The many faces of consumer welfare
The interpretation of consumer welfare by the ACM and its accordance with Dutch and European competition law

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Introduction

The subject of my thesis is the policy goal of the ACM – the Dutch national authority for competition, market regulations and consumer protection.

The ACM is the product of the recent merger of the NMa (Nederlandse Mededingingsautoriteit, translated: Dutch Competition Authority), CA (Consumentenautoriteit, translated: Consumer Authority) and the OPTA (Onafhankelijke Post en Telecommunicatie Autoriteit, translated: Independent Mail and Telecommunications Authority).\(^1\) A new authority, like a recently merged company, needs a common mission goal. The ACM mission goal is consumer welfare.\(^2\)

My thesis will answer the question whether the ACM has crossed legal boundaries in European or Dutch competition law through her choice and interpretation of her policy goal, which is consumer welfare. I aim to gain insight into how the ACM interprets consumer welfare, and whether this interpretation is in accordance with the law.

This topic is relevant for first and foremost Dutch competition law, because up to now the legal status of the policy goal of the Dutch National Competition Authority (NCA) is unclear: it has not yet been researched. Secondly, this research is important on a European level, as it sketches the room for maneuver for NCA’s to set goals of competition law on a member state level. Lastly, this research aims to provide an interesting overview of the economic, European and American academic discussion on consumer welfare.

So far, the academic literature has discussed the goal of European and American competition law to a great extent.\(^3\) The legislative goal of Dutch competition law in the past has been to follow in European

\(^1\) The merger took place in April 2013.

\(^2\) This is based on the ACM Strategy Document published September 2013: “Voor de ACM staat de consument centraal. (...) Daarmee wordt voortgebouwd op het werk van de drie voorgaande organisaties, die ook gericht waren op het verhogen van de consumentenwelvaart.” (translation: To the ACM, the consumer is key. (...) This builds on the work of the previous authorities, as they were aimed at promoting consumer welfare as well.”) (p. 4) “Het belangrijkste aanknopingspunt voor het optreden van de ACM vormt het effect op de consumentenwelvaart van gedragingen door ondernemingen in de markt.” (The main starting point of ACM action is the effect on consumer welfare of behaviour by undertakings in the market.”) (p. 5) I will discuss this document in more detail in chapter 3.

footsteps: the setting of a policy goal of consumer welfare under Dutch competition law is relatively new. Authors have been criticizing or applauding this goal, but up to now no all-encompassing framework has been drawn on the concept, nor has the compatibility of this policy goal with Dutch and European competition law been researched.

I will describe the legal framework relevant for such an assessment in the first chapter. To put this ACM interpretation into perspective, in the second chapter I aim to sketch the debate on consumer welfare and the goal of competition law in economics, and the EU and US legal tradition. The third chapter will assess the interpretation of consumer welfare both in theory and in practice by analyzing ACM policy documents as well as some important ACM decisions. Concluding, I will, using Dutch and EU competition law, analyze whether or not the ACM interpretation of consumer welfare is crossing these legal boundaries.

The ACM not only deals with competition law, but also with consumer protection and market regulation. Cases from these latter two fields will not be discussed in this thesis. The cases I will analyze are not limited in number. I therefore cannot draw firm conclusions on the approach of the ACM in all cases – the analysis is only indicative.

4 The goal of the Dutch mededingingswet was to align with European law: “Uitgangspunt is wel, dat de mededingingswet niet strenger en niet soepeler zal zijn dan de EG-mededingingsregels.” (Translation: “Starting point is, that the Competition Act will not be stricter nor more tolerant than EU competition law.”) Parliamentary documents II, 1995-1996, 24 707, 3, p. 10

5 As the ACM chairman commented: “Het juridische kader waarbinnen ACM opereert, komt in een economenblad minder aan bod. Toch is ook die invalshoek niet onbelangrijk, omdat uiteindelijk veel zaken voor de rechter beslecht worden. De enkeling die daar wel wat over zegt, maakt duidelijk dat juristen en economen nog steeds veel van elkaar kunnen leren.” (Translation: The legal framework in which the ACM operates, will feature less in an economic journal. This approach is important too, as ultimately many cases are decided before a judge. Those who do mention this, show that economists and legal experts can still learn a great deal from each other’s field of expertise.) From: C. Fonteijn, ‘Ten Geleide’, ESB Dossier Consumentenwelvaart als beleidsdoelstelling, ESB 2014, vol. 99, p. 1
CHAPTER ONE: THE LEGAL FRAMEWORK AND GENERAL BACKGROUND

1.1 General background information on competition law and its goal in the Netherlands

This paragraph concerns the merger of the CA, NMa and OPTA into the ACM and the legal changes this brought about. Also, I will sketch the legal and actual situation in the Netherlands before the Competition Act of 1998, the reasons for drafting this Act and the influence of European law on this Act. Lastly, I will discuss in more detail the enforcement goals of competition law and competition enforcement as written in Dutch law.

The ACM merger

On the 1st of April 2013 the NMa (Competition Authority), CA (Consumer Authority) and the OPTA (Independent Mail and Telecommunications Authority) merged into the ACM.

The idea of merging the market authorities was suggested by the Minister of Economics as early as 2002. It was not until 2010 that this idea was put into practice, when the Minister of Economics merged the three authorities into the ACM. Before 2010, the authorities did already grow more towards each other, as they shared more information and shared a working space.

The parliamentary memorandum to the Act Instituting the ACM explains that these three authorities were chosen to merge as all three were market supervisors on non-financial markets. In other words, they made sure the market functions well, by protecting competition in regulated markets, protecting consumers from harmful business practices and removing illegal hindrances to free competition. The memorandum states that the three supervisors work on a comparable market, have comparable expertise and do comparable market analyses. The main reason for the merger was achieving benefits of synergy: the common expertise and experience of the three authorities should lead to a better and more efficient market supervision.

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8 The NMa and CA shared a building in The Hague: Muzenstraat 41.
9 Parliamentary documents II, 2011-2012, 33 186, 3, p. 2 The NMa did have competences on the financial market with regard to the enforcement of competition laws.
10 Parliamentary documents II, 2011-2012, 33 186, 3, p. 1
The government was also very clear on the second reason for the institution of the ACM: cutting costs. In a time of austerity, the supervision authorities are not spared. The yearly savings as a result of the merger should amount to 3.3 million euros, the legislator calculated.\textsuperscript{12}

These benefits of synergy can however only be realized to the extent that there are overlaps: in expertise, experience or focus. The Minster of Economics does not specify these overlaps, and some authors argue that these so-called benefits of synergy only disguise the fact that the merger is only about cutting costs.\textsuperscript{13}

**Legal framework on the ACM merger**

The merger of the three market supervisors is regulated in two different acts, the Instituting Act\textsuperscript{14} and the Harmonisation Act.\textsuperscript{15} The first concerns the formal changes, the second the changes in material law. This option is chosen to reap some benefits of the merger earlier,\textsuperscript{16} like streamlining work processes and cutting redundant personnel.\textsuperscript{17}

**Formal law**

To reap the above named synergy benefits, the organizational structure of the three market supervisors had to be changed: sharing nothing but a common name is far from efficient. All competences related to consumer protection will be executed by the Consumer Department, also consumer related tasks in the field of mail, telecoms, transport and competition (former fields of the OPTA and NMa). The competences of the former OPTA are divided into two departments: Energy & Transport and Mail & Telecoms. Competition Enforcement will be the fourth and last department. The Consumer Department will have a very broad range of activities, which could cause internal conflicts about how to address individual cases. The combination of competition enforcement, market regulation and consumer protection in one market authority is unique in the world.\textsuperscript{18} The resources, including the human resources, and budget of the ACM remain part of the Ministry of Economics.

**Material law**

\textsuperscript{12} Parliamentary documents II, 2011-2012, 33 186, 6, p. 3 & 5
\textsuperscript{14} In Dutch: Instellingswet Autoriteit Consument en Markt
\textsuperscript{15} Act of 25 June 2014, Stb. 2014,247
\textsuperscript{16} Parliamentary documents II, 2011-2012, 33 186, 3, p. 12
\textsuperscript{17} M.Y. Schaub, 'Van Consumentenautoriteit naar Autoriteit Consument en Markt', *Tijdschrift voor Consumentenrecht & handelspraktijken* 2014 vol.3, p. 107
\textsuperscript{18} J. van Sinderen, 'Marktwerking en toezicht: ACM als toezichthouder', *TvOF 2012/4285*, vol. 44 p. 285
The NMa, OPTA and CA competences concerning market supervision were adapted to the new situation on the 1st of August 2014, when the Stroomlijningswet (Harmonisation Act) came into force.19 Up to this point, the competences of the newly shaped ACM were still in various specialized acts, which were tailored to the old authorities. In order to work more effectively, the procedures and competences of the new ACM needed to be harmonized. Even though a large part of the competences of the ACM are harmonized in this act, substantial parts of the competences and applicable material law can still be found in the Algemene Wet Bestuursrecht (Awb, translated: General Act on Administrative Law) and in the old specialized acts.

The main part of the Harmonisation Act concerns the competences assigned to the newly established ACM. Before the merger, the NMa had the widest and most aggressive competences of the three supervisors. Some commentators have argued most competences of the ACM have been set at the NMa level, without a good justification or balancing with regard to the overall structure of competences within the ACM.20 This could prove harmful to undertakings under investigation, as the extension of ACM competences was not accompanied by an extension of rights for the defendant undertaking.

One of the most debated competences concerns the new competences relating to information. The ACM is obliged by law to publish grave offenses under competition law;21 it no longer has the ability to weigh the decision to publish according to the interests of the parties concerned. Also, the ability of the ACM to accumulate information has been broadened, as undertakings have to pay a hefty fine when they do not provide the information the ACM has requested.22 The accumulated information is free to circulate within the ACM: information obtained in a market regulation case can be used later in a consumer protection case.

**Competition law and its goal in the Netherlands**

The Netherlands are sometimes described as a "tax paradise", but before 1998, "cartel paradise" would also fit.24 The act governing competition law, the 'Wet op de Economische Mededinging'25 (WEM) (Act on Economic Competition), was based on a misuse system. This meant that cartels were allowed, as long as

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23 Volkskrant 11 June 2014 ‘Voor de VS is Nederland het favoriete belastingparadijs’,  
25 Wet Economische Mededinging, Stb. 1958, 413.
they were not against the general interest. Cartels could be declared compulsory for a certain sector, or declared non-binding when against the public interest. The law was centered on the concept that cooperation in the business sector was a good thing, but that excesses needed to be controlled. However, which cartels were deemed ‘bad’ was completely up to the Minister of Economics, just as enforcement. Proper enforcement was lacking and the fines were low. Allowed cartels could be registered, but un-registered cartels were just as binding in private law.

The Netherlands eventually bent under the pressure of the much stricter European competition law, and decided to adopt a stricter competition act of its own. Another reason for this decision was the globalization of economic markets, which led to the concern that Dutch firms would not be able to face aggressive international competition without proper competition in the domestic market. The government also realized that the current misuse system did not work properly. The new act, the ‘Mededingingswet’ (Competition Act, Mw) replaced the WEM in 1997. The act concerned both procedural and material law. The four main changes this act brought are the following. A prohibition system was introduced, which set a prohibition on cartels and a prohibition on the abuse of dominance in the market. The prohibited conduct could be justified under a number of strict conditions. Regulation on mergers was introduced in the Netherlands. The procedural law relating to competition was embedded in Dutch administrative law. Moreover, the act instituted the NMa, the Dutch competition authority.

**Relation of Competition Act with European law**

European law naturally had a great influence on the Mededingingswet (Mw). It was one of the main reasons for change, and it had been the blueprint for the national competition law of many other Member States. The important provisions of articles 6 and 34 Mw are almost exact copies of the Treaty provisions 101 and 102 TFEU. In some cases the Competition Act refers to European law, Treaty provisions or secondary law, for example in the articles 1, 7 and 14 Mw. Also jurisprudence of the Court
of Justice is codified in the act, for instance in article 1(f) Mw,\textsuperscript{35} where the definition of abuse of dominance is written as defined by the Court in the case of Hoffmann/LaRoche.\textsuperscript{36} Next to these more obvious links, EU law is a great source of inspiration for courts in interpreting the competition law provisions in national cases.

The Dutch legislator did not simply copy all European competition legislation into a Dutch law; there are a number of differences. The \textit{de minimis} provisions are not only based on market share but also on turnover, and have been adapted to the national market standards. There is an, though unused, possibility to fine a natural person. The Minister of Economics can, based on grounds of general interest, allow a merger when the ACM initially did not. Lastly, the ACM has some internal regulation which differs from the Commission. Overall, the main differences can be found in procedural law: unlike in European law, competition law does not have a special kind of procedure in Dutch law, it falls within the ambit of administrative law. By extension, the principles and legal protection provisions of the Algemene Wet Bestuursrecht (General Administrative Act, Awb) apply.

**Goals of competition law (enforcement) in Dutch law**

Now that the general background of Dutch competition law has been sketched, one may wonder which goals of competition law the Dutch legislator has set. Perhaps strangely, this is not mentioned in the act, and barely mentioned in the parliamentary discussions leading up to the adoption of the act.\textsuperscript{37} However, this may not be so peculiar. The Competition Act was drafted in order to catch up with European competition law and the competition acts in other Member States. In other words, the act is of a more practical nature.

Academics have shown that the goal of competition law enforcement does not need to be the same as the goal of competition law in general.\textsuperscript{38} The Competition Act is again silent with regard to a goal for competition law enforcement. It only assigns the task of competition supervision to the ACM in article 3 Mw. The acts founding the ACM however, do have a very interesting provision on the goal which the ACM

\textsuperscript{35}P.J. Slot & Ch.R.A. Swaak ‘De Nederlandse Mededingingswet in perspectief’, Deventer: Kluwer 2000, p. 29-30

\textsuperscript{36}Article 1(i) Mw states that dominance on the market means the firm in question being able to act independently from other market players to a substantial extent. This is taken from the case of CJEU C-85/76, 13 February 1979, RC 1979 00461 (Hoffmann La Roche)

\textsuperscript{37}In the parliamentary discussions the Minister states that the proposal is not aimed at a system of completely unbridled competition, rather, it is aimed at promoting and safeguarding ‘workable competition’. This is the only reference to an aim in the parliamentary discussions. Parliamentary documents II, 1996-1997, 24707, nr. 12, p. 10

should aim for, found in article 2(5) of the Instituting Act. This ‘description of the goal’\(^{39}\) as it is called in the parliamentary discussions,\(^{40}\) does not in any way broaden or extend the competences of the ACM, the legislator assures up to three times.\(^{41}\) It should, rather, be a touchstone for all ACM activities. The different laws set the ACM competences, this provision sets the goal for which these competences are exerted. The initial text reads as follows:

“De werkzaamheden van de Autoriteit Consument en Markt hebben tot doel het bevorderen van goed functionerende markten, van ordelijke en transparante marktprocessen en van een zorgvuldige behandeling van consumenten.” (“The activities of the ACM aim to promote well-functioning markets, orderly and transparent market processes and a proper treatment of consumers.”)

It may seem striking that the goal of the new ACM, which is the new national competition authority in the Netherlands, does not mention competition. This struck the Member of Parliament Verhoeven\(^{42}\) as odd as well, and he proposed to add the following sentence to the ‘goal description’:

“Zij bewaakt, bevordert en beschermt daartoe een effectieve concurrentie en een gelijk speelveld op markten en neemt belemmeringen daarvoor weg.”\(^{43}\) (“Tot that end, she guards, promotes and protects workable competition and a level playing field in the market and removes obstacles in the way of this goal.”)

This amendment was accepted by the Parliament and added to the Instituting Act.

