EU Competition Law and the Digital Economy
Report from the Netherlands

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1. Introduction

1.1. Report structure

This introduction provides an introduction to competition law and its enforcement in the Netherlands. The questionnaire is answered in section 2. Section 3 contains a conclusion. Developments after 10 August 2019 have not been taken into account.

1.2. Competition law in the Netherlands

The Dutch competition authority, the 'Authority for Consumers and Markets' (ACM), was created on 1 April 2013 from a merger of the Consumer Authority, the Post and Telecommunications Authority and the Competition Authority. It is charged with the enforcement of (EU and national) competition law, as well as sector-specific regulation and consumer protection laws. These tasks are set in an administrative law context. Civil enforcement of competition law is possible through the civil courts. ACM is an independent agency, which means that the Minister of Economic Affairs and Climate Policy (the Minister) cannot intervene in specific proceedings or sector inquiries, although he or she can issue general policy guidelines.

The Dutch Competition Act came into force in 1998. It mirrors European competition rules, covering anticompetitive agreements, abuse of dominance and merger control and includes rules on market activities undertaken by public entities. Many concepts are defined by referring to their EU-law

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counterparts. National competition law is often applied in conjunction with EU provisions and is, in practice, for a large part 'Europeanised'. This is also relevant for the interaction between competition law and the digital economy.

In response to the challenges of the digital economy, European competition law seems to be in motion. This makes it a 'moving target'. Hence, the national competition authorities cannot rely on clear guidance from the European Commission or the Court of Justice. Within this setting, the Dutch competition authority has shifted gears recently. It has expressly designated the digital economy as one of its top priorities, not only for competition law, but also with regard to its telecommunication and consumer protection tasks. ACM wants to be leading in this field, while stressing the importance of close cooperation with the European Commission and other competition authorities.[12]

This setting is the backdrop for the answers provided in section 2.

1.3. On this report

So far, only a few cases with relevance for the digital economy were made public, of which even less resulted in a final decision. Therefore, we have also included market scans and other policy papers in our research, summaries of which are provided in the boxes included in the text. Where possible, we refer to the English versions of these documents.

2. Questionnaire

2.A. Competition Policy in the Digital Economy: Shifts in Focus?

Question 1: What are the main cases dealing with the digital economy (focusing on digital businesses or on the competition between digital businesses and incumbent operators) initiated and completed by your competition authority?

ACM has indicated that the digital economy is one of its top priorities for 2018 and 2019.[13] It is expected that this will lead to new cases. So far, however, ACM has taken a decision dealing with the digital economy explicitly in only two cases.

Box 1: *Thuisbezorgd.nl* (18 November 2016)

A small cafeteria requested enforcement action against the online meal order platform *Thuisbezorgd.nl*. The complaint concerned a 'narrow across platform price parity' clause, which formed part of *Thuisbezorgd.nl*'s general terms and conditions. The clause stipulated that restaurants affiliated to *Thuisbezorgd.nl* agreed to charge the same prices on their own sales channels and on the website of *Thuisbezorgd.nl*. The restaurants were, however, free to charge different prices on other websites or platforms. According to the cafeteria, this clause infringed Dutch competition law.

In response to the complaint, ACM carried out an initial investigation. Its analysis shows that there are many ways in which consumers can order meals. Furthermore, restaurants affiliated to

[12] M&M 2019 no. 3, "Interview met Martijn Snoep ", 18 April 2019.

[13] 13 February 2018: <https://www.acm.nl/en/publications/acms-key-priorities-2018-and-2019-digital-economy-green-energy-prescription-drug-prices-and-ports >. All links last accessed on 17 June 2019.

Thuisbezorgd.nl have a margin to differentiate in terms of the price of delivered meals, despite the price parity clause.

On this basis ACM concludes that the narrow price parity clause applied by *Thuisbezorgd.nl* does not harm consumer welfare. ACM decides not to undertake further investigations. [14]

Box 2: *LegalDutch* (14 December 2018)

LegalDutch is a price-comparison website that brings together clients and lawyers. It claims to be the largest Dutch purchasing platform for legal services. *LegalDutch* requested ACM to take action against the Netherlands Bar Association (NOvA).

The complaint concerns the so-called 'transaction fee rule'. This rule prevents lawyers practising in the Netherlands from receiving payments for securing cases. *LegalDutch* argues that the existing uncertainty over the interpretation of this rule by NOvA prevents price-comparison websites for lawyers from getting off the ground, infringing competition law.

ACM launches an initial investigation into the 'transaction fee rule'. It concludes that this rule, in combination with the contested explanation, prevents lawyers from using an online platform where they have to pay a fee *per case*. This can deter lawyers from using such platforms. ACM informs NOvA of its findings and, subsequently, NOvA publicly clarifies its interpretation of the provision.[15]

ACM finds that no further action is necessary. [16]

1a. In those cases, have any competition issues been identified which are specific to the digital economy and therefore warrant a particular focus on the digital economy in your jurisdiction?

Firstly, ACM notes that indirect network effects are a typical feature of online platforms. In *Thuisbezorgd.nl* ACM discusses the network effects of online platforms for the delivery of meals. In *LegalDutch* ACM notes that similar effects apply to the price-comparison websites for lawyers.

Secondly, in both cases ACM sets out its prioritisation policy,[17] recalling that (also in the digital economy) it prioritises cases based on the harmfulness of the conduct for consumer welfare, the significance of its action and the extent to which ACM action will be efficient and effective.

[14] Case number 15.1073.53.ACM/DM/2016/207286, 18 November 2016: <https://www.acm.nl/sites/default/files/old_publication/publicaties/16836_besluit-thuisbezorgd-english-new.pdf>.
[15] See: http://regelgeving.advocatenorde.nl/content/regel-2-onafhankelijkheid-partijdigheid-geen-provisie.
[16] Case number ACM/17/012061, 14 December 2018: <https://www.acm.nl/sites/default/files/documents/2019-01/besluit-handhavingsverzoek-legal-dutch.pdf>.
[17] Prioritisation policy, 18 March 2016: https://www.acm.nl/en/publications/publication/16182/Prioritization-of-enforcement-investigations-by-ACM/.

1b. Are other cases currently under investigation? If so, could you give a brief summary of the status of these investigations?

At present, there are two cases known to be pending and several market studies worth mentioning.[18]

The first case is an investigation into (vertical) pricing agreements.

