercises its powers in each case and which information it has collected on the undertaking.

In the process leading up to the merger of the Finnish competition and consumer authorities, the issue of information exchange was also raised. As a consequence of the debate on this subject, it was decided that business secrets must be protected and that information obtained in the context of an antitrust investigation may not be used for another purpose. No such protection has been built into the Dutch law.

From the parliamentary debate preceding the creation of the ACM, it is apparent that the information exchange can occur without prior consultation of the undertaking concerned. The undertaking will only be aware that the information has been shared at the moment the ACM takes a decision. Only then can the undertaking appeal that decision.

Conclusion

In carrying out their functions, competition authorities recognise that big is not always beautiful and that less can be more. But in a time of crisis, governments are keen to set an example by trying to achieve efficiencies. Mergers seem to provide an answer. Often however, anticipated efficiencies and synergies remain largely elusive following a merger. Personnel cuts resulting from the creation of the ACM may lead to cost-cutting. Information exchange may reduce the administrative burden on market participants. But such efficiencies must not be at the expense of the defence rights of the market participants. The anticipated streamlining law may lead to more efficiencies than are currently achieved by the creation of the ACM. It may also lead to heightened protection as concerns information exchange. Until then, undertakings might want to keep their heads down so that they do not become the subject of an ACM investigation.

References

Law on establishment of the ACM (Instellingswet) of 28 February 2013, entry into force: 1 April 2013.