On the 15\(^{th}\) of September 2014 I had the opportunity to interview MP K. Verhoeven on his reasons for this amendment. He explained that even though this amendment is a rather symbolic one, it makes clear that competition should indeed be a goal of competition law. The other goals of the ACM simply cannot be attained without taking competition into account as well. The wording ‘workable competition’ is a reference to the European competition goal.\(^{44}\) In the interview MP K. Verhoeven pointed out that the priorities of the new ACM were a little too focused on the consumer, referring to cases where cutting the marginal costs for the consumer may benefit them in the short term. This may prove to be harmful to competition in the long run, when the number of players on the market are reduced as a result of such a policy.

\(^{39}\) In Dutch: doelomschrijving
\(^{40}\) Parliamentary documents II, 2012-2013, 33 622, nr. 3, p. 42
\(^{41}\) Parliamentary documents II, 2012-2013, 33 622, nr. 3, p. 42
\(^{42}\) MP of the Democraten ’66 Party.
\(^{43}\) Parliamentary documents II, 2012-2013, 33 622, nr. 12, p. 1
\(^{44}\) MP Verhoeven explains: ‘Deze zin [het amendement] is gebaseerd op het missie statement van het Europese DG Competition: het beschermen van concurrentie en een competitief klimaat.’ (Translation: The amendment is based on the mission statement of the European DG Competition: protecting competition and a competitive climate.’) Parliamentary documents II, 2012-2013, 33 622, nr. 12, p. 1
It remains unclear to what extent the “goal description” and the amendment will influence ACM policy in practice.

1.2 The Legal Framework

This thesis is about a goal which the ACM has set: the goal consumer welfare.

ACM Strategy document

This goal is based on the Strategy document of the ACM,\textsuperscript{45} published in September 2013. In this document are many references to consumers, and a number of key statements on the goal of the authority:

“De ACM bevordert de concurrentie en reguleert markten zodanig dat de uitkomsten voor de consument optimaal zijn.”\textsuperscript{46} “Daarmee wordt voortgebouwd op het werk van de drie voorgaande organisaties, die ook gericht waren op het verhogen van de consumentenwelvaart.”\textsuperscript{47} “De bevoegdheden van de ACM stellen ons in staat om de gedragingen die schadelijk zijn voor de consumentenwelvaart te voorkomen of aan te pakken.”\textsuperscript{48}

The Strategy document does not have a clear legal status. It is not the product of a legislative process, nor is it a guideline document, like the Fine Guidelines or Clemency Guidelines.\textsuperscript{49} The reach of this document is limited to the ACM, and there are no clear obligations or rights framed in the document. Therefore, the strategy document has the legal status of a soft law document: no legal binding force. This document has to comply with higher legal norms and legislation.

Legal boundaries in Dutch & European law

This thesis will answer the question whether legal boundaries have been crossed by the ACM when making consumer welfare its policy goal. This paragraph provides an overview of these legal boundaries. This is limited to Dutch and European law, as well as limited to competition law: I will not address market regulation or consumer protection law. From the applicable laws I have selected the provisions which might influence or prescribe the goal of competition law for national authorities.

1.2.1 Dutch law

\textsuperscript{45} ACM Strategie, September 2013
\textsuperscript{46} Translation: “The ACM promotes competition and regulates markets in such a manner that the end results are optimal for consumers.” ACM Strategie, September 2013, p. 2
\textsuperscript{47} Translation: “This builds on the work of the three prior organisations, which were aimed at increasing consumer welfare as well.” ACM Strategie, September 2013, p. 4
\textsuperscript{48} Translation: “The competences of the ACM enable us to tackle or prevent actions which harm consumer welfare.” ACM Strategie, September 2013, p. 4
\textsuperscript{49} ACM Boetebeleidsregel & Beleidsregel Clementie, August 2014
Dutch law is applicable, as the ACM is an authority under Dutch law and its competences are governed by Dutch law.

The fundamental act in Dutch competition law is the Competition Act (Mw). The Competition Act does not prescribe a goal for the ACM but does state its task. According to article 2, the ACM is responsible for the supervision on compliance with regard to the provisions of the Competition Act. The main provisions in the Competition Act are similar to the tasks of the Commission under the articles 101, 102 TFEU and the Merger Regulation. In other words, the Competition Act states that the task of the ACM is to tackle anticompetitive agreements, cases of abuse of dominance and potential mergers harming competition. A policy goal should not interfere with or distract from this core task.

As mentioned above, the Act Instituting the ACM does provide for a goal, or rather, a ‘goal description’ as the parliamentary documents put it. The Competition Act offers a task description, this act provides for a goal description. This does not broaden ACM competences, but functions as a beacon for all ACM actions. It reads as follows:

“De werkzaamheden van de Autoriteit Consument en Markt hebben tot doel het bevorderen van goed functionerende markten, van ordelijke en transparante marktprocessen en van een zorgvuldige behandeling van consumenten. Zij bewaakt, bevordert en beschermt daartoe een effectieve concurrentie en een gelijk speelveld op markten en neemt belemmeringen daarvoor weg.”

This goal description does not mention consumer welfare. Does the policy goal of consumer welfare interfere with this goal?

The Algemene Wet Bestuursrecht (General Act on Administrative Law; Awb) applies, as the ACM is an entity falling under the ambit of the article 1:1 Awb. Some general principles in the Awb may influence the goal of the ACM. Article 3:3 Awb provides:

“Het bestuursorgaan gebruikt de bevoegdheid tot het nemen van een besluit niet voor een ander doel dan waarvoor die bevoegdheid is verleend.”

50 In Dutch: “De Autoriteit Consument en Markt is belast met het toezicht op de naleving van het bij of krachtens deze wet bepaalde.” Article 2 Competition Act
51 The main provisions of the Competition Act are: article 6 (agreements & collusions), article 24 (abuse of dominance) and the articles 29-49 (mergers).
52 Instellingswet ACM
53 Discussed in more detail in paragraph 1.2
56 Article 2 (5) of the Act instituting the ACM. Translation: The activities of the ACM aim to promote well-functioning markets, orderly and transparent market processes and a proper treatment of consumers. To that end, she guards, promotes and protects workable competition and a level playing field in the market and removes obstacles in the way of this goal.
57 This article determines which organisations are so-called ‘bestuursorganen’: administrative bodies.
In other words, this article forbids the ACM to take decisions based on the Competition Act which do not aim at tackling anti-competitive agreements, cases of abuse of dominance and potential mergers harming competition. Based on article 2 Mw, this is why these competences have been given. The ACM cannot base a decision solely on the behaviour that is harming consumer welfare; there must also be an anti-competitive agreement, an abuse of dominance or a merger restricting competition.

The final piece of Dutch law to take into account are guidelines by the Ministry of Economics. The Minister of Economics has the competence to draft guidelines for the ACM, as long as they do not discuss individual cases. Among other things, the Minister has chosen to provide some guidance on anti-competitive agreements promoting sustainability. In this guideline, he states that a long-term interpretation of consumer welfare should be adopted: not only the benefits to today’s consumers matter, also benefits to future consumers. As a consequence, the interpretation of consumer welfare by the ACM cannot be solely based on the immediate and short term effects of anti-competitive agreements promoting sustainability.

1.2.2 European law

Next I will discuss the legal restrictions in European law with regard to the freedom of National Competition Authorities (NCA’s) to draft their own policy goal. I will investigate the general influence of EU law on national legislation and policy before looking into the specific provisions of EU competition law.

Preliminary remarks on supremacy and direct effect

In general, European law can influence Member States' competition policy in two ways: supremacy and direct effect. Supremacy encompasses the idea that European law is supreme to national law. In other words, no national law may conflict with European law, and if so, European law overrules the national rule. This concept has its roots in the case of Costa ENEL, but also the Dutch constitution features supremacy of international law in the article 94 Grondwet (Constitution). Basically, the supremacy...
doctrine can exclude conflicting national rules, but it cannot be relied on by individuals before a national court.

Before a European law provision can be invoked by an individual in a national court, it has to have direct effect. This means the provision creates direct rights or duties with respect to EU citizens. The doctrine was founded by the case of Van Gend en Loos, but subsequent jurisprudence has modified the doctrine over time. The conditions EU law has to meet to have direct effect are the following. The provision in question needs to be clear, precise and unconditional. When a provision meets these, it has substitutionary effect, meaning that it replaces the national law on the subject.

Whether EU competition law is applicable in practice, depends on the distinction between cases having effect on trade between member states and purely national cases. To have an effect on trade, there is no need to cross borders: it is sufficient when there is a foreseeable influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Even though European law applies to these cases, national law of the Member State where the case is investigated applies as well. However, the scope of protection of the national competition law needs to be the same as the scope of protection in European law. As the articles 101, 102 TFEU and the Merger Regulation are governed by the principles of supremacy and direct effect, their national counterparts are overridden by European law.

The Member States have no autonomous legislative competence in cases affecting interstate trade, because according to article 3 TFEU the European Union has exclusive competence on competition rules necessary for the functioning of the internal market. The articles 103 and 105 TFEU show how this legislative competence of the Union has been shaped. Member States are free to draft their own national policy, but must abide by European law, as the principles of supremacy and direct effect still apply.

**Treaty provisions**

The following European law provisions I have selected because they influence or affect the setting of a goal in national competition law. They either concern goals or principles that EU competition law has set, or the competences of the Commission versus the national courts and authorities.

The general articles 3 TEU and 8 to 13 TFEU do not mention competition as an objective of European law. This used to be different in the previous Treaties, but as a result of efforts by the then French

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65 CJEU 5 February 1963, C-26/62, **RC 00001** (Van Gend en Loos)

66 Et al. the case law of CJEU 4 December 1974, C-41-74, **RC 1974 01337** (Van Duyn), CJEU 21 June 1974, C-2/74, **RC 1974 00631** (Reyners), CJEU 8 April 1976, C-43/75, **RC 1976 00455**


68 CJEU 30 June 1966, C-56/65, **ECR 235,249** (Société Technique Minière)

69 Article 3(1) of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, **OJ L1/1**
president Sarkozy, competition as an EU objective was left out of the current Treaties.\textsuperscript{70} It is however mentioned as an objective in the Protocol on the Internal Market.\textsuperscript{71} Does this mean competition is reduced to a means of achieving the single market?\textsuperscript{72}

Another applicable article is article 12 TFEU. This states that consumer protection requirements are taken into account in other EU policies and activities. Does this lead to a general focus on consumers in competition law?

Article 101 TFEU, and by extension article 102 TFEU, display a careful balancing of goals: sub 1 is concerned with protection of competition as such, but a restriction may be justified under subsection 3 when there are sufficient efficiencies (economic efficiency), as long as a fair share goes to consumers (consumer welfare). However, competition may not be eliminated altogether (protection of competition). The Merger Regulation (art 2.1.b)\textsuperscript{73} takes the “the development of technical and economic progress” [economic efficiency] into account, “provided that it is to consumers’ advantage [consumer welfare].”

As the European Union has exclusive competence on a significant part of competition law cases, it makes sense for the Union to have a detailed competition law policy. This Union policy influences Member States via the duty of sincere cooperation of article 4(3) TEU. This requires Member States to assist the Union, it requires them to fulfill their obligations as required by Treaty provisions and decisions by European institutions. Also, the Member States must “refrain from any measure which could jeopardize the attainment of Union objectives.”\textsuperscript{74} As the achievement of a market with free competition is a Union goal,\textsuperscript{75} Member States cannot take measures which fly in the face of free competition in the Union.

**Regulation 1/03**

All in all, the former legal restrictions are strict, but they still leave a lot of leeway to the NCA's. Regulation 1/03\textsuperscript{76} changed this significantly.

The Commission Regulation 1/03 led to the decentralisation of European competition law, allowing NCA's to apply the current article 101(3) TFEU.\textsuperscript{77} But from then on, the NCA's were also bound to stricter rules to ensure the consistency of the enforcement of European competition law throughout the Union:


\textsuperscript{71} Protocol No. 27 on the internal market and competition


\textsuperscript{74} Article 4(3) of the Treaty on the European Union

\textsuperscript{75} Protocol No. 27 on the internal market and competition

\textsuperscript{76} Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
First, the NCA, when investigating cases under national law, must apply the articles 101 and 102 TFEU simultaneously to these cases when these may affect interstate trade.\textsuperscript{78} Note that the cases possibly affecting interstate trade belong to a broader category than cross-border cases. For instance, this could also involve a purely national cartel, which precludes foreign companies from entering the national market. Secondly, these cases cannot be handled stricter under national competition law than they would have been under European competition law.\textsuperscript{79} This is a consequence of the supremacy of EU law: when 101 and 102 TFEU apply and the case would not be prohibited by these articles, national law cannot prohibit that behaviour nonetheless. However, such cases may be subject to stricter national laws in other fields, such as consumer protection law.\textsuperscript{80} Third, the Commission can take over investigations from national authorities, when the latter applies 101 and 102 TFEU.\textsuperscript{81} Fourth, article 16 of the regulation shows a restriction on both courts and NCA’s: they cannot rule differently on an agreement when the Commission has already ruled on the same subject. Pending Commission investigations, courts may pause proceedings until the Commission has decided on a matter.\textsuperscript{82}

**Guidelines**

Monti describes another method of convergence: Commission notices and guidelines.\textsuperscript{83} Unsurprisingly, the use of these soft law instruments soared after Regulation 1/03 came into force.\textsuperscript{84} The decentralization of competition law was accompanied by detailed instructions on the assessment of cases for the Commission herself, but more importantly, for the NCA’s.

These guidelines also contain descriptions of the goal of competition law according to the Commission: “The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”\textsuperscript{85} “Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits [of competition]

\textsuperscript{77} Article 5 of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{78} Article 3(1) of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{79} Article 3(2) of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{80} Article 3(3) of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{81} Article 11(6) of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{82} Article 16 of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
by significantly increasing the market power of firms.”86 “The objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers.”87

Do these guidelines not effectively remove the discretion of NCA’s to set their own goal? The NCA’s had no say on the content of these documents, can they still be legally bound to them?

**Expedia case**

This last question was the subject of the Expedia case of 2011.88 The French NCA fined two undertakings for having an illegal agreement, even though this agreement did not meet the thresholds in the De Minimis Notice of the Commission.89 Was the French NCA allowed to fine the companies anyway?90 The Court ruled that any illegal agreement had to restrict competition, but that the quantification of this rule by the Commission was of a non-binding nature.91 The notice could be helpful to NCA’s, but they were completely free to decide differently from the notice.92 Concluding, any Commission Notice “is not binding in relation to the Member States.”93

Consequently, the NCA’s are not bound by the objectives of competition law written in the guidelines, and are free to set other goals within the limits of European legislation.

Overall, the European influence on national competition law is undeniable. By the way of cases ‘affecting interstate trade’, a notion which is interpreted broadly, the European Union influences national competition enforcement to a large extent. Zooming in on the goals of competition law, European law does not seem very clear. Only the guidelines had a clear description of goals, but these were declared non-binding on the NCA’s. Chapter three will discuss whether the goal of the Dutch ACM stays within the boundaries of Dutch and EU legislation on competition.

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86 European Commission ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ C 031 , 05/02/2004 par. 8
87 European Commission ‘Guidelines on Vertical Restraints’ 2010, OJ C 130/01 par. 7
88 CJEU 13 December 2012, C-226/11, ECR 2012 -00000 (Expedia)
89 In European law the agreement has to affect competition negatively in order for it to be illegal. When the restricting effect on competition is barely there, for instance agreements among very small companies or agreements on a very small part of the business chain, the agreement is perfectly legal. The Commission has tried in its De Minimis Notice to quantify when competition was restricted and when this was not the case, using thresholds: European Commission ‘Commission Communication of the 30th of August 2014 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union’ 2014 OJ C291 (De Minimis Notice) p. 1
90 CJEU 13 December 2012, C-226/11, ECR 2012 -00000 (Expedia) par. 13
91 CJEU 13 December 2012, C-226/11, ECR 2012 -00000 (Expedia) par. 24-28
92 CJEU 13 December 2012, C-226/11, ECR 2012 -00000 (Expedia) par. 31
93 CJEU 13 December 2012, C-226/11, ECR 2012 -00000 (Expedia) par. 29
CHAPTER TWO – DISCUSSIONS ON CONSUMER WELFARE

This academic discussion on consumer welfare is part of many years of academic thinking on the goals of competition law. Consumer welfare is certainly not the only possible goal of competition law. Other important goals are economic freedom, efficiency and market integration. The discussion on the goal of competition law has been dominated mainly by economics and was started in the United States.