Box 3: Ongoing investigation into vertical pricing agreements

In December 2018, ACM started an investigation into (vertical) pricing agreements between manufacturers of goods and retailers.[19] ACM suspects that 'certain manufacturers' of consumer goods such as television sets, bicycles and fashion items, are imposing minimum sales prices on retail stores which sell online. Allegedly, minimum prices are imposed at the request of brick-and-mortar stores that find it difficult to compete with the lower prices offered by online stores, to protect their own position on the market.

Presently, no additional information is available.

The second case is the *Apple App Store* case, which was the direct result of a market study into appstores (textbox 8).

Box 4: Ongoing investigation into Apple App store

On 11 April 2019, ACM started an investigation into the Apple App Store[20] as a follow-up to its 2019 market study into mobile appstores (textbox 8). The investigation focuses on Dutch apps for news media that are offered in Apple's App Store. In response to complaints about the Apple App Store, ACM focuses on Apple, but it cannot be excluded that ACM will expand its investigation to also cover Google's Play Store at a later stage.

Presently, no additional information is available.

Two further market studies are relevant.

Box 5: Market study 'Fintechs in the payment system. The risk of foreclosure'

Tech companies in the financial sector need access to their customers' payment accounts. Previously, this information was only available to the banks. However, under the Revised Directive on Payment

[18] Also note an article (written on personal title) on ACM's website: "Price effects of non-brand bidding agreements in the Dutch hotel sector", 7 June 2019: <https://www.acm.nl/sites/default/files/documents/2019-06/working-paper-acm-price-effects-of-search-advertisement-restrictions.pdf>.

[19] "ACM onderzoekt prijsafspraken tussen fabrikanten en winkeliers consumentengoederen", 27 December 2018: <https://www.acm.nl/nl/publicaties/acm-onderzoekt-prijsafspraken-tussen-fabrikanten-en-winkeliers-consumentengoederen>.

[20] "ACM launches investigation into abuse of dominance by Apple in its App Store", 11 April 2019: <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>.

Services of 13 January 2018,[21] providers other than the customer's own bank also have access to that information. To gain access, payment service providers have to meet certain conditions. These are to be laid down by the suppliers of the payment systems.

In its market study of 19 December 2017 ACM concludes, *inter alia*, that there is a risk of foreclosure of new providers of payment services.[22]

So far, no follow-up actions have made public.

Box 6: Market study 'Taking a closer look at online video platforms'

In this market study of 22 Augustus 2017 ACM analyses possible anti-competitive risks to consumer welfare.[23] The document is structured like a traditional competition law analysis: relevant markets are defined, market shares are calculated and ACM uses a set of theories of harm. ACM investigates the complex multi-sided markets in which online video platforms are active. It encounters difficulties in determining the market power of players such as YouTube and Facebook. ACM concludes that even though Google and Facebook hold substantial positions in the relevant markets, the dynamic and innovative nature of these markets ensures that they remain competitive. Google and Facebook are not found to have a dominant position.

No follow up actions have been made public.

Question 2: Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?

2a. How have these adaptations taken shape (legislative changes, policy changes, changes in enforcement strategies)?

ACM announced its first *formal* investigations (textboxes 3 and 4) only recently. Policy documents show how apparently ACM has moved towards a more activist ambition. This is also reflected in the way ACM views the challenges posed by 'big tech'-companies.

First of these is a 2016 research document.

Box 7: Research document 'Big Platforms, Big Trouble?'

[21] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015, OJ 2015, L337/35.

[22] Fintech market study, 19 December 2017: <https://www.acm.nl/sites/default/files/documents/2018-02/acm-study-fintechs-in-the-payment-market-the-risk-of-foreclosure.pdf>.

[23] Market study online video platforms, 22 August 2017: <https://www.acm.nl/sites/default/files/documents/2017-10/acm-a-closer-look-at-online-video-platforms-2017-10-16.pdf>.

In this research document of 21 September 2016 ACM focuses on gaining knowledge of digital markets and online platforms.[24] ACM is confident that it can apply competition law successfully when required, but is, at the same time, aware that defining the relevant market and ensuring a timely enforcement is specially challenging. ACM states, however, that its biggest challenge is to determine whether there is a competition problem at all. 'Big tech' may be creating problems, but they are also creating huge benefits for consumers.

In 2017 ACM published its market study into online video platforms (textbox 6). The study confirms the focus on consumer welfare, but it also shows the difficulty of carrying out a competition law analysis of the digital economy. More recently, like other NCA's, ACM seems to have reconsidered its position. Perhaps the challenges posed by digital markets cannot be resolved by competition law alone, and what is required is additional legislation or a change of perspective. In 2018 ACM states that it is in favor of an evaluation of the current balance of *ex post* competition law and *ex ante* regulation, preferably at a European level.[25] The Dutch legislator has followed up on this request (textbox 9). The new approach is set out in the 2019 market study.

Box 8: Market study into mobile appstores

In this study, published on 11 April 2019, ACM focuses on the two largest appstores, Google's Play Store and Apples' App Store.[26] With regard to these appstores' market behavior, ACM identifies three potential types of conduct that may warrant a further investigation: 1) Apple and Google may *favour their own apps* over apps from competing app providers; 2) in certain instances *comparable apps may be treated differently*; and 3) Google and Apple may not be *transparent* in their communication with app developers.

ACM does not take a pure competition law perspective. There is no focus on a relevant market. Instead, ACM looks at the Apple and Google 'ecosystems'. It does not calculate market shares, but considers whether Apple and Google are 'gatekeepers', *i.e.* whether they control access to their respective appstores. ACM analyses whether the platforms create 'a bottleneck' for app developers, and includes considerations concerning the relevant public interests of both competitors and consumers.

The study led to the investigation into a possible abuse by Apple in its App Store (textbox 4). No further actions have been taken as yet.

In conclusion, ACM seems to be in the process of gaining a better understanding of complicated digital markets and is changing its enforcement practices. It appears to be 'zooming out' from its specific legal competencies and advocating for the use of *ex ante* instruments. Though this undoubtedly helps ACM in gaining knowledge of these markets and in shaping its response

[24] Research document "Grote platforms, grote problemen?", 21 September 2016: <https://www.acm.nl/nl/publicaties/publicatie/16333/Grote-platforms-grote-problemen>.
[25] "InSight 2018": <https://www.acm.nl/sites/default/files/documents/2018-04/insight-2018.pdf >.
[26] Market study into mobile appstores, 11 April 2019: <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>.

accordingly, this approach also has drawbacks as it may cause the companies that are the subject of such market studies to face legal uncertainty for extended periods of time.