The fundamental idea behind competition law is that competition is beneficial for the solving of market failures. This is based on the belief that in the free market, a maximum of wealth can be generated from a minimum of resources, which benefits all people, both rich and poor, as everyone will be able to get more value for money. The free market, ruled by competition, is the starting point. However, there may be market failures, such as information asymmetry or high transaction costs, causing the parties involved not to get the most value for their money. Competition law is a means of solving these market failures. This chapter will focus on the academic background of the concept of consumer welfare as a goal of competition law.

Consumer welfare does not have one single interpretation, on the contrary, there are many different ways of looking at this concept. Considering the widespread use of this concept, especially in competition law, it is fruitful to analyze the main interpretations of this concept further. I will do so from the viewpoint of three paradigms: economics, the American tradition and the European tradition.

2.1 Consumer welfare as consumer surplus? – The debate in economics

The scope of this paragraph is not limited to consumer welfare interpretations. It is important that the reader gets a proper understanding of the basics of economics, and how economics is influencing consumer welfare. Then some general information on the concept of consumer surplus will be given. The question of the measurability of consumer surplus is answered. Lastly, I will investigate whether consumer surplus is a desirable goal of competition law according to economists.

2.1.1 Economic foundations

The fundamental idea of economics is that waste should be avoided. This means waste in a general sense: waste is opportunities and possibilities not materializing. This leads to both suppliers and buyers

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being frustrated: when the price of a particular good is too low, buyers get frustrated as they cannot obtain as much of the product as they want. When the price is too high, suppliers are frustrated because they cannot sell enough of their product. Economists call wasted opportunities 'having cash on the table' (instead of cash being in the pockets).

The market automatically hinges towards arriving at a market equilibrium (in other words: a balanced market). A market equilibrium is a stage in the market in which the 'forces of the market' are balanced. No market player has the intention of changing his behaviour, and as a consequence the production and prices in the market in an equilibrium will not change. This is a consequence of the incentives of buyers and sellers to sell resp. buy the products they wish to: when the market is out of equilibrium, there is an excess of demand or an excess of supply. In an equilibrium, there is no excess of demand or supply, no cash on the table, no waste.

Arriving at a market equilibrium leads to the maximization of economic surplus in the market. Economic surplus is the benefit that each party gets out of a certain transaction. For example, a buyer needs a pair of shoes, and he is willing to spend € 75,- on them. This is his reservation price: the maximum price for which he is willing to buy the shoes. But the shoes only cost € 60,-. The economic surplus of the buyer is €15. The seller was willing to sell them at a price of € 50. This is his reservation price, the minimum amount for which he is willing to sell the shoes. By selling them for € 60, his economic surplus equals € 10. Total economic surplus amounts to € 25. At a market equilibrium, the economic surplus is maximized, as all parties involved get the most economic surplus as a result of their transactions.

A market equilibrium is efficient as well. In other words, 'if price and quantity take anything other than their equilibrium values, a transaction that will make at least some people better off without harming others can always be found.' This concept of efficiency stems from the economist Pareto, and is therefore also known as Pareto efficiency. In a Pareto efficient society, all possible ways of achieving extra economic surplus without harming other market players, have taken place. Pareto efficiency is therefore quite a 'cheap and easy' way of improving the welfare of individuals and thus society as a whole: some are better off while nobody is harmed.

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103 The conditions of Pareto efficiency can be found in: Y.K. Ng, Welfare economics. Towards a more complete analysis, London: Palgrave Macmillan 2004, pp. 31 and further.
This ‘market equilibrium’ structure depends on several conditions, the main one being: all benefits of the action must attribute to the buyer, and all the costs of production must attribute to the seller. When this is not the case, there may be free riding problems, where the rational choice for the individual differs from what would be the rational choice for society as a whole.\textsuperscript{104}

There are different kinds of efficiency: economic, static, dynamic, productive and allocative efficiency. Economic efficiency is how well resources are allocated to maximize output of goods and services. Static efficiency is how efficient a market is at a certain point in time, where dynamic efficiency is the efficiency of a market over a longer period of time. Productive efficiency is reached when all resources are used as best as technically possible, allocative efficiency is reached when all resources are used as best as technically possible to produce what society demands.

What is the economic foundation of competition law? When firms have too much power, or have agreements among each other, they will set the price of the product too high, or the quantity of the product too low. This causes frustration on the buyers’ side, as the price is above their reservation price or they cannot buy the desired amount of the product. This leads to cash being on the table (waste). A competition authority fights this kind of behaviour by firms, aiming for enhanced competition. In perfectly competitive markets, individual firms have no influence on the product which they sell.\textsuperscript{105}

\textbf{2.1.2 Consumer welfare or consumer surplus?}

Now let us turn to the concept of \textit{consumer welfare}. What is the economic background of consumer welfare?

In economics, the concept of “consumer welfare” has no independent meaning. Consumer welfare is understood as “consumer surplus”. The remainder of the paragraph will concern itself with the concept of “consumer surplus”. This does not make the analysis redundant: consumer surplus still greatly influences the concept of consumer welfare. Also, some narrow interpretations of consumer welfare actually mean consumer surplus when referring to consumer welfare.

Consumer surplus is the economic surplus of the buyer. The influential economist Marshall defined it as follows: “the excess of the price which he [the buyer] would be willing to pay rather than go without the thing, over that which he actually does pay.”\textsuperscript{106}

Again in other words: the difference between the reservation price of the buyer and the real price of the product.

The shaded area shows the consumer surplus. Line S is the supply, Line D the demand line. Where the lines intersect are the optimal price and quantity of the product. All consumers that get the product for the optimal price, but would actually have been willing to pay more for the product than having to go without it, are in the shaded area.

The purpose of consumer surplus is to measure the change in welfare for the buyer before and after the purchase of the product.

**Measuring consumer surplus**

But how does one measure consumer surplus? In order to know whether there is a surplus, and to know the amount of surplus, consumer preferences must be known. While it is relatively easy to measure the preferences of a single consumer with regard to one single product, measuring the preferences of a large group of consumers with regard to a wide variety of products may prove to be difficult. Also, the consumer is presumed to behave rationally in its cost-benefit analyses of whether to purchase something or not. In reality, consumers are irrational in their purchasing decisions, behavioural economics has shown.

Below, I will discuss the three main ways of measuring consumer surplus. First, there is the Marshallian

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107 This reference diagram is from the following website: http://www.bized.co.uk/reference/diagrams/Consumer-Surplus


method. This measures the consumer surplus using the amount that the consumer is willing to pay for a certain product in an all-or-nothing offer. So either the product is bought at price $P$, or the consumer does not get the product at all.\footnote{Y.K. Ng, Welfare economics. Towards a more complete analysis, London: Palgrave Macmillan 2004, p. 67}

The following two methods measure consumer surplus in the case of a price change. The compensating variation measures the compensation that can be taken from an individual when the price of a product drops, to leave the individual at his old utility level:\footnote{Y.K. Ng, Welfare economics. Towards a more complete analysis, London: Palgrave Macmillan 2004, p. 67} When the price of a product drops, the utility level of the individual (the extent to which the individual can satisfy his wants) rises, as he has more money to spend on other things. The money which can be taken from him, to set him back at his old utility level (before the price drop), is the compensating variation. The equivalent variation measures the compensation that must be given to an individual in the case of a hypothetical price drop.\footnote{Y.K. Ng, Welfare economics. Towards a more complete analysis, London: Palgrave Macmillan 2004, p. 67} How would a drop in price $X$ of a product affect the individuals' utility? How much money should be given to the individual in order to set him at the new utility level (as if the price drop had actually happened)?

Which measure is preferable, depends on the available information and the specifics of the case.\footnote{For more detail: Y.K. Ng, Welfare economics. Towards a more complete analysis, London: Palgrave Macmillan 2004, p. 85 - 86 Ng} There are however many limitations on the ways of measuring consumer surplus.\footnote{J.L. Wrigglesworth & H.S. Gravelle, The three consumer surpluses as individual welfare measures, Scottish Journal of Political Economy 1987, vol. 34/3} Wriglesworth names one of these, namely that even though the measures can establish the direction of welfare change, they cannot establish the magnitude of the welfare change. In other words, whether the welfare change rises or lowers surplus, but not the extent of the change.\footnote{Dr. I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, CLES Working Paper Series 3/2013, p. 9} Other problems are the calculation price changes in a variety of products and the effect of changes on large groups of consumers.

Note that consumer surplus is limited to the welfare change of consumers (buyers) in the relevant market, and does not take into account third parties.\footnote{Dr. I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, CLES Working Paper Series 3/2013, p. 9}

2.1.3 According to economists, what should be the goal of competition law?

Now that the economic background to the consumer welfare discussion has been sketched, does economics provide for answers on the best welfare standard to use? In principle, economics does not. The choice for a certain welfare standard is not solely based on empirical arguments, but also contains
normative points of view. As economics does not provide answers on normative issues, economists are unable to solve the welfare standard discussion. But it does provide some arguments for and against some welfare standards, based on empirical research and economic models.

**Total welfare**

Overall, economists prefer a total welfare standard. Motta lists several arguments: consumers often own firms, directly or through pension funds, so a loss in profit directly affects their welfare. Maximising consumer surplus to the extreme would set prices at marginal costs, driving firms from the market and depriving them of their incentive to innovate. Tax policies are a more efficient way of welfare distribution in society, according to Motta.

This position of economists is understandable, as a total welfare standard is neutral towards the distribution of welfare, which requires some normative assessment. In other words, total welfare is only about making the pie larger, which is done by achieving a market equilibrium, which is (Pareto) efficient. Consumer welfare, or consumer surplus, has a clear preference for welfare distribution favouring consumers.

**Different view: consumer bias or consumer surplus**

Even though the number of economists preferring total welfare is large, some economists argue that the government policy on competition should be biased in favour of consumers. This may seem counterintuitive, but one should bear in mind that the government is just one of the players in the market. Businesses and consumers react to government policy. Companies anticipate the National Competition Authorities' behaviour, and, having more information, could use perks to influence the NCA to allow certain market behaviour. One could view the relationship of the NCA and the businesses in a market as negotiating parties: one side provides information, the other decides on the matter based on this

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122 When setting a welfare standard - distributive issues are unavoidable. Distribution is the division of wealth within a country. Does one want to leave this to the forces of the market? Does one want to protect minorities or vulnerable groups in society? Does one want to promote certain ways of life, such as a 'greener' lifestyle? All of these choices are normative choices.
information.\textsuperscript{124} When the NCA has a total welfare perspective, which calls for a complex balancing of all interests, it is relatively easy for firms to persuade the NCA to be mild towards the market behaviour under investigation. The NCA has less information, and is less able to oversee all the possible alternatives to the market behaviour in question.\textsuperscript{125} A consumer bias, or consumer surplus as a goal, would prevent this strategic behaviour\textsuperscript{126} by firms, as they know the NCA cannot be persuaded by efficiency justifications alone.

Moreover, the position of consumers in competition law is weak. Consumers do not have the necessary information to address potential anti-competitive behaviour harming consumers. And even if they had the information, individual consumers lack the incentive to do so.\textsuperscript{127} Lastly, consumers have little lobbying opportunities, whereas the businesses do.\textsuperscript{128} By creating a favourable bias towards consumers in competition law enforcement, these weaknesses are compensated.

A consumer aim or bias could even be beneficial for the total welfare of society, as businesses choosing alternative market behaviour for reasons of consumer surplus, can mitigate the effects of Type I errors (over-enforcement) by the NCA.\textsuperscript{129} Type II errors (under-enforcement) cannot be mitigated.

To sum it up: economics defines consumer welfare as 'consumer surplus': the economic surplus of buyers. This is measurable in neatly outlined cases, but in broader cases with a large group of consumers and a broad range of products, measuring consumer surplus is complicated. Economics is not a normative science and it does not have the ultimate answer to the question which welfare standard is the best. It does prefer total welfare, as this is closest to aiming for market equilibrium. Some economists argue that the government, for reasons of strategic delegation and compensation for the weak position of consumers, should adopt a consumer bias or consumer surplus goal in competition law enforcement.

\section*{2.2: Consumer welfare as total welfare? - Consumer welfare debate in the United States of America}

\textsuperscript{124} J. Farrell & M.L. Katz, 'The economics of welfare standards in antitrust', \textit{Competition Policy Center} 2006, p. 28


\textsuperscript{126} J. Farrell & M.L. Katz, 'The economics of welfare standards in antitrust', \textit{Competition Policy Center} 2006, p. 15-16

\textsuperscript{127} - Strategic behaviour by firms is one of the main ideas of the Post-Chicago School, see above para. 1.1

\textsuperscript{128} This is the tragedy of the commons - a small group of people losing a lot of money versus a large group of people losing a little bit of money: who is more likely to act and do something about this? The first group. The large group has no incentive to do so, as each individual loses only a little bit.


The debate on consumer welfare is far from novel. In United States of America the debate on the topic began in the 1960’s and it has kept going to this day. This paragraph will discuss this debate and address its context, to research the ’American interpretation of consumer welfare’.

From now on when referring to American competition law I will use ‘antitrust law’, as this is the common term for this field of law in the United States. The historical context and fairly unique circumstances of the United States will first be addressed, then I will provide an overview on how consumer welfare rose to its current status as the goal of antitrust law and an overview of the ongoing debate on the topic.

**2.2.1 Historical context**

The Sherman Act of 1890 was a shot in the dark: there were no predecessors to this act in any country, nor was there academic literature on the topic of antitrust law. The reason for Congress to pass this act was the behaviour of trusts, conglomerates of companies, in some parts of the country. The main articles of the Sherman Act are sections 1 and 2:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. (…)”

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony (…)”

Their European counterparts are the articles 101 and 102 TFEU. The text of the Sherman Act is quite sparse. No guidance is given as to how to interpret a ‘restraint of trade’ or ‘monopolization’. As the United States has a common law tradition, the courts were and still are very influential as to the interpretation of acts. The Sherman Act has even been described as "being little more than a linguistic anchor for case law decisions".

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131 Hence the term ‘antitrust law’.
132 15 U.S. Code § 1 (Sherman Act)
133 15 U.S. Code § 2 (Sherman Act)
Over time, antitrust enforcement has developed into two pillars: public and private enforcement. Where in the EU private enforcement of competition law is rare, in the United States private enforcement is alive and kicking. There is also public enforcement, divided among the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

Courts enforced antitrust law, and in doing so, they interpreted the antitrust acts, developing antitrust law. All this led to a division in antitrust law: on the one hand, very abstract legal texts, on the other, very detailed case law. One of the main changes the courts made to the legal text, was addressing the scope of section 1 of the Act. To declare all restraints of trade illegal, as section 1 of the Sherman Act seems to do, would be excessive: the courts declared that only unreasonable restraints of trade were illegal. Some actions however, did not need to be assessed under this rule of reason, but were per se illegal. This led to a more and more complex and intricate system of antitrust case law, which did not benefit legal certainty for companies.

2.2.2 Birth and rise of ‘consumer welfare’ as a goal of competition law

In the 1970’s, outside of mainstream thinking, a new antitrust paradigm won popularity so fast that some call it the ‘law and economics revolution.’ This paradigm, also called the Chicago School, revolved around the idea that the foundation of antitrust should be economics, more specific, neo-classical economics. Neo-classical economics is based on price theory, as described in paragraph 2.1, which focuses on consumer preferences, market equilibrium and efficiency. The Chicago School proclaimed that the free market was much stronger than believed in the past. It has a self-correcting ability to overcome restraints in trade, and thus only the worst cases of anticompetitive behaviour needed government intervention. It also claimed the variety of goals of antitrust law based on case law should be replaced by one aim: to improve economic efficiency and increase consumer welfare.

Robert Bork

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136 In spite of Commission efforts, for instance the European Directive on Antitrust Damages Actions, November 2014, IP/14/455.
137 In fact, most of the enforcement is done by private parties, according to the FTC website: http://www.ftc.gov/tips-advice/competition-guidance/guides-antitrust-laws/enforcers
138 Later on in this paragraph I will discuss these institutions in more detail.
Robert Bork, a lawyer and a Chicago school proponent, introduced consumer welfare as the goal of antitrust law. One of his two main contributions was his article on the 'Legislative Intent and the Policy of the Sherman Act',\(^{143}\) which discussed the legislative intent of Congress during the making of the Sherman Act. According to him, Congress intended the goal of antitrust law to be consumer welfare, though it never literally said so. The crown of his work was the book 'Antitrust Paradox', which was published in 1978.\(^{144}\) In this work he claimed that all previously court-constructed goals of antitrust law needed to be replaced by one goal: consumer welfare.

But what did consumer welfare mean, according to Bork? There has been a lot of confusion on the topic, both in courts and in academia.\(^ {145}\)

In Bork’s mind, allocative efficiency is linked directly to consumer welfare. In other words, when all resources are used as best technically possible to produce what society demands, consumer welfare benefits. Efficiency necessarily improves consumer welfare. Bork seemed to equate consumer welfare with allocative efficiency. A citation from ‘the Antitrust Paradox’ might clarify this:

"Consumer welfare, in this sense, is merely another term for the wealth of the nation (...)"\(^ {146}\)

**Supreme Court case affirms consumer welfare as goal of competition law**

Yet consumer welfare was just one of the many ideas on what the goal of antitrust should be. This changed when the Supreme Court of the United States referred to Bork in the case of Reiter.\(^ {147}\) This case dealt with the question whether consumers were hurt in their business or property by anti-competitive behaviour, and thus entitled to treble damages like companies. This legal question could be reformulated into: ‘Is the Sherman Act intended to exclude consumers?’ On which the Court replies: ‘Absolutely not!’, while stating that Congress designed the Sherman Act as a ‘consumer welfare prescription’ and referring

\(^{147}\) Reiter v. Sonotone Corp. 442 U.S. 330 (1979)
to Bork’s book ‘The Antitrust Paradox’. In subsequent cases the Court has repeated this phrase: the Sherman Act designed as a ‘consumer welfare prescription’.

### 2.2.3 Academic debate on the interpretation of consumer welfare

**Ongoing debate**

On the surface, this seems to solve the whole debate on the goal of antitrust law. Yet, far from it: the Court has never elaborated on what consumer welfare actually means. Therefore, the Reiter case solely caused the academic debate to switch from ‘what is the goal of antitrust law’ to ‘what does consumer welfare mean?’

Academics are divided into two camps: the academics who believe ‘consumer welfare’ should be interpreted as total welfare and those who think ‘consumer welfare’ should mean consumer surplus or consumer protection.

**Critique of Bork**

Beforehand, I will address the main critique to Bork’s concept of consumer welfare. As early as 1968, the economist Williamson addressed Bork’s statement that optimal allocative efficiency is best for consumers. He proves in a model that in some cases, choosing allocative efficiency may harm consumers. In his ‘naive trade off model’ two companies merge. It is a horizontal merger, which causes the prices of the product to increase, but also leads to substantial efficiencies for the companies involved. In other words, it causes harm to consumers, but it also leads to a large increase of productive efficiency. The benefits of the latter outweigh the loss to consumer surplus. Thus, the choice for optimal allocative efficiency, allowing the merger, leads to consumer harm.

**Scholars interpreting consumer welfare as consumer surplus**

The first group of legal and economic scholars are those who believe ‘consumer welfare’ should be interpreted as consumer surplus, consumer protection, or there should be a legal bias in favour of

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148 Reiter v. Sonotone Corp. 442 U.S. 330 (1979) section 24
consumers. All three of the scholars discussed below are defending a consumer surplus standard, but they use different wording. Lande and Kirkwood use ‘consumer protection’ standard, Salop uses the ‘true consumer welfare’ standard. Kirkwood and Lande let go of the economic perspective: they do not claim a consumer bias leads to more efficiency in society. Rather, they see consumer surplus as the rightful property of consumers. A consumer has the right to receive a certain amount of consumer surplus. Monopolization is forbidden because a monopolist could charge the full reservation price of consumers, depriving consumers of their surplus. Thus, the goal of antitrust law is "to protect consumers (...) from anticompetitive behaviour that exploits them".

Supreme Court affirms?

The Supreme Court case of Brooke Group underpins this interpretation of consumer welfare, Lande and Kirkwood say. This was a failed predation case, in which a firm in tobacco products had cut its prices considerably in order to drive its competitors off the market. Yet, this policy had failed. The Supreme Court ruled that this behaviour was not a violation of antitrust law, as the low prices were simply 'a boon to consumers'. Had efficiency been the goal of antitrust, the behaviour would indeed have been a violation, as cutting prices below marginal cost is not efficient.

The academic Steven Salop repeats and affirms these statements to a large extent. He also shows that harm to competition is almost always interpreted as harm to consumers: a merger has never been forbidden because it would harm competitors. Moreover, he uses similar arguments to Fridolfsson, explained in 2.1. Firms, who are profit focused, have more information on their behaviour than courts or agencies, and can therefore strategically adapt their behaviour to the goal of antitrust. This way, the damage done to total welfare remains limited under a consumer welfare goal, as firms will choose the alternative that is both beneficial to the firm and the consumer. In this manner, consumer welfare

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functions as an incentive for undertakings to choose the best alternative for themselves and the consumer.\textsuperscript{160}

**Scholars criticizing the consumer surplus view**

The consumer surplus view has been heavily criticized.

Werden asks first and foremost – who is a consumer? Does the law only care about consumers at the end of the distribution chain? Or simply all people in their capacity as consumers? If so, is this not equal to total welfare?\textsuperscript{161} Can't every transaction simply be reframed to present the buyer and the seller? For example, does the individual buy an insurance, or does the insurance company buy the risk of the individual?

Carlton states that interpreting consumer welfare as consumer surplus does not take dynamic efficiencies into account, which hinders innovation, leading to lower consumer surplus in the long term.\textsuperscript{162}

Orbach addresses the lack of coherence in the doctrine of consumer welfare as such. He explains that the present interpretation of consumer welfare in some cases harms consumers rather than improves their welfare.\textsuperscript{163} He shows that consumers oftentimes want to pay for exclusivity and status goods, where antitrust law is solely focused on low prices\textsuperscript{164}, for example in resale price maintenance bans. In such cases, low prices lower consume welfare.

**General remarks on the American debate on consumer welfare**

Are there any general remarks to be made on this debate? Does it differ from the European debate, and are there things to be learned?

One of the most striking aspects of this whole debate, is its lack of coherent terminology. This is probably rooted in the confusion Bork caused, but over 30 years later, almost all of the articles I read had a

\begin{thebibliography}{99}
\end{thebibliography}
different interpretation of consumer welfare: it has been called consumer surplus, consumer protection, ‘the true consumer welfare standard’. Like Orbach writes: consumer welfare has too many meanings.\(^{165}\)

Opposite the lively academic debate, is the silence of the courts. The Supreme Court has up to this day never addressed the meaning of consumer welfare after Reiter.\(^{166}\)

### 2.3 Academic debate on consumer welfare in the European Union

In this paragraph I will turn to the European Union. What is the academic and institutional debate on the goal of competition law, and more specifically, consumer welfare? And what is the ‘European concept of consumer welfare’, if there is one?

Before starting the analysis, it is important to focus on some key traits of the European Union, to provide some context to the evolution of the concept of consumer welfare in the EU.

#### 2.3.1 Key traits of the European Union

In its core, the EU is nothing more than a group of states, called Member States, working together in different areas, the intensity of which varies. These Member States are still separate and independent states, with their own language, culture and economic market. Because of these differences, the EU market is naturally less competitive. This affects policy decisions in the EU: market integration is still a topic high on the agenda of the EU institutions and national governments.\(^ {167}\) Because of these differences between the Member States, there are more barriers to trade within the EU compared to the USA. This may be a reason for the more limited faith in the free market: often, enforcement is preferred over ‘leaving it to the market’.\(^ {168}\)

Second, competition law became part of the European legal tradition much later than in the United States. After the Second World War the first competition regulations were enacted by the new precursor to the European Union.\(^ {169}\) As a consequence, the law itself, drafted in the Treaties, is much more detailed, and


\(^{167}\) The Commission still drafts annual reports on the state of the single market integration: http://ec.europa.eu/internal_market/top_layer/monitoring/integration-reports_en.htm

\(^{168}\) For instance, in the United States Resale Price Maintenance is allowed, where this is prohibited in the EU. Even though this is a restriction of competition, the US believes that the market is strong enough to allow these small restrictions, the EU disagrees.

more elaborate on its goals as found in the articles 3 TEU and 8 to 13 TFEU. Also, there is separate procedural law for competition cases.\textsuperscript{170}

Lastly, Europe has a civil law tradition. Legislation is deemed more important than jurisprudence, generally speaking, courts serve to interpret the gaps that the legislator left open. Similarly, the role of the courts in interpreting the law is smaller and the influence of the enforcement authorities, to whom the governments have delegated their competition enforcement competences, is larger.

The question naturally following is: is the discussion on the goal of competition law, and on consumer welfare especially, different as well?

One major difference in the academic discussion is that it is to a large extent institutional, rather than academic. Where the US Supreme Court stood at the sidelines of the debate on consumer welfare\textsuperscript{171}, the Court of Justice of the European Union and the European Commission are at the center of it.

No total welfare perspective

The Treaty articles and Merger Regulation show that economic efficiencies are allowed only to the extent that consumers benefit as well. This excludes total welfare, or total surplus as the main goal of European competition law\textsuperscript{172}: the total welfare perspective treats all market players equal. European law however, shows a distributive bias favouring consumers.

One thing that the discussion in the United States on consumer welfare has made (painfully) clear, is that the concept of consumer welfare is vague. Thus, the interpretation of the goal of consumer welfare is very important. Both the Courts of the European Union and the European Commission have a different interpretation of consumer welfare, and value consumer welfare differently.

2.3.2 Views on consumer welfare – the European Commission and the Courts of the EU

The consumer welfare interpretation by the European Commission

Around the beginning of the century, the Commission shifted its approach in competition law enforcement. This shift is called the 'more economic approach.' Cseres nicely summarizes this shift as the 'new line of enforcement that focused on the effect of business conduct and the way they impact consumer welfare.'\textsuperscript{173} The ‘more economic approach’ evolves around more economics, decentralization of previously exclusive Commission competences and ex post control of market behaviour.

\begin{flushright}
\textsuperscript{170} The articles 104 and 105 TFEU and related EU legislation
\textsuperscript{171} Supra 2.2: The Supreme Court has not mentioned the goal of competition law after the Reiter case.
\textsuperscript{172} D. Zimmer ‘The basic goal of competition law: to protect the opposite side of the market’ in D. Zimmer et al. The goals of competition law Cheltenham: Edward Elgar 2012, p. 493
\textsuperscript{173} K.J. Cseres, 'The Controversies of the Consumer Welfare Standard', The Competition Law Review 2007 vol. 3(2) p. 152. & Supra 2.1. In the 1960’s, the economics-oriented Chicago School in the United States had set consumer welfare as the goal of competition law as well. An indication of the Americanization of EU competition
\end{flushright}
The Commission enabled the ‘more economic approach’ by publishing a number of Guidelines, which explain the Commission’s assessment of cases. In the 2004 Guidelines on the assessment of Article 81(3) (currently Article 101(3)) on the justifications for anti-competitive agreements, the Commission sets consumer welfare as the goal of Article 101 TFEU:

“The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”

The Commission seems to link the most commonly used goals in competition law: it reasons that both competition and market integration serve consumer welfare and allocative efficiency, because an integrated market promotes an allocative efficiency for the benefit of consumers. The horizontal merger guidelines give some examples of consumer benefits: low prices, high quality products, a wide selection of goods and services, and innovation. Other public values enshrined in Treaty goals, such as public health or social justice, are non-economic and non-competition related. The Commission only takes these into account when they meet the justification conditions of article 101(3): The Commission has a narrow approach with regard to non-economic concerns.

Consumer welfare plays a role in two different stages in the decision making: in the establishment of harm to competition, and in the assessment of efficiencies or justifications.

In order to establish liability under European competition law the undertaking must have harmed competition. Harm to competition is usually proven by showing consumers have been harmed. In its

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174 For example the ‘Guidelines in horizontal mergers’, the Guidelines on vertical mergers’ and ‘Guidelines on vertical restraints’.


178 In paragraph 105 of the Guidelines on Article 81(3) however, the Commission says that the ultimate aim of competition law is still protecting the competitive process. This is at odds with paragraph 13 of the same Guidelines.

179 European Commission, ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ C 031, 05/02/2004 par. 8

180 Article 9 TFEU

181 Article 3(3) TFEU


guidelines on vertical restraints, the Commission refers to behaviour harming consumers as ‘increasing prices, limiting product choice, lowering quality and reducing innovation.’ Is explicit proof of harm to consumers needed? No. A key assumption of harm to consumers is: competition always benefits consumers, so a restriction of competition harms consumers.

Consumer welfare is important in the assessment of efficiencies and justifications. Suppose a merger is deemed anticompetitive at first sight, but is able to generate substantial benefits for society. When these benefits meet certain criteria, the merger is allowed nonetheless. Efficiencies must be substantial, timely and benefit consumers. The Commission states in its horizontal merger guidelines that the consumers must not be made worse off because of the merger. In other words, the pass on rate of benefits to consumers must be so, that their position remains neutral compared to their position before the merger. Because pass on to consumers is difficult to calculate, the Commission assumes that benefits of a qualitative nature will generally pass on to consumers. Also, the Commission assumes that reductions in variable costs pass on to consumers more than fixed costs will. The merger takes place in a relevant market. According to the Commission, in principle, the consumers who benefit from the merger must be in the same relevant market. Otherwise the benefits would lose their purpose of compensating for the harm to competition in that same market. The concept of consumer encompasses both intermediate and final consumers. The merger must be timely as well, because the later the benefits arise, the less they can compensate for the anticompetitive harm.

The above reasoning on efficiencies in merger cases applies to justifications under the articles 101 and 102 TFEU as well.

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185 Examples of these cases are found in: P. Whelan & P. Marsden, ‘Consumer detriment’ and its application in EC and UK competition law,’ E.C.L.R. 2006, vol. 27(10) p. 8-9.
186 European Commission ‘Guidelines on Vertical Restraints’ 2010 OJ C 130/01 par. 101
187 For instance in par. 90 of the Commission Communication (Notice) ‘Guidelines on the application of Article 81(3) of the Treaty’, 2004, OJ C101/97: “The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers.”
188 European Commission ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, 2004 OJ C 31/03 par. 79.
Based on this limited analysis, the ‘Commission consumer welfare standard’ seems to be closest to a narrow consumer welfare standard\textsuperscript{196}, as consumers need to be actually and effectively compensated for the harm to competition via ‘consumer benefits’ and ‘efficiencies’. Non-economic considerations have to meet the justifications of article 101(3) TFEU, otherwise they cannot influence the decision in a particular case.

**The consumer welfare interpretation by the Courts of the European Union**

This ‘more economic approach’ was reflected in individual decisions of the Commission. As new cases were brought before the General Court or the Court of Justice, the courts were able to reflect on the compatibility of the Commission's policy with European law.

In 2006, the General Court decided two cases, in which it affirmed the central position of consumers in competition law. In the case of Postsparkasse\textsuperscript{197}, it said the ultimate purpose of competition enforcement is the promotion of consumer well-being.\textsuperscript{198} In the case of GlaxoSmithKline\textsuperscript{199}, it ruled that an agreement restricting parallel trade (i.e. in medicines) could only be a restriction by object of European competition law, when the agreement would affect the benefits of final consumers.\textsuperscript{200} As only harm to the profits of intermediate consumers (the wholesalers of medicines) was proven, the agreement was not deemed to be anti-competitive without further investigation on the effects.\textsuperscript{201} Was ‘harm to final consumers’ going to be the new criterion for establishing a violation of article 101 TFEU?