2b. Which enforcement tools are or have been available in your jurisdiction to this end? Has the competition authority drafted reports or explicitly adopted guidelines or binding administrative rules tailoring competition law and/or enforcement practices to digital businesses?

There are no specific guidelines for digital businesses, however, the research document on big platforms contains indications (textbox 7). ACM has also adopted new versions of its guidelines on horizontal cooperation and vertical restraints,[27] which contain examples of prohibited practices in digital markets (restrictions of online sales, online advertising and price differentiation between online and offline retail channels). Furthermore, the Dutch legislator is advocating changes to the enforcement tools and guidelines for competition authorities at the EU level (textbox 9).

2c. Have legislators or authorities in your jurisdictions been conducting evaluations of (competition) policy regarding digital markets? If so, could you summarize the outcome of those evaluations?

The Ministry published a 'discussion paper' on 19 December 2018, setting out the challenges of competition law and online platforms.[28] It asked whether competition law should be modified (and if so, how) and whether there is added value in introducing *ex ante* regulation of online platforms (and if so, what kind).

Two days after the consultation closed, on 3 February 2019, a Member of the Dutch Parliament submitted a memorandum proposing far-reaching measures for dealing with 'big tech': a statutory cap on the market share of big tech; an obligation to share data; and the possibility to stop tech companies from entering the European market following multiple regulatory breaches.[29] The Minister's proposals are somewhat different.

Box 9: Minister of Economic Affairs and Climate Policy proposals in relation to platforms

In a Letter to Parliament of 17 May 2019, the Minister advocates changing competition law in three areas, while stressing that these changes will have to be made on the EU level.[30]

[27] "Leidraad Samenwerking tussen Concurrenten"; "Leidraad Afspraken tussen leveranciers en afnemers", 26 February 2019: https://www.acm.nl/sites/default/files/documents/leidraad-samenwerking-tussen-concurrenten.pdf; https://www.acm.nl/sites/default/files/documents/leidraad-afspraken-tussen-leveranciers-en-afnemers.pdf.

[28] Ministerie van Economische Zaken en Klimaat, "Discussienotitie: toekomstbestendigheid mededingingsbeleid in relatie tot online platforms", 19 December 2018: https://www.internetconsultatie.nl/mededinging_platforms

[29] Kamerstukken II, 2018-2019, 35143, nr. 2: <https://www.tweedekamer.nl/kamerstukken/detail?id=2019Z02054&did=2019D04620>.

[30] Kamerbrief, "Toekomstbestendigheid van het mededingingsinstrumentarium in relatie tot online platforms" 17 May 2019: <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/05/17/kamerbrief-over-toekomstbestendigheid-van-het-mededingingsinstrumentarium-in-relatie-tot-online-platforms>.

First, a proposal for a new instrument for competition authorities is put forward, best described perhaps as inspired by the 'significant market power'-instrument in telecommunications regulation, which, in turn, was inspired by the attempts to use competition law to allow access to the incumbent's telecommunications monopolies' networks. The Minister labels this an *ex ante* measure (rather than *ex post* punishment). To use this measure it is not necessary to establish dominance or abuse; a 'gatekeeper-position' - where using the platform is necessary for other companies to reach their customers or for consumers to find products and services – is sufficient. The *ex ante* measure can require a dominant platform to share specific data or to provide consumers with a choice between its own services and the services of competitors.

Second, a proposal to change the current European guidelines to instruct national authorities how to determine the relevant market in a digital context and how to establish non-price related abuses.

Third, a (non-controversial) proposal to broaden the notification threshold for mergers to include the value of the transaction, to prevent 'killer acquisitions'.

A detailed elaboration of this *ex ante* measure has not been carried out yet. However, ACM published a joint discussion paper with the Minister (8 August 2019), in which it argued that under article 102 TFEU, dominance will still have to be established before the appropriate *ex ante* remedies can be used, but that the burden of proof should be lightened by introducing rebuttable, legal presumptions, particularly in the light of the non-punitive character of the proposed *ex ante* instrument.[31] Ideally such a tool would be available at both national and EU level.

Question 3: Is your domestic competition law using the consumer welfare standard as its specific goal?

3a. If no, what other standards are being relied on as the goal of competition law enforcement?
&
3b. If yes, how do you interpret the consumer welfare standard in your jurisdiction?

Until recently, question 3 would have to be answered with a 'yes'. However, ACM has changed its 'strategy document' and now seems to focus on the more general standard of 'well-functioning markets'. ACM is a merger of authorities, and although the Dutch Competition Act does not contain any prescribed goal for competition law, the Act instituting ACM does. ACM has to promote well-functioning markets, ensure a proper treatment of consumers, and promote and protect effective competition.

Until recently, ACM in its policy documents clearly put the interest of *consumers* first, making consumer welfare the informal goal of competition law. The effect on consumers has always been decisive in ACM's decisions, although the interpretation of 'consumer welfare' has turned out to be

[31] See: <https://www.acm.nl/en/publications/acm-supports-dutch-cabinets-call-additional-regulatory-tools-regarding-online-platforms>.

rather broad (ranging from price-based interests to innovation, sustainability and product diversity).[32] Also in its 2016 Prioritisation Document, ACM explains that 'consumer harm' is not limited to pure financial harm to consumers and direct buyers, [33] but is a broader concept which includes any potential harm and social harm that can be avoided or limited by taking enforcement action.

A general point for discussion is that a focus on consumer welfare may lead to less enforcement action in the digital economy. On the one hand, big tech companies have promoted consumer welfare with their free, high-quality services and it is, therefore, difficult to see why enforcement action would be required. On the other hand, as a result of the very nature of online platforms, competition *as such* may suffer, because of direct and indirect network effects, which leads to 'winner-takes-all' positions.

ACM is, of course, aware of this (textbox 7) and updated its 'Strategy', moving away from consumer welfare and more towards "making markets work well", in May 2019.[34] This change could mean that ACM may start more cases in which consumer harm is less prominent.

3.c Has this standard been applied consistently in cases dealing with digital businesses or with competition between digital businesses and incumbent operators?