The Court of Justice disagreed. In the T-Mobile case\textsuperscript{202} it stated that:

“(…) Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”\textsuperscript{203}

In the second instance of the GlaxoSmithKline case\textsuperscript{204}, the Court ruled that the General Court had erred in law by assuming that a restriction by object was dependent on harm to consumer benefit.\textsuperscript{205} It repeated

\begin{itemize}
  \item \textsuperscript{197} GC 7 June 2006, T-2013/01 and T-214/01, \textit{ECR} 2006 II-01601 (Postsparkasse)
  \item \textsuperscript{198} GC 7 June 2006, T-2013/01 and T-214/01, \textit{ECR} 2006 II-01601 (Postsparkasse) par. 115 This is the literal French translation of consumer welfare: V. Daskalova, ‘Consumer Welfare in EU competition law: What is it (not) about?’, \textit{TILEC Discussion Paper May 2015}, p. 16
  \item \textsuperscript{199} GC 27 September 2006, T-168/01, \textit{ECR} 2006 II-02969 (GlaxoSmithKline)
  \item \textsuperscript{200} GC 27 September 2006, T-168/01, \textit{European Court Reports} 2006 II-02969 (GlaxoSmithKline) par. 121
  \item \textsuperscript{201} GC 27 September 2006, T-168/01, \textit{European Court Reports} 2006 II-02969 (GlaxoSmithKline) par. 122
  \item \textsuperscript{202} CJEU 4 June 2009, C-8/08, \textit{European Court Reports} 2009 I-04529 (T-Mobile)
  \item \textsuperscript{203} CJEU 4 June 2009, C-8/08, \textit{European Court Reports} 2009 I-04529 (T-Mobile) par. 38
  \item \textsuperscript{204} CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, \textit{European Court Reports} 2009 I-09291 (GlaxoSmithKline)
  \item \textsuperscript{205} CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, \textit{European Court Reports} 2009 I-09291 (GlaxoSmithKline) par. 64
\end{itemize}
the phrase of the T-Mobile case. The Court of Justice affirmed that competition and the integrated market were values as such, not just means to attain the goal of consumer welfare and allocative efficiency. Competition as such and market integration were in no way inferior goals to consumer welfare or allocative efficiency. Whatever consumer welfare may be, it is not the primary goal of EU competition law.

In the case of Post Denmark the Court of Justice mentioned consumer welfare as well. She seemed to have a different vision of consumer welfare: restrictions on competition harm competition, which in turn harms consumer interests. According to the Court, consumer welfare is the indirect effect of promoting competition and market integration. Still, the Court did not define consumer welfare.

In June 2014 the General Court again decided on the question whether proof of harm to consumers was needed in order to establish a restriction by object under European competition law. This concerned the Intel case, also called the test-case of the more-economic approach of the Commission. This time, however, the Court held that the Commission did not need to prove consumer harm, as "it is apparent from the case-law that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure." In other words, harm to competition as such is sufficient to establish a breach of European competition law.

Did the Commission change its policy in response? In 2010, the Commission redrafted its Guidelines on Vertical Restraints. This said the objective of competition law is to prevent restriction of competition to the detriment of consumers and to serve the integrated market. It does not mention consumer welfare. Daksalova showed that the Commission has stopped viewing consumer welfare as the primary goal of European competition law, putting innovation and variety on an equal footing to consumer welfare.

In accordance with the Chicago School mentioned in the previous paragraph, the Commission strove for a single goal in the complex field of competition law. The Courts seem to think a plurality of goals is

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206 CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, European Court Reports 2009 I-09291 (GlaxoSmithKline) par. 63
207 CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, European Court Reports 2009 I-09291 (GlaxoSmithKline) par. 63
208 CJEU 27 March 2012, C-209/10, European Court Reports 2012 -00000 (Post Denmark)
209 CJEU 27 March 2012, C-209/10, European Court Reports 2012 -00000 (Post Denmark) par. 44
211 Wils, W.P.J., ‘The Judgment of the EU General Court in Intel and the so-called ‘more economic approach’ to abuse of dominance’, World Competition, vol. 37, nr. 4, p. 6
213 European Commission ‘Guidelines on Vertical Restraints’ 2010 OJ C 130/01
214 European Commission ‘Guidelines on Vertical Restraints’ 2010 OJ C 130/01 par. 7
216 Laura Parret shows that multiple goals can endanger the coherent implementation of competition rules. L. Parret ‘Side effects of the modernisation of EU competition law: Modernisation as a challenge to the
best: market integration, economic efficiency, competition as such, and presumably consumer welfare, are all important goals of EU competition law. A second difference concerns non-economic concerns in competition cases. In the case of GlaxoSmithKline\textsuperscript{217} the General Court required the showing of price effects before a restriction of competition was established.\textsuperscript{218} Referring to this,\textsuperscript{219} the Court states that nothing in the law indicates that only agreements with a negative price effect are able to be anti-competitive by object.\textsuperscript{220} This is interpreted as a rejection of a price-based and narrow interpretation of consumer welfare.\textsuperscript{221}

However, as long as the meaning of consumer welfare according to the Court remains undetermined, the position of consumer welfare in European competition law will remain unclear.

### 2.3.4 Academic debate on the interpretation of consumer welfare

European academics have criticized the current interpretation of consumer welfare and the influential role it plays in the assessment of cases. I will focus on the notion of consumer in the current interpretation of consumer welfare, and the notion of welfare in 'consumer welfare'.

The European Commission uses the terms consumer and customer interchangeably.\textsuperscript{222} In its Guidelines on Horizontal Mergers, it says the concept of consumer must be read broadly, encompassing both intermediate and final consumers. In merger cases, consumers are the actual or potential customers to the parties to the merger.\textsuperscript{223} ‘Consumers encompasses all direct or indirect users of the product covered by the agreement, including producers that use the product as an input, wholesalers, retailers and final consumers.’\textsuperscript{224}

The General Court made a distinction between final consumers and intermediate consumers in the GSK case\textsuperscript{225}, and this determined the outcome of this case.\textsuperscript{226} The Court of Justice makes this distinction as

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\textsuperscript{217} GC 27 September 2006, T-168/01, ECR 2006 II-02969 (GlaxoSmithKline)

\textsuperscript{218} GC 27 September 2006, T-168/01, ECR 2006 II-02969 (GlaxoSmithKline) par. 121 & 122: “advantages in terms of price and supply”

\textsuperscript{219} Daskalova states it is very likely the Court referred to this particular statement of the General Court: V. Daskalova, ‘Consumer Welfare in EU competition law: What is it (not) about?’, TILEC Discussion Paper May 2015, p. 18

\textsuperscript{220} CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECR 2009 I-09291 (GlaxoSmithKline) par. 63

\textsuperscript{221} V. Daskalova, ‘Consumer Welfare in EU competition law: What is it (not) about?’, TILEC Discussion Paper May 2015, p. 18

\textsuperscript{222} European Commission, ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ C 031, 05/02/2004 par. 8.


\textsuperscript{225} GC 27 September 2006, T-168/01, ECR 2006 II-02969 (GlaxoSmithKline) par. 121-122

\textsuperscript{226} GC 27 September 2006, T-168/01, European Court Reports 2006 II-02969 (GlaxoSmithKline) par. 122
well, but in this case, and previous competition cases, it was not a relevant factor in the assessment of the case.

P. Akman challenges this broad concept, and especially the assumption based on this broad reading of 'consumer': that harm to customers is presumed to create harm to final consumers. He shows that in some cases, behaviour harming customers is beneficial or neutral to final consumers and vice versa in other cases. He argues customer welfare and consumer welfare have nothing to do with each other. This wrongful assumption can lead to wrongfully given damages to customers and faulty assessments of competition cases.

A number of academics disagree with the idea that consumer welfare should only protect consumers. They claim that a broad consumer bias benefits the whole of society, and that such an artificial distinction between purchasers would be attainable in practice. Why would the interest of the same company be valued more when it is acting as a buyer instead of a seller?

What is meant by welfare? In economics, welfare is based on the fulfilling of preferences. Goods are scarce, so the more preferences are satisfied, the better. This enhances consumer welfare. Lianos asks some questions with regard to this assumption. First of all, is more consumption, and consequently more production, truly welfare enhancing? Does satisfying preferences really lead to welfare? Behavioural economics has shown that many preferences are based on biases, some of which are simply irrelevant to the product itself. Secondly, preferences are hard to measure, especially for large groups.

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227 CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECR 2009 I-09291 (GlaxoSmithKline) par. 62-64
228 For example: CJEU 15 March 2007, C-95/04, Jur. 2007 I-02331 (British Airlines)
231 An example of the first is a two part tariff system with a fixed fee and a wholesale price. The price may fluctuate, where the upstream market gets a bigger piece of the profit pie than the downstream market. This is harming the downstream market (the customer of the upstream market), yet, this is neutral to final consumers. An example of the second is a case when the prices of a certain product go up after a merger. When demand is inelastic and pass-through is almost full, intermediate customers can simply pass the raise in price to the final consumer, who is harmed. Yet the intermediate consumer is not harmed. (Example from P. Akman ‘Consumer’ versus ‘Customer’. The Devil in the Detail’, Journal of Law and Society 2010, vol. 37(2) p. 328-329 and 339)
why the Commission has made assumptions about preferences, for instance that a lower price or more variety is what consumers want. But is this true in all cases?²³⁹

2.3.5 General remarks on the European notion of consumer welfare

Concluding, consumer welfare is just one of the goals of European competition law, and is seen by the Court of Justice as the indirect effect of promoting competition and market integration, whereas the Commission sees consumer welfare as the primary goal, encompassing quality, low prices and variety. The assumption is that competition benefits consumer welfare. The Commission concept of consumer welfare seems closest to the above ‘narrow consumer welfare standard’, but the Court has not given a meaning to ‘consumer welfare’. One thing the US and EU discussion have in common, is that the meaning of consumer welfare is far from clear.


²³⁹ Orbach has shown this is not true in all cases: B.Y. Orbach, 'The Antitrust Consumer Welfare Paradox', *Journal of Competition Law & Economics* 2010, vol. 7(1) pp. 133-164
CHAPTER THREE – HOW DOES THE ACM INTERPRET CONSUMER WELFARE?

Introduction

The last chapter has provided the reader with a detailed background of the views on the goals of competition law in general, with a focus on consumer welfare. This next chapter will return to the research question of this thesis: *Has the ACM crossed legal boundaries in European or Dutch competition law through its choice and interpretation of its policy goal, which is consumer welfare?* As written in the first chapter, the competition authority has recently merged with the regulatory and consumer authority, creating one big market supervision authority. This merger was accompanied by a change in policy. In policy documents, the concept of ‘consumer welfare’ was described as the goal of competition law enforcement. Yet, there is confusion on what the ACM means by ‘consumer welfare’. The last chapter has made it clear that there are many interpretations of consumer welfare. Therefore, I will research the views of the ACM on consumer welfare.

This chapter is divided into a theoretical and a practical part. The theoretical part will analyze policy documents and the view on consumer welfare therein. The practical part will analyze five decisions by the ACM in individual cases. I will elaborate on the practical part in paragraph 3.2. The theoretical part, addressed in this paragraph, will again be divided into three sections. The first will concern the general policy documents, the second documents on health care, and the third documents on sustainability. Each section will address the concept of welfare and the concept of the consumer. Next, the reception of the new goal of the ACM in the Dutch academic literature is brought to the fore.

3.1 The interpretation of consumer welfare in the policy documents

3.1.1 Four general interpretations of consumer welfare

In paragraph 2.3 I have discussed the article by Dr. I. Lianos.\textsuperscript{240} He has set up a framework of the four main interpretations of ‘consumer harm.’\textsuperscript{241} I have modified his framework to set up the main four ‘consumer welfare standards’: the four main ways to interpret consumer welfare. These standards will help the reader to link the ACM policy documents on consumer welfare to a specific interpretation. Please note that these are general standards: the ACM interpretation is not likely to fall into one single category.

The four interpretations of consumer welfare are, broadly, the following.

| The economic standard of **consumer surplus** is the difference between the reservation price of the buyer and the actual price of the product. Consumer surplus is based on Kaldor-Hicks efficiency: a restriction of |


competition is allowed, as long as the benefit to the producers is such that they could hypothetically compensate the negative effect.\textsuperscript{242}

The \textbf{narrow consumer welfare} standard demands that the compensation for a restriction of competition does actually take place and will effectively compensate for the negative effect as a result of the restriction of competition.\textsuperscript{243}

The \textbf{extended consumer welfare} standard includes sustainability considerations and other public values. It views welfare as broader than simply the increasing of consumer surplus, encompassing consumer preferences related to sustainability or public health. The competition authority executes a cost-benefit analysis on the effect of the conduct on the consumers in the relevant market.\textsuperscript{244}

The \textbf{consumer sovereignty standard} aims to promote consumer sovereignty: ‘the state of affairs where the consumer has the power to define his or her wants and the ability to satisfy these wants at competitive prices’.\textsuperscript{245} Product variety is deemed very important. There is more room for behavioural economics, to find out how consumers make choices.\textsuperscript{246}

\textbf{3.1.2 The ACM interpretation of consumer welfare – general policy documents}

What is the interpretation of consumer welfare by the ACM based on ACM policy documents? This section will answer that question. I have picked the relevant documents from the ACM website.\textsuperscript{247} These were all published after the ACM merger of April 2013. I will introduce and explain the slogan of the ACM. Then, the interpretation of consumer welfare will be discussed using the four general interpretations, after which the concepts of ‘welfare’ and ‘consumer’ will be analyzed separately. I will discuss the relation to competition as such and the way the policy goal influences ACM decision-making.

The main theme, or slogan of the ACM is “Creating chances and choices for businesses and consumers.”\textsuperscript{248} In her own words:

\begin{itemize}
\item \textsuperscript{242} I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, \textit{CLES Working Paper Series} 2013 vol. 3, p. 16
\item \textsuperscript{243} I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, \textit{CLES Working Paper Series} 2013 vol. 3, p. 16-17
\item \textsuperscript{244} I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, \textit{CLES Working Paper Series} 2013 vol. 3, p. 17
\item \textsuperscript{246} I. Lianos ‘Some Reflections on the Question of the Goals of EU Competition Law’, \textit{CLES Working Paper Series} 2013 vol. 3, p. 18
\item \textsuperscript{247} www.acm.nl
\item \textsuperscript{248} Dutch: De ACM creëert kansen en keuzes voor bedrijven en consumenten. ACM Strategie, September 2013, p. 2, ACM Speerpunten, April 2013, p. 1, ACM Marktvissie, April 2013, p. 1, ACM Jaarverslag 2013, May 2014,
\end{itemize}
"ACM ziet de vergroting van de welvaart van consumenten als haar belangrijkste drijfveer. Markten optimaal laten werken in het belang van de consument, daar gaat het om. Markten waarin de consument echt kan kiezen, en ondernemers vrijuit kunnen concurreren om de gunst van de klant."\textsuperscript{249}

The actions of the ACM should create the optimal results for consumers, whether this action is market regulation, competition supervision or consumer protection.\textsuperscript{250} These optimal results are described as ‘sustainable welfare growth in broad terms.’\textsuperscript{251}

The starting point of a competitive market society is consumer sovereignty, according to the ACM, as consumers are aware of their preferences and know how to satisfy these.\textsuperscript{252} It is only when this sovereignty is violated by undertakings that the ACM intervenes, as this would lead to consumer harm.\textsuperscript{253} Therefore, the first goal is consumer sovereignty, but ultimately extended consumer welfare (broad welfare for consumers) matters most. Only once the policy documents mention that undertakings could benefit from ACM action too.\textsuperscript{254}

How does competition relate to this? Is it valued at all? It is, but only as an instrument, a means to the goal of consumer welfare.\textsuperscript{255} This position of the ACM might be at odds with the amended article 2(5) of the Act Instituting the ACM, which reads that the ACM will ‘guard, promote and protect effective competition’. This article values competition as such, not as a means to an end.