In both *Thuisbezorgd.nl* and *LegalDutch* (textboxes 1 and 2) the main reason for not taking further action was that the conduct was found not to adversely affect consumer welfare. However, the changed Strategy notes that in prioritising 'the economic harm, the importance of the problem to society, and the best possible solution' are important.[35] Perhaps the investigation into the Apple App store (textbox 4) is indicative of this change, as in this case consumer harm is less obvious. In future cases, we expect that both consumer welfare as well as the protection of competition as such are relevant.

2.B. Market definition and market power

Question 4: How does your competition authority define the market with regard to digital economy players?

ACM does not mention explicitly that it defines the market in a different way with regard to digital economy players. However, ACM publications show that the 'traditional' market definition for digital

[32] For example: "Analyse van duurzaamheidsafspraken 'De Kip van Morgen'", 26 January 2015: <https://www.acm.nl/nl/publicaties/publicatie/13758/Analyse-ACM-van-duurzaamheidsafspraken-Kip-van-Morgen>; "Analyse (…) in het kader van het SER energieakkoord", 6 September 2013: <https://www.acm.nl/sites/default/files/old_publication/publicaties/12033_acm-notitie-sluiting-kolencentrales.pdf>; Case 13.0512.22/Bronovo-Medisch Centrum Haaglanden (MCH-Bronovo), 6 September 2013: <https://www.acm.nl/sites/default/files/old_publication/publicaties/11969_bronovo-mch-concentratiebesluit.pdf>.

[33] Above, footnote 17, at p. 2.

[34] See: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission.>.

[35] "ACM's Strategy 2019": https://www.acm.nl/sites/default/files/documents/acm-strategy-2019.pdf.

economy players is perceived as problematic (*e.g.* in a position paper on big tech's market power[36]) while the recent market study into appstores may signal a new approach (textbox 8).

4.a. Are the traditional price/product and geographic area criteria being relied on in ongoing or completed investigations or is a new data-focused market test taking shape?

ACM relies on traditional criteria in assessing markets and market power for digital economy players, but seems to use a more data-focused market test as an add-on to assess market power.

In its research report of 2016 on 'big platforms' ACM considers that the definition of the relevant market for 'big platforms' is somewhat different in that these actors are active on more than one market. The SSNIP-test appears to be less useful (textbox 7). To remedy this issue, ACM has conducted market studies to gather more information on digital markets:

In the 2017 market study on online video platforms (textbox 6), ACM seems to rely on traditional criteria, studying the different revenue models of online video platforms (what product do they sell to whom) to determine on what sides of this multisided market the players operate. However, in that same report, ACM also gives significant attention to whether data collection by online video platform operators can give rise to market power and a potential abuse thereof. ACM stresses that it is difficult to determine the price/value of a product for the user of online video platforms (in particular when comparing 'free' platforms with paid-for content platforms).

In its 2017 market study on Fintechs (textbox 5), ACM also includes *data* in the definition of the relevant market. When defining the relevant market, the study takes account of 'what the fintech needs from the bank to make its product functional'. Considering the information on the payment accounts of customers ACM concludes that 'relevant upstream market (…) [is] the market for information about the payment accounts of a specific customer'.[37]

Then, in the 2019 market study on mobile appstores (textbox 8), ACM considers the 'ecosystem', including the relationship between appstore and app provider and the impact of this relationship on the availability of apps for the consumer. The study clarifies that it does not 'carry out a competition-law analysis, in which markets are defined'.[38] The investigation into the Apple App store (textbox 4) considers the 'gatekeeper' function of the Apple App Store: 'no realistic alternatives to the App Store and Play Store exist, [giving] (…) in theory, Apple and Google the opportunity to set unfair conditions'. It is as yet unclear whether this represents a change or whether the 'bottleneck' function is to be a relevant criterion.

Considering the investigations that were closed, ACM seems to have applied a rather 'traditional' approach. In *Thuisbezorgd.nl* (textbox 1) ACM refrains from defining a relevant market but considers various markets such as the 'market for delivered meals' or the 'market for delivered and takeaway meals' and when analysing these markets, it relies on traditional price/product criteria. In *LegalDutch*

[36] Position Paper, '*Rondetafelgesprek over de marktdominantie van internet- en technologiebedrijven*', 31 January 2018, p.2: <https://www.acm.nl/sites/default/files/documents/2018-02/positionpaper-acm-over-marktdominantie-grote-tech-bedrijven.pdf>.
[37] Above, footnote 23, p.26 and 29.
[38] Above, footnote 27, p.17 and 18.

(textbox 2) ACM defines a relevant market for lawyers' services on the basis of traditional criteria and does not deal specifically with the particularities of data-focused markets.

4.b. Does your authority make use of a specific methodology when defining markets for online platforms (e.g. a distinction between transaction and non-transaction platforms or between business models and functionalities)?

Relevant here is, first (and most recent), that in the App Store investigation (textbox 4) ACM notes that the battle fought by platform ecosystems is not about dominating markets, but about becoming the default gateway to the internet (or internet-based services) and content for a critical mass of users that can be monetised in various ways. Consequently, one and the same platform may be important for very different companies with different business models, if it has 'bottleneck potential'. Competition with regard to this potential bottleneck comes from a variety of different markets, which makes a traditional market definition very difficult.

Second, when defining the markets in the market study into online video platforms (textbox 6), ACM distinguishes between transaction and non-transaction platforms. For transaction platforms, it is sufficient to determine a single relevant market that covers both sides of the platform. This is not necessarily the same for non-transaction platforms. There are situations (*e.g.* free-to-air-television) that call for the identification of a relevant market on both sides of the platform.[39]

Third, in *Thuisbezorgd.nl* (textbox 1), ACM considered the market for 'delivered meals' or 'delivered and takeaway meals' on the basis of the business model of the platform. This methodology does not refer to any specific features of online platforms.

4.c. Is the particular nature of platform markets taken into consideration in the market definition practice of your jurisdiction?

ACM seems to advocate that the particular nature should be taken into consideration in order to define the relevant market in which the platform operates. For instance, in its 2018 position paper,[40] ACM raises questions as to the nature of Facebook: is it only a social network or is it also a video platform and/or a news site? ACM remarks that these questions are not easy to answer, but that they are necessary to identify possible risks to competition. Furthermore, in its 2016 market study (textbox 6), ACM refers to the different approaches to different kinds of platforms.[41] In contrast, in *Thuisbezorgd.nl,* of 2016 (textbox 1), ACM did not take the specific features of the online platform into consideration, but rather understood the platform as one amongst several channels for customers to order delivery or takeaway food.

4.d. Have the authorities or courts been seized with cases involving zero price markets, and how did they define the relevant market?

ACM has considered zero price markets in the context of two reports. In addition there is a judgment of a (non-specialised) civil court.

[39] ACM refers to Filistrucchi et. al., "Market Definition in Two Sided Markets – Theory and Practice" (2013), Journal of Competition Law & Economics.
[40] Above, footnote 37.
[41] Above, footnote 40.

The report on online streaming platforms (textbox 6) covers a zero price market. ACM notes that there are 10 different important online video platforms active in the Netherlands. These platforms differ from each other in the way they show their content, are open to content from third parties and in how they offer their services and generate revenue. The difference in their revenue models determines with whom the platforms compete and how they connect the three sides of their market with each other (*i.e.* the selection of content, the usage of video content by users and the online advertisement chain). In its 2016 research document on "big platforms" (textbox 7), ACM adds that it is clear that data increasingly acts as a means of payment.[42]

In addition there is the *Funda.nl* judgment of the District Court of Amsterdam.

Box 10: *Funda.nl* judgment

In this judgment of 21 March 2018, the District Court of Amsterdam considered zero price markets.[43] The case focuses on the online real estate platform *funda.nl,* on which real estate agencies can post property. This is a non-transaction advertisement platform.

Funda.nl was founded by the Dutch Association of Real Estate Agents (NVM). Competing associations, such as VBO, have concluded agreements with *funda.nl* so that their agents can also make use of it. However, NVM-agents receive preferential treatment in terms of costs, website features and ranking of property offers. VBO claims these are unfair conditions and an abuse of dominance.

Although abuse is not established, the court does define the relevant product market. It considers – based on unpublished expert reports – the online real estate advertisement market, a market that brings together potential residential real estate buyers and real estate agents by means of online search, and, only considering the relationship between real estate buyers and agents, establishes a single relevant market for this multi-sided online platform.

Question 5: How is market power established in the practice of your competition authority in cases relating to digital economy players?

In general, market power is established by relying on several aspects, taken together. This includes market shares, access to data, the wider market situation and may include business to business relations. The 2016 research document on 'big platforms' (textbox 7) points at the relevance of data as a potential source of market power and (indirect) network effects.[44] Furthermore, the market scan concerning appstores considers 'bottleneck' positions in the 'platform ecosystem' (textbox 8).

[42] Above, footnote 25, p.7.

[43] Rechtbank Amsterdam, 21 March 2018, Case No. C/13/528337, ECLI:NL:RBAMS:2018:1654, VBO/Funda. Link: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:1654.

[44] Above, footnote 25, p.5. Also see an article, written on personal title, in which ACM-employees list four relevant factors: the importance of data as input (for the product or service), the availability and replicability of the data, the importance of scale and network effects, and the degree of competition in the market to which data serves as input; R. Stil et.al., "*Beoordeling van datamacht in het mededingingstoezicht*", TvT 2018: <https://www.bjutijdschriften.nl/tijdschrift/tijdschrifttoezicht/2018/2-3/TvT_1879-8705_2018_009_002_004>.

In the offline world, the (competition law specialist) Rotterdam District Court *NS-judgment* should be mentioned.[45] In this case the incumbent railway carrier was fined for abusing its dominant position. The court establishes, for the first time, an explicit, high standard of proof: ACM is required to establish dominance 'beyond reasonable doubt'. This high standard of proof, if upheld, may have relevance for establishing dominance in the digital world as well.

5.a. Are market shares being relied on?

Market shares are relevant, but it is (now) recognised that a broader approach may be called for.

Already in the 2016 research document on online platforms, ACM recognises the challenges of defining the relevant market with regard to online platforms (textbox 7), quoting Van Gorp & Batura: "Competition Authorities in online markets should rely less on market shares and profit margins and more on the 'contestability' of platforms".[46] In its 2018 position paper ACM states that big tech companies are exceptional in the way that even though they may have large market shares (*e.g.* in search engines), they compete fiercely with each other on different markets and for innovation strength.[47]

This is stated again in ACM's analysis of YouTube's market power in online advertising (textbox 6).[48] Here, ACM refers to the fact that market shares in dynamic markets such as online advertising are not sufficiently informative to establish a dominant position. Nonetheless, ACM relies on a fairly classical approach in which the demarcation of relevant markets and establishing dominance by way of a market share analysis plays an important role.

In the 2019 market study concerning appstores there is less focus on the classical analysis (textbox 8). In relation to Apple, ACM also refers to the spending behaviour of Apple product end-customers as compared to other customers.[49] Although Apple's market share may be smaller in terms of users, the access to this user group is more valuable for app providers as Apple 'high-end' customers tend to spend more on apps. This seems to indicate that in defining market power other factors besides market share are also relevant.

5.b. Is a business' power in related markets taken into consideration? If so, how?

Yes, a business' power in related markets can be relevant. An example is ACM's analysis of Google's potential to use its potentially dominant position in online advertising in the market for DSP's, in the online video platforms market study.[50]

5.c. Has potential or future competition been taken into account when defining market power? Is it used differently for cases in the digital economy?

[45] ROT 18/2537, ECLI:NL:RBROT:2019:5089, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2019:5089.
[46] N. van Gorp and O. Batura, "Challenges for Competition Policy in a Digitalised Economy", July 2015.
[47] Above footnote 37, p.2.
[48] Above footnote 24, p.61.
[49] Above, footnote 27, p.52.
[50] Idem, p.56.

In the 2018 position paper, ACM questions the durability of "winner-takes-all positions". ACM is uncertain if these seemingly inviolable positions are able to withstand the technological developments through which new, innovative market players can rise up and trigger competition. [51] In the market study into appstores, potential competition is considered when assessing the 'bottleneck' function (textbox 8). Alternatives to apps, such as 'regular webpages' or 'web-apps', alternatives to appstores, such as 'sideloading', 'pre-installing' and other app-stores, and the possibilities to switch between app-ecosystems are also considered. This potential, however, is found to be so limited that the 'bottleneck' function of Apple's and Google's appstores translates into significant and stable market power. [52]

5.d. Can you notice variations in the use of the concept of market power in digital economy cases compared to other fields?