Let us take a closer look at this interpretation of consumer welfare, by separating the concepts of ‘welfare’ and ‘consumer’. Welfare, according to the ACM, is welfare in a broad sense. The effect on prices, quality, variety and innovation matters, both in the short and long term.\textsuperscript{256} A cost-benefit analysis is made of the predicted benefits.\textsuperscript{257}

When discussing the concept of consumer, the ACM refers to the interpretation by the European Commission: all direct and indirect users of the products covered by the agreement in question.\textsuperscript{258} The wording of ‘user’ and ‘consumer’ is used interchangeably in the ACM documents.\textsuperscript{259} In other words, it


\textsuperscript{250}ACM Strategie, September 2013, p. 2
\textsuperscript{251}ACM Strategie, September 2013, p. 2
\textsuperscript{252}ACM Strategie, September 2013, p. 4
\textsuperscript{253}ACM Strategie, September 2013, p. 4
\textsuperscript{254}ACM Jaarverslag 2013, May 2014, p. 9
\textsuperscript{255}ACM Strategie, September 2013, p. 4 & ACM Jaarverslag 2013, May 2014, p. 9
\textsuperscript{256}ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 12
\textsuperscript{257}ACM Strategie, September 2013, p. 6
\textsuperscript{258}ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 13
\textsuperscript{259}For instance: first the ACM refers to ‘users’ of a product, and later on in the paragraph the ACM refers to the same groups as ‘consumers’. ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 13
seems as if the ACM does not differ according to intermediate or end customers of the product, but this is not clear. This interpretation differs from the concept of consumer in consumer protection law, where only end-users are defined as consumers. Yet, the Strategy document claims that the ACM will use an integrated approach in problems related to market and consumer. How is this feasible in practice, when the interpretation of consumer differs? Moreover, to gain deeper understanding of the consumer, the ACM will use behavioural economics.

The goal of consumer welfare influences the material decision making of the ACM in three ways: prioritizing, the manner of supervision and the choice of instrument. When assessing the priority of a case, the ACM looks at the (potential) harm to consumers, the interest of society and the effectiveness of ACM action. The anticipated contributions to consumer welfare as a result of the action are leading.

3.1.3 The ACM interpretation of consumer welfare – healthcare and sustainability documents

This section will zoom in on the policy goals of the ACM relating to the healthcare market and the sustainability market. Four out of the five cases I will analyze in the next paragraph relate to the healthcare or sustainability market.

Healthcare

Receiving medical treatment is very different from simply buying a product in the supermarket: the product is highly complex, and the consumer has to rely on the expertise of the ‘seller’ (the physician). For general medical treatment, the financing of the product is based on solidarity: by means of collective health insurance. Therefore, competition in the healthcare sector is not straightforward, but happens indirectly: the consumers pay the insurance companies, who in turn buy the products from the health sector. The members of the healthcare sector compete to sell their products to the insurance companies, not to the final consumer who will be receiving the treatment.

The ACM approach towards healthcare agreements under competition law is that cooperation should benefit consumers both in their role as patients and their role as insurance payers. These roles may clash: the patients value quality above everything else, but the insured consumers do not want their insurance fee to be sky-high. It is the task of the insurance company to balance these interests, in other words, to solve issues of distribution.

260 ACM Strategie, September 2013, p. 2
261 ACM Strategie, September 2013, p. 9
262 ACM Strategie, September 2013, p. 4
263 ACM Strategie, September 2013, p. 11
264 ACM Marktvisie, April 2013, p. 11-12
265 NMa Richtsnoeren voor de zorgsector, March 2010, p. 9
266 NMa Richtsnoeren voor de zorgsector, March 2010, p. 9
267 ACM Jaarverslag 2014, March 2015, p. 32-33
268 ACM Beoordeling fusies en samenwerkingen in de zorg, September 2013, p. 1
The ACM uses a cost-benefit analysis of the benefits and costs of the cooperation. The consumer remains key: the input of consumers, represented by insurance companies and patient organizations, is highly valued.

**Sustainability**

Secondly, I will look at the interpretation of consumer welfare in the sustainability market: the market aiming towards a less polluted and ‘greener’ future. This sustainability market is different, as it focuses on the external effects of the product and the long term influence these effects will have on future generations.

The ACM allows agreements aimed at sustainability, as long as the sovereignty of consumers is not harmed substantially. This could happen when the agreement covers a large part of the market. Then the ACM will review in more detail the benefits and costs of the agreement under article 6(3) Competition Act.

Compared to the general market, both the concept of welfare and the concept of consumer are interpreted differently by the ACM. Welfare is interpreted even more broadly: it encompasses both the fulfillment of consumer preferences (the ‘good feeling’ consumers get when buying a sustainable product), as well as the efficient handling of scarce goods (such as clean drinking water).

This brings us to the interpretation of the concept of consumer. The ACM uses a remarkable interpretation of the compensation principle of article 101(3) TFEU and 6(3) Mw. It states that the assessment of the benefits for consumers may go beyond the current consumer and the relevant market, taking into account the long term benefits for future generations and the external effects of the agreement. The ACM justifies this position by arguing that otherwise, environmental pollution could not be addressed by way of self-regulation, a desired political goal. Yet, this leads to complicated questions, such as: How to compare welfare loss within the relevant market to welfare increase outside of the relevant market, as the result of an agreement? How to value a current benefit compared to the costs for future generations? It is questionable whether the ACM can reasonably answer such questions.

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269 ACM Beoordeling fusies en samenwerkingen in de zorg, September 2013, p. 2
270 ACM Jaarverslag 2013, May 2014, p. 28
272 Compatible with 101(3) TFEU, ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 11
273 ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 10
274 Which states that consumers need to be compensated by benefits when the merger or agreement is a restriction of competition.
To sum it up: in the healthcare sector, both insurance companies and patients are consumers. This may lead to clashing of interests. In the sustainability sector, the concepts of consumer and of welfare are interpreted considerably broader, which may lead to complicated questions of distribution.

3.1.4 The interpretation of consumer welfare by the ACM based on policy documents - conclusion

The end goal is creating optimal results for consumers, in other words: consumer welfare. The ACM notion of consumer welfare is above all broad. The concept of welfare covers a lot more than just the price of the product, but also innovation, sustainability concerns and product variety on the market. And despite the multiple policy documents, it is not yet clear what the ACM means by ‘consumer’. It seems to follow the definition of the European Commission, but broadened, to cover even future consumers in sustainability cases. In these latter cases, the ACM analysis may even go beyond the borders of the relevant market.

How does this fit into the framework of Lianos, as described at the beginning of this paragraph? The starting point of the ACM is consumer sovereignty: the ACM wants to help create a market where consumers are free and able to choose the products and services they desire. Hence the focus of the ACM on product variety and freedom of choice of consumers. This role of the ACM is largely facilitating. This changes when there are market failures, which hinder the freedom of choice of consumers. Then, the ACM will intervene in the market. She will conduct a cost-benefit analysis, based on both the long and short term effects of the conduct on the price, quality, product variety and innovation. If this balancing exercise turns out in favour of the consumer, the conduct is allowed. This indicates that the extended consumer welfare standard is the ultimate goal of competition enforcement, according to the ACM policy documents.

3.1.5 Reception of the consumer welfare policy goal by academics

The new policy goal of consumer welfare was introduced in the aftermath of the merger of the ACM. Even though many academic articles addressed the merger, most only touched only briefly upon the new policy goal of consumer welfare.277 The most fundamental criticism on consumer welfare as the goal of competition law enforcement was written by the Tilburg-based economics professor van Damme.278

The ACM aims for the promotion of broad welfare. Van Damme raises four objections against this approach. He states that the purpose of the ACM, as market authority, is essentially micro-economic: making sure markets function well. A macro-economic goal such as the promotion of ‘broad’ welfare does not match this purpose.279 Also, such a vague goal leads to legal uncertainty among Dutch businesses:

279 E. van Damme, ‘De betovering van de consumentenwelvaart’, ESB Dossier Consumentenwelvaart als
how will they predict what conduct is legal?280 The same vagueness hinders external control of ACM actions, as ‘welfare’ is so broad it might cover almost any action.281 Lastly, Van Damme highly doubts the feasibility of such a goal.282

What the ACM means by ‘consumer’ is even less clear.283 It does not address this adequately in the policy documents. Even if the ACM would provide a clear definition, there is no such thing as an ‘average’ consumer: consumer preferences differ vastly.284

On the goal of consumer welfare as a whole, Van Damme disapproves even more. He describes consumer welfare as a fashionable285, but empty goal.286 By choosing consumer welfare as a goal, the ACM let go of the foundation of economics.287 The economic foundation of competition law does not reach further than concepts such as ‘the relevant market’ and ‘consumer surplus’.288 Beyond that, there is no scientific basis for ACM action. There are several fundamental issues that are unresolved in economics up to this day: economics cannot provide answers to normative questions, has trouble choosing sides when problems of distribution arise, and also it holds an image of man which is falsely materialistic and rational.289 When the scientific underpinnings of competition law show this many weaknesses, modesty is key.290 The ACM should not aim for grand welfare changes in society, but modestly focus on consumer surplus in individual cases.

3.2 What is the interpretation of consumer welfare based on ACM decisions?

Introduction
The concept of consumer welfare is vague. It is a “one size fits all” concept, which can meet everyone’s taste. That is why, when the ACM decided consumer welfare would be its policy goal, this required further research into what the ACM truly meant by ‘consumer welfare’. The previous paragraph has looked at policy documents to try and answer this question.

In the previous paragraph the ‘Lianos framework’ was introduced: a list of four types of interpretations of ‘consumer welfare’. The preliminary interpretation of consumer welfare based on ACM policy documents seemed to indicate that both the consumer sovereignty standard and the extended consumer welfare standard, related to the ACM perception of consumer welfare.

This next paragraph will 'test' this interpretation by analyzing five cases. By looking at the reasoning of the decisions taken, I hope to establish a more in-depth understanding of what the ACM means by ‘consumer welfare’.

The following cases will be discussed: the decision concerning the Persgroep-Mecom merger of February 2015291, the Analysis of the ‘Kip van Morgen’292 of April 2014, the ACM Memo on the ‘SER Energieakkoord’293 of September 2013 and the decisions on two hospital mergers, of the MCH and Bronovo, December 2013294, and of the RGH and LLZ, March 2015295. I chose these particular cases because they are complex cases, and thus required a more elaborate argumentation by the ACM. The number of cases analyzed is small: any conclusion based on this analysis needs further research on a larger scale.

Each subsection will discuss one case, except for the hospital merger cases, which will be analyzed together. I will discuss the facts and reasoning by the ACM before looking into the interpretation of consumer welfare conveyed in the case.

### 3.2.1 Persgroep - Mecom merger

**Facts**


293 Translation: “SER (platform for employee and employer organisations) Energy Agreement”, Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013.


In July, 2014 the ACM received a notification of a planned merger between two publishing houses. The Belgian publishing house of the Persgroep wanted to merge with the British publishing house Mecom. The Persgroep publishes mainly the ‘Algemeen Dagblad’, the ‘Volkskrant’ and ‘Trouw’, Mecom publishes seven regional papers, for instance the ‘Brabants Dagblad.’ On top of that, Mecom publishes a large number of free local papers. This merger would make the Persgroep the largest publishing house of newspapers in the Netherlands. The one other large publishing house is TMG, which distributes the ‘Telegraaf’.

The newspaper market has faced a declining market for over a number of years. Papers have been losing readers, thus have less subscription income and also face declining advertisement income.

**ACM Reasoning**

After the notification the ACM will decide, in the Notification Decision, whether restrictions of competition are expected. If so, the ACM will conduct a more in-depth analysis on these expected restrictions in an Authorization Decision.

The ACM distinguished several product markets in which the parties (Persgroep and Mecom) were active: the market of readers of newspapers, the advertising market, the printing market and the distribution market. In the Notification decision, the ACM explains that there will be no consumer harm in the reader market for newspapers, as there is hardly any competition between national and regional newspapers. Yet, the ACM has doubts whether the newly merged firm might impede on competition in the advertising market, printing market and distributing market. The ACM decides further investigation in an Authorization Decision is required.

The ACM investigates the percentage of advertisers who print in both the national and the regional papers. It turns out, only big, national companies who want a nation-wide coverage for their advertising make use of both the national and regional newspapers.
advertisement do so.\textsuperscript{304} These large firms have a lot of market power, and will not accept an increase in advertising costs.\textsuperscript{305} There is no threat to competition in this market.\textsuperscript{306}

The printing press market remains competitive as well, as there is overcapacity in the market, and there are low barriers for new entrants on the relevant market of printing newspapers.\textsuperscript{307}

Competition may however be hampered on the distribution market. The newspaper distribution market in the Netherlands is divided into sections. Both the Persgroep and TMG are “main distributors”, who have contracted to distribute other newspapers besides their own.\textsuperscript{308} After the merger, the Persgroep will be the publishing house with the largest number of subscribers in almost two thirds of the Netherlands. As the Persgroep will have more market power, they might set less advantageous conditions in future agreements with TMG.\textsuperscript{309} To mitigate this consequence of the merger, the Persgroep has to provide for a remedy. The ACM and the Persgroep agree to draft two agreements: one with TMG to prolong the cooperation with unchanged conditions, and one for a new party interested in becoming a main distributor.\textsuperscript{310} This is a behavioural remedy, focused on adapting the behaviour of the merged entity, rather than a structural remedy, focused on, for example, changing market shares.

The ACM accepts these remedies and gives Mecom and the Persgroep the authorization to merge.\textsuperscript{311}

\textbf{Consumer welfare}

What does this case tell us about the interpretation of consumer welfare? At first sight, relatively little. Consumer welfare is not mentioned once in the decision documents. Rather, this seems to be a classic merger case, which revolves around competition: The ACM has done quantitative economic research to find out the effect of the merger on the affected market players, such as advertisers. Based on this data, the ACM analyzed whether competition would be affected as a result of the merger. The consumer is barely mentioned in the decisions, because competition is not affected in the reader’s market.\textsuperscript{312} Still, the

\textsuperscript{304} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 28
\textsuperscript{305} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 34-35, 51-52
\textsuperscript{306} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 37 & 57
\textsuperscript{307} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 64
\textsuperscript{308} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 66-67
\textsuperscript{309} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 67
\textsuperscript{310} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 76 & 77
\textsuperscript{311} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger) p. 82
\textsuperscript{312} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, case number 14.0810.22, (Notification Decision Persgroep Merger) p. 14-15 & 19
case contains an interpretation of consumer welfare: when competition is protected, consumer welfare increases. In other words, competition benefits consumer welfare.

The next two cases are set in the context of sustainability initiatives.

### 3.2.2 Kip van Morgen agreement

#### Facts

The ‘Kip van Morgen’-case is about an agreement in the poultry industry, which is part of a larger initiative called ‘Ander Vlees 2020’. The goal of this agreement is to make chicken meat in supermarkets more sustainable by setting a new minimum quality standard for chicken meat. Both producers and retailers are involved, making the agreement both horizontal and vertical. Almost all major supermarkets take part, so the agreement covers the entire Dutch market.

The agreement provides for a chicken living up to five days longer, 10 percent less chickens per square meter, there is distraction material for the chickens, the chickens have a longer period of continuous darkness and the use of antibiotics is lowered.

#### ACM Reasoning

First of all, the ACM reasons, the agreement falls under the ambit of article 6(1) of the Competition Act. Competition is restricted, because as a result of the agreement consumers will no longer be able to choose regular chicken meat in the supermarkets. Secondly, the ACM researches whether the agreement is compatible with section 6(3) of the Competition Act (Mw).