We see no difference. Certain elements will always have to be taken into account when establishing dominance. The concept of 'market power' does not seem to have a different *meaning* across different parts of the economy. However, in digital economy cases there is more uncertainty about how to establish market power. This can be inferred from the answers provided above.

Question 6: Can you notice a difference in ex post assessments (abuse of dominance cases) and ex ante assessments (concentration merger control cases), both in relation to defining markets and conceptualizing market power?

Not (yet) in practice. However, in the 2016 research document on online platforms (textbox 7), ACM weighs the potential advantages and disadvantages of *ex ante* and *ex post* assessments.[53] ACM concludes that there are risks and challenges in *ex ante* regulation of platforms. These may cause unintentional effects by obliging companies to incur extra costs. This may harm competition as smaller companies may experience these extra costs as a barrier to enter the market. *Ex post* control by competition authorities also remains a challenge as cases are complex and time consuming. By the time the case is closed, the market may have changed completely.

As discussed above, the Minister has recently proposed to lobby for an EU-level *ex ante* instrument for competition authorities for platforms with a 'gatekeeper-position' (textbox 9), a proposal that is supported by ACM.

2.C. Theories of harm

Question 7: Which practices in digital markets or involving digital businesses have been analyzed in the decision-making practices or case law of your jurisdiction?

Specific practices were analysed by ACM in only two cases: *Thuisbezorgd.nl* and *LegalDutch* (textboxes 1 and 2). In addition, two other investigations, on vertical price agreements and on the Apple App Store, have been opened (textboxes 3 and 4). More general information on market practices can be found in market studies concerning online video platforms, fintech and appstores (textboxes 5, 6 and

[51] Above, footnote 37, p.1.
[52] Above, footnote 27, p.42-44; 44-51; 51-68; 73.
[53] Above, footnote 25, p.9-11.

8). The new guidelines on vertical agreements also contain examples of certain digital practices which ACM considers as restrictive by object.[54]

To the best of our knowledge, as to court judgments, there is only the *Funda.nl*-judgment (textbox 10).

7a. What types of collusive behaviour have been considered as restrictive by object or by effect? Have others been considered as not posing a restriction? What elements have been taken into account to reach either conclusion?

So far, no conclusions have been reached concerning collusive behaviour in the digital economy. The *Thuisbezorgd* and *LegalDutch* cases were closed without a final decision on the compatibility of the behaviour. Both cases were decided on the basis of the expected absence of consumer harm (textboxes 1 and 2). The investigation into vertical price agreements may give us more information, but is ongoing (textbox 3).

7.b. Which unilateral practices (tying, refusal to supply, refusing access to data, long term predatory pricing) have been considered as abusive? Have others been considered not to constitute an abuse? What elements have been taken into account to reach either conclusion?

So far, there have been no decisions concerning unilateral practices in digital markets. However, the analysis set out in the online video platforms market study (textbox 6) shows that ACM is considering several theories of harm, which invariably assume the presence of consumer harm. The study does not reach a definitive conclusion as to the compatibility of unilateral actions with competition law as the platforms under scrutiny were not held to be dominant.

More recent ACM policy documents suggest that ACM may be expanding the scope of its competition law interventions so as to include 'gatekeeper' issues. In this respect both the market scan into appstores (textbox 8) and the Strategy 2019[55] are relevant indications.

7c. Have mergers or other concentrations involving digital businesses been handled by your authority? What criteria or tests have been relied on to allow or prohibit the envisaged concentration?

So far, ACM has not finalised any such investigations. However, it is noteworthy that a second phase investigation was opened with regard to the proposed acquisition of Iddink, a distributor of (digital) learning materials and electronic learning environments (ELO's) in secondary education, by Sanoma, a publisher of (digital) learning materials.[56] The potential competition law issue is the possible foreclosure of Iddink's ELO by providing preferential treatment or better compatibility with Sanoma-products.

[54] Above, footnote 28.
[55] Above, footnote 36.
[56] See: https://www.acm.nl/sites/default/files/documents/2019-05/concentratiebesluit-nader-onderzoek-nodig-naar-overname-iddink-holding-door-sanoma-learning-2019-05-03.pdf.

Question 8: What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?

Given the absence of cases, there is no concrete information on justifications. Nonetheless, comments are provided below in so far as possible.

8.a. Have economic efficiency justifications been offered by digital economy players to justify certain types of behaviour considered as anticompetitive? If so, please summarize them.

A recent policy change by ACM concerning vertical agreements may make it more difficult for undertakings to successfully offer efficiency justifications. In its 2015 policy document on vertical agreements, ACM based its enforcement strategy on a balancing exercise between possible theories of harm and possible economic efficiencies.[57] This exercise could result in ACM not pursuing a case, even where invoking article 101 (3) TFEU would possibly not be successful.

In its 2019 guidelines, that replace the 2015 document, ACM subscribes more closely to the view of the European Commission and states that it is for the company to prove that there are likely economic efficiencies that meet the threshold of article 101 (3) TFEU.[58]

Recent changes to the Strategy, in which ACM focuses on more than mere consumer welfare, may also have an effect on economic efficiency arguments.[59]

b. Have these justifications been accepted or rejected by your authority in the cases in which they were offered?

No information is available, as no cases have been decided.

8.c. Has the multi-sidedness of markets been factored into the assessment of potential efficiency justifications?

In general, multi-sidedness of markets has been considered in policy documents (e.g. textbox 6). However, as no cases have been decided, there is no further information available.

8.d. Does your authority also take justifications other than those grounded in economic efficiency into account (e.g. in relation to innovations brought by digital players)? Have such justifications also played a role in permitting certain types of behaviour in the digital economy?

ACM seems to suggest that innovation is generally taken into account. This explains a certain reluctance to intervene, as can be deduced from the analysis set out in the Online Video Platforms market study (textbox 6).

[57] 'Het toezicht van ACM op verticale overeenkomsten', 20 April 2015: https://www.acm.nl/sites/default/files/old_publication/publicaties/14164_toezicht-acm-verticale-overeenkomsten.pdf.
[58] Above, footnote 28.
[59] Above, footnote 36.

Question 9: Have you witnessed the emergence of specific theories of harm tailored to digital markets?

9.a. How is harm defined and where does it differ from theories of harm in other sectors?
&
9.b. Do arguments focused on innovation play a role in determining the presence or absence of harm to competition?

Specific theories of harm have not emerged in ACM decisions, but rather in more general analyses. The most recent analysis, of the market study into appstores (textbox 8), is based on ACM's overall task to ensure that markets work well: "ACM also takes the long-term effects on consumer welfare into account (…) not just the effects on prices, but also (…) on innovation and on the quality and diversity of products and/or services. Our oversight efforts are not only focused on the conduct of companies, but also on market structure". Furthermore: "the public interest of consumer protection can be characterised by consumers who have options to choose from and who are able to make well-informed decisions. But consumers also benefit from high quality, safe products, their data being protected safely and consumer rules being enforced".[60]

The subsequent investigation of Apple (textbox 4) focuses on giving preferential treatment to Apple's own apps. This theory of harm is to a certain extent specific but also fits the general framework of the market study.

9.c. What standard of proof is relied on to establish harm to competition? If likelihood evidence is used, what level of probability is defined as a threshold for intervention?

In the absence of specific cases we need to rely on general administrative law as applied in competition cases. Generally, in Dutch administrative procedures in competition law cases, the standard of proof is generally not labelled explicitly, but is understood in terms of a burden of proof on ACM (under circumstances shifting to an evidentiary burden on the undertakings concerned), to present sufficient and coherent evidence of an infringement. The approach is similar to that of the European Union courts.

Question 10: What kind of remedies have been employed in cases relating to digital markets. Do you see any differences to remedies in other markets?

There are no cases, but the Minister has proposed to advocate for changes in policy that reflect new types of (ex ante) remedies (textbox 9).

2.D. Regulatory overlap and enforcement challenges

Question 11: Has there been any overlap in practice between ex ante regulation aimed at controlling market behaviour – such as, but not limited to, consumer protection legislation, the proposed platform Regulation, the GDPR, the geo-blocking Regulation, the ePrivacy Directive and/or proposed ePrivacy Regulation, or similar national instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?

[60] Above, footnote 27, p.71

We focus on the overlap between *general* competition law (excluding merger control) and *more specific* market regulation, which can be enforced either *ex ante* (such as some specific telecom-related obligations) or *ex post* (such as consumer protection legislation).

The first case that is relevant here is *LegalDutch,* on the Code of Conduct for lawyers (textbox 1). The Code is enacted by NOvA. NovA is established by law, and charged with the task of ensuring easy access to the legal system and protection of the rule of law; the Code, although non-binding, is a form of *ex ante* regulation 'aimed at controlling market behaviour'. The case is quite specific, as NOvA has a somewhat hybrid nature of being entrusted with a public task and being the professional organisation of the legal profession. It shows the interplay between specific regulation and general competition law. As was decided in the well-known *Wouters* case,[61] these rules in principle have to conform to general competition law standards.

The second case is the pending Apple investigation that followed in the wake of the appstore market study (textboxes 4 and 8). The rationale for this market study was (*inter alia*) found in the (objectives of) the Net Neutrality Regulation.[62] Although ACM acknowledges that the Regulation does not address online platforms such as appstores directly, it considers that the growing importance of appstores, in combination with the objectives of the Net Neutrality Regulation, provides a sufficient reason to carry out the market study.[63] ACM identifies three types of conduct that may warrant further investigation (see textbox 8). These seem to reflect the principles of net-neutrality and b2b protection. It is not yet clear whether ACM will refer to the Net Neutrality Regulation in the Apple App Store case.

ACM does not address the possible lack of transparency in the communication between app-stores and app-providers, since this may be solved by the upcoming Platform Regulation.

11.a. If no, have steps been taken to tackle potential overlap and conflicts in future cases?

Not applicable.

11.b If yes, has this overlap resulted in conflicting interpretations/visions of how digital enterprises can behave on the market?

As far as we are aware, there are no 'conflicting interpretations/visions' *between* different enforcement bodies or *within* ACM.

To illustrate, Martijn Snoep, chairman of ACM, recently explained that the market study into appstores, which resulted in a competition case (textbox 4), was a very broad exploration, which might as well have resulted in a consumer protection or regulation case. However, he considered it unlikely that a violation of privacy legislation would be picked up by ACM: this would clearly be a case for the Data Protection Authority.[64]

[61] Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
[62] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access [2015] OJ L310/1: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015R2120.>.
[63] Above footnote 27, p.15-16.
[64] Above, footnote 12.

Although ACM is responsible for the enforcement of competition law, telecommunication law (including Net Neutrality regulation) and consumer protection legislation, we are not aware of internal conflicts resulting from diverging interpretations.

Question 12: Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction? Are the same authorities entrusted with the enforcement of ex ante digital economy regulation (such as the GDPR and the geo-blocking Regulation, platform regulation) and of competition law?

ACM

Competition law and consumer protection law

ACM is an independent agency charged with the 'duties assigned to it by or pursuant to the law',[65] and is both the competition law and consumer protection law enforcer. ACM views the digital economy as one of its priorities, but (apparently) not as a separate sector.

Sector-specific regulation

ACM is also charged with the oversight of sector-specific regulation in the telecom, transport, post, energy and healthcare sectors.[66]

PSD2

Since 19 February 2019, ACM is responsible for enforcing the provisions transposed into Dutch law on the basis of the Payment Service Directive (PSD2).[67] ACM is responsible for access to payment systems and bank account services of financial institutions such as banks and oversees the calculation of surcharges for the use of payment methods. ACM explicitly points out that with regard to PSD2, it cooperates with other regulators such as the Dutch central bank (DNB), the Authority for the Financial Markets (AFM) and the Data Protection Authority (AP).

Financial Sector

ACM is authorised to enforce certain rules with respect to the financial sector.[68] It shares enforcement powers with other authorities such as the DNB and the AFM.[69]

Geoblocking

As of 23 February 2019, ACM is also the designated regulator to enforce the rules for geoblocking in the Netherlands.[70]

Platform Regulation

[65] Instellingswet ACM, Article 2(2): <https://wetten.overheid.nl/BWBR0033043/2019-01-01.>.
[66] For a full list: <https://www.acm.nl/nl/organisatie/missie-visie-strategie/onze-taken.>.
[67] "ACM enforces competition with regard to payment service directive 'PSD2'", 19 February 2019: <https://www.acm.nl/en/publications/acm-enforces-competition-regard-payment-service-directive-psd2.>.
[68] "Concurrentie in de financiële sector: Wat doet de ACM op het gebied van de financiële sector?": <https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/marktwerking-in-de-financiele-sector/wat-doet-de-acm-op-het-gebied-van-de-financiele-sector.>.
[69] See: <http://ec.europa.eu/competition/sectors/financial_services/national_competent_authorities.pdf/>.
[70] "ACM enforces compliance with European geoblocking rules", 26 February 2019: <https://www.acm.nl/en/publications/acm-enforces-compliance-european-geoblocking-rules.>.