The agreement must:

1) contribute to improving the production or distribution of goods or to promoting technical or economic progress

2) allow consumers a fair share of the resulting benefit

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315 Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014, p. 2

316 Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014, p. 3


318 Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014, p. 4

319 Original Dutch version: “Het eerste lid geldt niet voor overeenkomsten, besluiten en onderling afgestemde feitelijke gedragingen die bijdragen tot verbetering van de productie of van de distributie of tot bevordering van de technische of economische vooruitgang, mits een billijk aandeel in de daaruit voortvloeiende voordeelen de gebruikers ten goede komt, en zonder nochtans aan de betrokken ondernemingen, a. beperkingen op te leggen die voor het bereiken van deze doelstellingen niet onmisbaar zijn, of b. de mogelijkheid te geven, voor een wezenlijk deel van de betrokken goederen en diensten de mededeling uit te schakelen.”
3) restrict competition only so far as necessary to attain these objectives

4) not eliminate competition altogether

The first condition of section 6(3) Mw is the determination of benefits of the agreement. The ACM will only accept the improvements to chicken meat production as beneficial to the extent that they are valued by consumers. A survey is held among consumers to establish the ‘willingness to pay’ (WTP) of consumers for the improvements relating to the Kip van Morgen. The result: consumers are willing to pay 0.82 € extra per kilo of chicken, whereas the cost of the agreement would be 1.46 € per kilo of chicken. This cost-benefit analysis leads the ACM to conclude that there are no net benefits (for consumers).

This analysis is remarkable, as the first condition of 6(3) Mw does not require consumers to value benefits, it only requires there to be benefits. It seems as if this approach would make the second condition redundant.

And indeed, the second condition is passed off by concluding that there are no benefits. The third condition is not met either: the ACM puts forward that the agreement is not necessary as there are already initiatives of higher sustainability standards of chicken meat on the market. Lastly, ACM believes that the agreement leads to less choice for consumers, as it will no longer be possible to buy regular chicken meat.

Concluding, the agreement does not fulfill the four requirements of article 6(3) Mw, and therefore, the agreement is found to be incompatible with competition law.

Consumer welfare

This ACM analysis reveals a preference for consumer sovereignty: a restriction of competition is defined as a limitation in the choices for consumers. The benefits of the agreement are only regarded truly as benefits when consumers value them, and their willingness to pay is determined by way of a choice experiment.

Indications of extended consumer welfare were also visible in the decision, as all preferences of consumers were taken into account, not only price-based preferences. Animal welfare, environment and health concerns were accepted, provided they were valued by consumers.
3.2.3 Energie Akkoord agreement

Facts

The Energieakkoord-case is a sustainability case as well. The Energieakkoord\textsuperscript{328} is the result of extensive talks between employer-, employee- and environmental organisations and both national and local governments.\textsuperscript{329} Goal of the agreement is to achieve sustainable growth in the Netherlands.\textsuperscript{330}

One of the main deals of the agreement concerns the phased closing of five coal fueled power stations built in the 1980’s.\textsuperscript{331} The NOx, SO2 and CO2 emission rates of the old stations are higher than the rates of the modern coal fueled power stations, so their closure is beneficial for the environment. However, they do provide ten percent of the power production in the Netherlands.\textsuperscript{332} This will lead to rising power prices for consumers.\textsuperscript{333}

Reasoning ACM

The ACM has been asked by the parties to test the compatibility of the agreement with article 6 Mw. The agreement falls in the ambit of article 6(1) Mw, as it is an agreement between businesses which closes off a percentage of the power-producing capacity, causing power prices for consumers to increase.\textsuperscript{334} This is a clear indication of a restriction of competition.\textsuperscript{335}

The ACM investigates whether the agreement may be justified. The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.\textsuperscript{336} As a result of the agreement, power prices will increase, leading to consumer harm. Benefits arising as a result of the agreement need to compensate for this harm. The ACM confirms that sustainability benefits can be welfare-enhancing.\textsuperscript{337}

The assessment of benefits is categorized according to the kind of emission. However, the ACM chooses not to include the benefits of the reduction in CO2 emissions.\textsuperscript{338} Emissions of CO2 are governed by the

\textsuperscript{328} Translation: Energy Agreement. SER ‘Energieakkoord voor duurzame groei’, September 2013.
\textsuperscript{329} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013, p. 1
\textsuperscript{330} SER ‘Energieakkoord voor duurzame groei’, September 2013, p. 11
\textsuperscript{331} SER ‘Energieakkoord voor duurzame groei’, September 2013, p. 21
\textsuperscript{332} Energieonderzoek Centrum Nederland, Externe Notitie ‘Effecten van versneld sluiten van de vijf oudste kolencentrales’, September 2013, p. 3
\textsuperscript{333} Energieonderzoek Centrum Nederland, Externe Notitie ‘Effecten van versneld sluiten van de vijf oudste kolencentrales’, September 2013, p. 3
\textsuperscript{334} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013, p. 1-2
\textsuperscript{335} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013, p. 2
\textsuperscript{336} Article 6(3) Mw and article 101(3) TFEU
\textsuperscript{337} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013, p. 3
\textsuperscript{338} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting
European trade in emissions. Each company will buy emission permits according to its predicted need. If the CO2 emission is lower, this will leave the permit unused. The company can then sell the permit to another company, who is then able to emit more CO2. As the emission permits are not taken out of the market, the companies owning the coal fueled power stations will sell their leftover permits as well. As a result, the level of emissions (on a European level) will remain static. Thus, there is no environmental benefit.

The government has set a maximum of NOx and SO2 reductions in the Netherlands. Due to the closure of the coal fueled power stations, a number of governmental measures no longer needs to be taken. The prevented costs of these measures amounts to benefits for consumers.

There is no maximum on the emission of particles. The benefits of a reduction of such emissions is determined by estimating the positive effects on the Dutch citizens, based on increased health and life expectancy.

The cost-benefit analysis leads to the following conclusion. The benefits amount to 30 million € per year. The increase in energy prices over the same period of 2016-2021 will amount to 75 million € per year. The costs do not outweigh the benefits. The agreement does not meet the first of the cumulative criteria of article 6(3) and is therefore not justified. The agreement to close the coal fueled power stations is a restriction of competition.

The ACM decision that this section of the agreement was illegal, was a blow to the Energieakkoord. To prevent the entire agreement from crumbling, the government stepped in and drafted new output standards for coal fueled power stations. ‘Coincidentally’, exactly these five coal fueled power stations did not meet the standards, and had to be closed.

**Consumer welfare**

Most of the statements in the advice seem to have both characteristics of narrow consumer welfare as well as extended consumer welfare: the ACM wants to preserve the level of consumer surplus, by making...
sure that the cost of the agreement will not lead to energy prices getting closer to the reservation price of consumers.\textsuperscript{345} But also, she takes into account some external effects of the agreement.

Similar to the Kip van Morgen-case, the ACM researches whether there are benefits to consumers that would compensate for the harm to competition in the agreement. Unlike in the Kip van Morgen-case, consumers are not asked to reveal their preferences, nor is their willingness-to-pay measured. Rather, the ACM looks at the (indirect) savings realized as other environmental measures would no longer need to be taken, and increased health and life expectancy of Dutch citizens. In the previous decision, the ACM converted the added value of the agreement for consumers into monetary benefits using consumer preferences and willingness to pay. In this decision the ACM converts the added value of the agreement for consumers into monetary benefits using the indirect savings and increased life expectancy this agreement will bring to consumers.

Both methods are sound ways of measuring consumer benefits. Willingness-to-pay is more subjective, and therefore closer to consumer choice, whereas measuring savings and increased life expectancy as a result of the agreement is more objective. The savings are linked to measuring consumer surplus, but the increased life expectancy relates more to extended consumer welfare considerations.

### 3.2.4 Hospital mergers

**Background Dutch Healthcare sector**

The next cases concern the healthcare sector, which is a particular field in competition law.

The healthcare sector in the Netherlands has been privatized relatively recently. Competition still struggles to get a strong hold on the healthcare market. The system is based on compulsory health insurance with private insuring companies.\textsuperscript{346} The companies enter into negotiations with the hospitals to decide the kind and volume of the healthcare to be purchased at what price.\textsuperscript{347}

The basic idea behind the system is that insurers buy healthcare selectively at hospitals, demanding low prices and high quality. This in turn leads to hospitals competing to ‘sell’ their care to the insurance companies.\textsuperscript{348} Practice however has shown that it is more complex. Insurers have had troubles ‘guiding’ their clients to the lower-cost hospital, clients instead prefer the insurance with which they are free to choose their own hospital.\textsuperscript{349}

\textsuperscript{345} All customers of energy are defined as consumers.
\textsuperscript{349} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de
The ACM is not the only relevant authority. There is the Nederlandse Zorgauthoriteit (NZa), which drafts rules for hospitals in a dominant position, and the Inspectie Gezondheidszorg (IGZ), which inspects the quality of the healthcare.

Until 2004, when the hospital market had recently been liberalized, the ACM was convinced that there was no competition worth mentioning in the sector, and refused to apply competition law. After 2004, the rules were applied. A lot of hospitals have merged over the last decade. Almost all of these mergers have been authorized by the ACM. Academics fear that this will lead to health care institutions being ‘too important to fail’, that will need saving with public funds in case of financial trouble.

3.2.4.1 MCH – Bronovo merger

Facts

In July 2013, the bigger hospital Medisch Centrum Haaglanden (MCH) and the Bronovo hospital proposed their merger to the ACM. Their motives for the merger were better quality of care, benefits of scale and meeting the minimal quality standards set for each specialization of healthcare, as insurers tend to use these standards as a starting point of the negotiations.

Reasoning ACM

Generally, the ACM will assess a proposed hospital merger on the following aspects.

Competition is warranted when the merged entity is disciplined, so that it will not act independently of customers and competitors. The consequences of the merger depend on the ability of customers and competitors to discipline the merged hospital. The level of discipline is predicted by taking into account

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350 Mededingingswet, case number 14.059.22 (RGH – LLZ merger) p. 18
351 Translation: Dutch Healthcare Authority.
352 Translation: Inspectorate Healthcare.
356 Translation: Medical Centre The Hague.
357 Melding voorgenomen concentratie Stichting Bronovo en Stichting Medisch Centrum Haaglanden, Autoriteit Consument en Markt, July 2013, case number 13.0512.22
358 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 2
359 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 3
360 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de
the view of the insurance companies, who are the direct customers of the hospital, quantitative data on
the origin and destination of patients, travelling distance for patients and the views of patients' representatives.361

What is the reasoning of the ACM in the MCH-Bronovo merger?

The relevant product markets of the merging parties (hereafter: the parties) are clinical and non-clinical care.362 The geographical relevant market comprises of The Hague, Leidschendam-Voorburg and Wassenaar.363 The combined market share of the parties in the relevant markets is 50-60% in clinical care, 40-50% in non-clinical care.364 The main competitor of both parties is the Haga hospital, which is part of the RHG Group. Other hospitals put competitive pressure on the borders of the relevant market.365

Most of the customers of the hospital, the insurance companies who purchase care with the premia of their clients, are neutral towards the merger.366 A few however are heavily opposed. They fear that two blocks of hospitals will emerge: the Reinier Haga hospital block on the one hand, and the MCH-Bronovo block on the other.367 The first block does not have the capacity to take over the production of the other, so the insurance company can no longer purchase healthcare selectively.368 Still the insurers admit that Bronovo will need to change its profile to be profitable in the future.369

The patient boards of both hospitals are positive and expect a high increase in quality of the medical care.370 The NZa predicts a substantial rise, between 5 and 15 percent, in the price of hospital care.371

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361 Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 3
362 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 3
363 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 4
364 Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) p. 5-6
365 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 12
366 Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) p. 8
367 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 14-16
368 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 14-16
369 Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) p. 15
370 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 16
371 Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 17-18
The ACM however doubts the economic models of the NZa, according to her they always predict a rise when the relevant markets of hospitals overlap.\textsuperscript{372}

The ACM sketches her general view of the healthcare market and competition. She remarks that insurance companies have a variety of instruments to push hospitals to increase quality or lower prices.\textsuperscript{373} Even though the market is still in transition, the ACM expects the insurers to improve at negotiating with hospitals.\textsuperscript{374} There is more information available than in the past, and there are advantageous legislative developments.

Bronovo and MCH are not each other’s nearest competitors. One big competitor, the Haga hospital, remains.\textsuperscript{375} There is sufficient capacity in the region to cope with changing patient shifts, and there are enough possibilities for the insurers to discipline the merged entity.\textsuperscript{376}

The ACM grants the authorization to merge, as competition in the relevant market will not be restricted.\textsuperscript{377}

\textbf{3.2.4.2 RGH-LLZ merger}

\textbf{Facts}

The second merger I will discuss is the between the Reinier Haga Groep (RGH) and the Lange Land Ziekenhuis (LLZ), proposed to the ACM in September 2014.\textsuperscript{378} The Reinier Haga Group is the bigger one of the two. The LLZ has had financial insecurity in the past.\textsuperscript{379}

\textbf{ACM Reasoning}

The relevant product markets are clinical and non-clinical care.\textsuperscript{380} The geographical relevant market consists of primarily The Hague, Zoetermeer and Delft.\textsuperscript{381} The combined market share is 50-60% in both product markets.\textsuperscript{382} For both parties, their main competitor is the MCH-Bronovo hospital.\textsuperscript{383}
Compared to the merger case of MCH-Bronovo, the insurance companies are a lot more critical on the proposed merger.\textsuperscript{384} When asked about their possibilities to discipline the parties, the insurers doubt their ability to guide patients towards the cheaper hospitals.\textsuperscript{385} The insurers cannot refuse to purchase care at the RGH hospitals as it is, and the merger will not strengthen their position.\textsuperscript{386} Their view on the consequences of the merger is negative as well, as they expect increasing prices without an equivalent rise in quality, and a loss of dynamics in the market.\textsuperscript{387}

The patient board of the LLZ hospital is happy with the merger, as this will end the financial insecurity of the hospital.\textsuperscript{388} The NZa predicts a small increase in prices after the merger, of 1-5 percent.\textsuperscript{389}

As explained above, the ACM assesses a merger according to the ability of both competitors and customers to discipline the merged parties. In this case, this ability of the customers has lessened: insurers fear they cannot discipline the merged entity effectively. The ACM admits that the negotiating position of the insurance companies could change as a result of the merger.\textsuperscript{390} But there is one strong competitor left in the relevant market. The MCH-Bronovo hospital functions as the alternative for both insurers and patients, generating competitive pressure, so the parties will not be able to act independently from the market.\textsuperscript{391} This leads the ACM to conclude that the merger provides no restraints on competition and is therefore allowed.\textsuperscript{392}

These, and a large number of other hospital merger cases, have led to a lot of criticism in academic literature.\textsuperscript{393} Recently, even the Minister of Health has commented that the unbridled merging of hospitals has weakened competition in the healthcare sector.\textsuperscript{394}

\textsuperscript{382} Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 7
\textsuperscript{383} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 11
\textsuperscript{384} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 12
\textsuperscript{385} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 17
\textsuperscript{386} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 16-17
\textsuperscript{387} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 20
\textsuperscript{388} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 20
\textsuperscript{389} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 21
\textsuperscript{390} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 22
\textsuperscript{391} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 25
\textsuperscript{392} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 25-26
\textsuperscript{393} M. Canoy & W. Sauter, ‘Hospital mergers and the public interest: recent developments in The
Consumer welfare

The ACM attaches great importance to the quality of the medical care in hospitals, in other words, to the welfare of the patients of the hospital. This reveals a broad, quality based welfare standard, focused on consumers.

Or rather, focused on the patients: the ACM seems to be inclined more towards patients (represented by patient boards) than the insurance companies and their clients. Especially in the second merger case, the ACM brushes the critique of insurers aside and allows the merger.

As mentioned above, the notion of welfare is long-term welfare based on quality. It seems more important to secure the existence of the hospital and the quality of its care, over an extended period of time, than to make sure patients and other consumers receive immediate benefits from the merger. This seems mostly related to extended consumer welfare.