The so-called Platform Regulation is not yet in force.[71] It is, however, very likely that ACM will become the designated regulator with respect to its enforcement.

AP: Data protection authority

The *Autoriteit Persoonsgegevens* supervises the processing of personal data in order to ensure compliance with laws that regulate the use of personal data.[72] It is an independent agency whose tasks and competences are based on the GDPR and the Dutch GDPR Implementation Act.[73]

CvdM: Media authority

The *Commissariaat voor de Media* supervises compliance with the Media Act 2008 and the Act on the fixed book price.[74]

12.a. If yes, what tools are in place to guarantee a coherent and streamlined enforcement within that authority?

Not applicable.

12.b. If not, do these authorities cooperate? Is there room for exchanges of information between them?

ACM and AP have concluded a cooperation agreement (11 October 2016).[75] It covers the exchange of information and sets out situations where competences overlap. The protocol also covers specific topics such as *ConsuWijzer*, the consumer information portal of the Dutch government, the Spam-prohibition, and the Cookie-provision. A recent example of cooperation can be found in the combined approach to the website *stemwijzer.nl* in order to enforce rules applying to cookies.[76]

Also with the CvdM, ACM has concluded a cooperation agreement (22 December 2015),[77] leading, for example, to a joint study on the topic of fake news.[78]

ACM also participates in the meeting of 'market regulators', together with the AP, the AFM, the CvdM, the DNB, the Dutch Gambling Authority and the Dutch Healthcare Authority. In these meetings, the market regulators address common concerns, to ensure effective and efficient supervision and limiting supervisory burdens.

12.c. Are authorities' decisions reviewed by courts? Is there one court responsible for reviewing cases coming from different authorities?

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[71] See: <https://ec.europa.eu/digital-single-market/en/platforms-to-business-trading-practices.>.
[72] See: <https://www.autoriteitpersoonsgegevens.nl/en/node/1930.>.
[73] Uitvoeringswet Algemene verordening gegevensbescherming: <https://www.officielebekendmakingen.nl/stb-2018-144.html.>.
[74] See: <https://www.cvdm.nl/english/.>.
[75] Staatscourant 3 November 2016: <https://www.autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/convenant_acm-ap.pdf.>.
[76] "Toezichthouders ACM en AP treden op tegen StemWijzer.nl", 8 February 2017: <https://www.acm.nl/nl/publicaties/publicatie/16924/Toezichthouders-ACM-en-AP-treden-op-tegen-StemWijzernl.>.
[77] Staatscourant,3 November 2016: <https://zoek.officielebekendmakingen.nl/stcrt-2015-46967.html.>.
[78] "Take fake news seriously, even if its impact has been limited so far", 26 July 2018: <https://www.acm.nl/en/publications/take-fake-news-seriously-even-if-its-impact-has-been-limited-so-far.>.

In the administrative law column of the court system there are two relevant highest instance courts: the Council of State and the Trade and Industry Appeals Tribunal. For overarching (procedural) issues these courts have put up cooperation mechanisms to ensure there is no divergence.

As to ACM decisions, prior to judicial review, an objection must be lodged with ACM itself. ACM decisions on the basis of that objection can be reviewed by the specialised Rotterdam District Court. Appeal is possible with the Trade and Industry Appeals Tribunal.

Also with respect to AP decisions, an objection must be lodged first. AP decisions taken on the basis of that objection can then be reviewed by the administrative sector of the local district court in the district where the claimant is residing. Appeal is possible before the Administrative Jurisdiction Division of the Council of State.

3. Concluding remarks

In this concluding section we would like to zoom out just a little from the topics that were discussed so far.

3.1. Development of action in the digital economy

The conclusion as to competition law and the digital economy can only be that, so far, punitive enforcement action has been absent. This does not mean that no action has been taken. First, ACM has focused on strengthening knowledge and expertise. Next, several market studies have been published in which ACM's position seems to be that the digital economy is not really that different from the brick & mortar economy. More recent activity is marked by a broadened perspective. ACM seems to recognise that it has the tools to provide a broader view of possible harm stemming from the digital economy. ACM's chairman has the ambition for ACM to become one of the leading authorities when it comes to responding to the challenges of the digital economy.

3.2. Beyond consumer markets

The digital economy has a wider reach than the areas which have been covered in section 2. Areas that are also touched by digitalisation are, for example, *health care* and *education.* Platformisation of *agricultural services* may impact the production of food; platformisation of labour has already led to calls for the protection of precarious workers.[79] In part, these are regulated markets, with recognised public interests, bringing further complexities to the topic of competition law and the digital economy.

The digital economy may even have consequences for democracy and the rule of law itself. This may impact the use of competition law in the digital economy: *e.g.* the Minister of Internal Affairs is concerned about the impact of big tech on democracy and discussed the use of competition law and the Minister of Justice commissioned a report on algorithmic decision-making by public authorities and market parties.

[79] On 23 July 2019 ACM published a policy document on this topic: https://www.acm.nl/sites/default/files/documents/2019-07/consultatiedocument-acm-leidraad-tariefafspraken-zzpers.pdf.

3.3. Actors in a Europeanised landscape

In the Netherlands, European competition law is never far away, it almost always applies in conjunction with national competition law. This raises questions about the *policy* dimension at the EU level. Action taken with regard to the digital economy will have to be coordinated at the EU level.

Other important players are the courts, both at national and EU level. At the national level courts play a role, through the preliminary reference procedure, along the lines of concurrent application of national and European competition law and through indirect influence on national procedural rules by both EU Courts and the ECHR-case law. With regard to providing legal certainty and contributing to the development of the law, the national (highest) courts play an important role, also because guidance from the EU level remains scarce. One of the main worries here is the duration of competition law procedures, while precisely in the digital economy this slowness has been flagged as worrisome.

3.4. Conclusion

The digital economy raises complex challenges for competition law, not just because new concepts and procedures will have to be developed, but because this will have to be done in the interlocking dimensions of national and European competition law, market regulation and public interest protection. However, our impression is that ACM is well prepared and ready to implement a coherent strategy in the Netherlands in future cases.