What is the role of competition in this context? The market shares of the merging hospitals are well over 50% of the relevant market. The Horizontal Merger Guidelines of the Commission state that market shares over 50% can in themselves already be proof of a dominant position in the market.395 Smaller competitors may compensate, but only when they have the capacity to serve the patients of the merging parties if necessary.396 The decisions deny that this is the case.397 Also, the ACM relies to a large extent on the buyer power of insurance companies to ensure competitive prices in the sector, by purchasing healthcare selectively. Yet, the insurers themselves highly doubt their ability to do so. How is it that the ACM still decides that there is sufficient competition left on the market? First, the ACM seems to value welfare considerations, such as quality and availability of healthcare, more in healthcare markets compared to other markets. Secondly, the smaller hospitals, Bronovo and LLZ, might on the long term no longer be able to make ends meet. There were some indications of their financial insecurity in both cases.398 The ACM prefers the existence of these hospitals over a restriction of competition on the shorter term.
3.3 The interpretation of consumer welfare by the ACM

The ACM decisions having been discussed, it is time to answer the main question of this chapter. What is the interpretation of consumer welfare by the ACM? Does the interpretation of consumer welfare based on ACM decisions reflect the interpretation in the policy documents?

A short summary of the policy documents:

“The end goal is creating optimal results for consumers, in other words: consumer welfare. The ACM notion of consumer welfare is above all broad. (…) The starting point of the ACM is consumer sovereignty: the ACM wants to help create a market where consumers are free and able to choose the products and services they desire. Hence the focus of the ACM on product variety and freedom of choice of consumers. (…) This changes when there are market failures, which hinder the freedom of choice of consumers. Then, the ACM will intervene in the market. She will conduct a cost-benefit analysis, based on both the long and short term effects of the conduct on the price, quality, product variety and innovation. If this balancing exercise turns out in favour of the consumer, the conduct is allowed. This indicates that the extended consumer welfare standard is the final and ultimate goal of competition enforcement, according to the ACM policy documents.”

None of the interpretations of consumer welfare discussed in the decisions completely matches the above description.

The interpretations on what increases consumer welfare varies to a large extent in the analyzed cases. The Persgroep merger puts competition at the center of its reasoning, indirectly stating consumers are best served by competition. The Kip van Morgen-agreement values benefits only to the extent that consumers value them as such, by researching their willingness to pay for these benefits. The Energy Agreement aims for consumer preferences as well, but this time by calculating the benefits and costs to consumer surplus. Lastly, the reasoning in the hospital merger cases focuses on the welfare of patients and the quality of medical care.

Based on this small number of investigated cases, the ACM seems to use a cost-benefit analysis when assessing the potential justification benefits of a restrictive agreement. In merger cases, the ACM asks whether there will be enough competition left on the market. What constitutes ‘enough competition’ may differ from case to case.

Next, I will turn to the separate concepts of ‘consumer’ and ‘welfare’.
Consumers

The policy documents state on consumers:

“(…) it is not yet clear what the ACM means by ‘consumer’. It seems to follow the definition of the European Commission, but broadened, to cover even future consumers in sustainability cases.” 402

The decisions were all united in their approach towards the concept of consumers. Consumers are all users of the product in the relevant market. In none of the cases future consumers are taken into account. Based on this analysis, there is a clear indication that the ACM concept of consumer is the same as the concept used by the European Commission.

Welfare

The policy documents refer to a broad and long-term notion of welfare:

“The concept of welfare covers a lot more than just the price of the product, also innovation, sustainability concerns and product variety on the market.” 403

The confusion on what is meant by consumer welfare as the policy goal of the ACM seems to stem from confusion on what is meant by ‘welfare’. The Persgroep merger does not specify what welfare is, but implies that welfare of consumers increases in a competitive market. The Kip van Morgen-agreement and Energy Agreement case link welfare to the satisfaction of consumer preferences, but the first calculates the willingness to pay of consumers, the latter looks at the costs and savings as a result of the agreement. The hospital mergers view welfare mainly as high quality of medical care for patients.

Clearly, these interpretations differ.

Competition

The approach towards competition in the policy documents is the following:

“Is it valued at all? It is, but only as an instrument, a means to the goal of consumer welfare.” 404

In the analyzed decisions, the importance of competition varies. In the decisions on sustainability, competition is indeed valued as a means to provide for the fulfilling of consumer preferences. The Persgroep merger has competition at its center. The hospital merger cases interpret competition rather differently, taking into account the existence of the hospital and a proper healthcare system in the (very) long term.

Conclusion
To sum it up: the clearer picture drawn by the policy documents on the policy goal of the ACM is not reflected in the cases. Rather, interpretations of consumer welfare in the cases were quite different. This seems to stem from confusion on what is meant by ‘welfare’ in the first place, as the concept of consumer is quite clear in the investigated cases.

The next chapter will continue by assessing the legitimacy of this broad policy goal along the benchmarks of Dutch and European law.
CHAPTER FOUR: THE ACM INTERPRETATION OF CONSUMER WELFARE AND LEGAL BOUNDARIES

Introduction

After this research on the interpretation of consumer welfare by the ACM, the compatibility of this interpretation with Dutch and European competition law will be analyzed. The legal boundaries relevant to the ACM and her policy goal have been discussed in paragraph 1.3. Does the ACM interpretation of consumer welfare stay within these boundaries? This chapter will try to provide some preliminary answers to this question. Even though I have analyzed all ACM policy documents, I have analyzed a limited number of five cases. Any conclusion based on these analyses will be indicative, and will need further research.

As the legal framework to this thesis was provided in the first chapter, I will only very briefly name the main provisions in both Dutch and European law. Further, the common points of the interpretation of consumer welfare by the ACM will be listed. Also, I will provide an overview of the interpretation of consumer welfare according to the Court, Commission and the ACM. Then, three areas where the ACM interpretation gets close to the limits in the law will be discussed.

Legal framework: main provisions

The Competition Act is the main act in Dutch competition law. This act states that the ACM is responsible for the supervision of the compliance with the provisions of the Competition Act. Based on this act, the main tasks of the ACM are tackling anti-competitive agreements and cases of abuse of dominance, as well as assessing potential mergers harming competition. The Act Instituting the ACM provides for a goal description, which aims to serve as a beacon for all ACM action.

The influence of European competition law on ACM action can hardly be overstated. Because the country of the Netherlands is relatively small, agreements, mergers and abuses of dominance will quickly have an influence on interstate trade. The ACM has to apply European competition law to all agreements and other activities within the scope of competition law which affect trade between Member States. Those activities not affecting interstate trade do not have to comply with European law. However, the Dutch legislator voluntarily chose to align as much as possible with European competition law when he drafted

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405 Dutch: Mededingingswet
406 Article 2 Competition Act
407 The main provisions of the Competition Act are: article 6 (agreements & collusions), article 24 (abuse of dominance) and the articles 29-49 (mergers).
408 Instellingswet Autoriteit Consument & Markt
410 Article 3 para. 1 of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
the Competition Act.\textsuperscript{411} In principle, Dutch competition law is not supposed to derive from European competition law.

The main relevant provisions of European competition law are the articles 101 and 102 TFEU and the relevant jurisprudence of the General Court and the Court of Justice of the European Union.

\subsection*{4.1 Interpretation of consumer welfare: main characteristics}

As concluded in the third chapter, the interpretation of consumer welfare is not unequivocal. The policy documents sketch a more or less clear picture of consumer welfare, but the decisions of the ACM fail to do so.\textsuperscript{412} How is it possible to assess the legal compatibility of the ACM interpretation when the interpretation itself is unclear? Below, I will discuss the four common points of the interpretation of consumer welfare by the ACM, based on the analysis of both the policy documents and the decisions. Note: not every common point features in every single decision.

The first main common point of consumer welfare from an ACM perspective is the consumer being at the heart of the decision making. This key position of the consumer is repeated several times in the policy documents.\textsuperscript{413} In four out of five of the investigated decisions the effect of the merger or agreement on consumers was decisive in answering whether or not there was a restriction of competition.\textsuperscript{414} Moreover, the preferences and opinions of consumers were highly valued, for instance in the Kip van Morgen-case and the hospital mergers.\textsuperscript{415} The notion of consumer is broad: it covers all users of the product in the relevant market.\textsuperscript{416}

Secondly, the notion of welfare is interpreted in a broad sense.\textsuperscript{417} Welfare can be interpreted as variety in the market\textsuperscript{418}, for instance in the Kip van Morgen-decision, or quality,\textsuperscript{419} as the hospital mergers show.

\begin{itemize}
\item \textsuperscript{411} Parliamentary documents II 1995/1996, 24 707, nr. 3, p. 10
\item \textsuperscript{412} Paragraph 3.2
\item \textsuperscript{415} Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014, p. 6, Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22 (MCH-Bronovo Merger) p. 3
\item \textsuperscript{416} Paragraph 3.2
\item \textsuperscript{417} ACM Strategie, September 2013, p. 2 and ACM Position Paper Mededinging & Duurzaamheid, July 2013 p. 12
\item \textsuperscript{418} Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014
\item \textsuperscript{419} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) & Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger)
\end{itemize}
Welfare can also be a reduction in price or increased sustainability\textsuperscript{420}, as featured in the Energieakkoord-decision.

The third common point is related to the method of assessing benefits when an agreement or merger needs to be justified. The ACM seems to weigh the advantages and disadvantages of the measure, using the cost-benefit analysis\textsuperscript{421}. In both cases concerning justifications, the Kip van Morgen- and the Energieakkoord-case, the available benefits are first measured and 'monetized' and then compared to the costs of the measure\textsuperscript{422}.

The fourth and final common point is that competition is deemed to be instrumental to the goal of consumer welfare. The policy documents state that competition is a tool, though an important tool, to achieve consumer welfare\textsuperscript{423}. With the exception of the Persgroep merger, the cases seem to focus on consumers more than they do on competition.

These four common points of both the policy documents and the decisions provide a general overview of the interpretation of consumer welfare.

**Consumer welfare and the Court of Justice, the Commission and the ACM**

The European Commission, the Court of Justice and the ACM all take a different position towards consumer welfare. In this short section I will compare these positions. Consumer welfare as a goal is used by the Commission and the ACM. Yet, welfare is viewed less broadly by the Commission: the Commission states non-economic considerations must fit into the justification framework as found in article 101(3) TFEU. The ACM does not limit the influence of non-economic considerations. The Court of Justice rejected a price-based concept of consumer interests as well. Different from the Commission and the ACM, the Court has only mentioned consumer welfare once in a judgment, but defined it no further. The Court held that harm to consumer interests is a consequence of harm to competition.\textsuperscript{424} In a way, the Commission and the ACM have a reverse view on competition: in their view, competition is a means of improving consumer welfare. However, there seems to be consensus that the concept of 'consumers' encompasses both intermediate and final consumers.

**4.2 Is the ACM interpretation of consumer welfare compatible with Dutch and European competition law?**

\textsuperscript{420} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013
\textsuperscript{421} ACM Strategie, September 2013, p. 6
\textsuperscript{422} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013, p. 7 and Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', April 2014, p. 6
\textsuperscript{423} ACM Strategie, September 2013, p. 7
\textsuperscript{424} CJEU 27 March 2012, C-209/10, ECR 2012 -00000 (Post Denmark) par. 44
Next, the ‘areas of concern’ will be discussed. These areas are instances where the interpretation of consumer welfare of the ACM runs the risk of crossing a certain legal boundary.

4.2.1 Article 2(5) of the Act Instituting the ACM

The article 2(5) of the Act Instituting the ACM provides for a “goal description”, as the parliamentary documents call it.\(^{425}\) It should be the touchstone of all ACM action. Different specific laws set the competences of the ACM, this provision sets the goal for which these competences are exerted. The provision reads as follows:

“De werkzaamheden van de Autoriteit Consument en Markt hebben tot doel het bevorderen van goed functionerende markten, van ordelijke en transparante marktprocessen en van een zorgvuldige behandeling van consumenten. Zij bewaakt, bevordert en beschermt daartoe een effectieve concurrentie en een gelijk speelveld op markten en neemt belemmeringen daarvoor weg.”\(^{426}\)

Note that this article does not mention consumer welfare. It describes a goal: “promoting well-functioning markets, orderly and transparent market processes and a proper treatment of consumers.”\(^{427}\) Even though consumers should be treated properly, the act does not mention that this means increasing the welfare of consumers. To reach this goal, the ACM will “guard, promote and protect workable competition and a level playing field (…).”\(^{428}\) This is the way, according to the law, to attain the previously mentioned goal.

It is striking that the legislative goal is mentioned only once in the policy documents, whereas the policy goal of the ACM is mentioned multiple times.\(^{429}\) Does the policy goal in practice replace the legislative goal as the touchstone for all ACM action? The ACM policy goal of increasing consumer welfare is described as the ACM’s “main driving force”.\(^{430}\) “Optimally functioning markets in the interest of consumers, that’s what it is all about.”\(^{431}\)

The ACM states her policy mission is a translation of the legislative goal of article 2(5) of the Act Instituting the ACM.\(^{432}\) But is the ACM policy goal of consumer welfare truly an accurate representation of...
the legislative goal? The legislative goal does not prescribe consumers to be at the heart of ACM decision making, nor does the law require a broad reading of the notion of welfare.

Thus, the policy goal of the ACM, set in spite of the existing legislative goal, has a different focus than the legislative goal in article 2(5) of the Act Instituting the ACM. In this manner, the ACM differs from her legislative goal set in Dutch competition law.

4.2.2 Articles 101 and 102 TFEU

The second legal limit concerns not so much the text of the articles 101 and 102 TFEU, but their interpretation by the European Court of Justice. Based on article 19 TEU the Court’s interpretation of the Treaty is leading.

The ACM is bound to the interpretation of the European Treaties by the European Court of Justice when she decides on cases affecting interstate trade.\textsuperscript{433} In such cases, European competition law applies.

The Court of Justice has ruled on consumer welfare and the goals of European competition law on a number of occasions. In the case of T-Mobile she ruled that article 101 TFEU is not solely drafted to protect the direct interests of competitors and consumers, but also to protect the market structure in the Union, and hence competition as such.\textsuperscript{434} The case of GlaxoSmithKline affirmed: competition is not just a means to attain the goal of consumer welfare.\textsuperscript{435} The Court ruled in the case of Post Denmark on the position of consumer welfare in European competition law, stating that consumer welfare is the indirect effect of promoting competition and market integration.\textsuperscript{436}

This interpretation of the articles 101 (and 102) TFEU shows a discrepancy between the goals of competition law according to the Court versus the goal of competition law according to the ACM. Three Court judgments have affirmed competition as such is a goal of European competition law. This differs from the ACM Strategy document which states competition is instrumental.\textsuperscript{437} Further, competition as such seems to have a secondary position in the hospital merger cases as discussed in paragraph 3.2. These cases seem to prefer the welfare of patients over competition concerns: the mergers lead to hospitals with a dominant market share,\textsuperscript{438} even though the weak buyer power of insurers and the only other competitor in the market might not keep the merged hospital from behaving independently from the

\textsuperscript{433} Article 3 para. 1 of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1
\textsuperscript{434} CJEU 4 June 2009, C-8/08, ECR 2009 I-04529 (T-Mobile) par. 38
\textsuperscript{435} CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECR 2009 I-09291 (GlaxoSmithKline) par. 63
\textsuperscript{436} CJEU 27 March 2012, C-209/10, ECR 2012 -00000 (Post Denmark) par. 44
\textsuperscript{437} ACM Strategie, September 2013, p. 7
\textsuperscript{438} Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) p. 5-6 and Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 12
market. The ACM however states that competition is not restricted.\textsuperscript{439} This view differs from the view of the Court of Justice, which ruled that consumer welfare is the indirect result of competition:\textsuperscript{440} competition first, consumer welfare second.

In short, by making competition secondary to the goal of consumer welfare, the ACM differs from the interpretation of the Treaty articles 101 and 102 TFEU as ruled by the Court of Justice.

The notion of ‘consumer’ reveals another interesting aspect of the interpretation of the Court of Justice and the ACM interpretation. The ACM places consumers at the heart of her policy.\textsuperscript{441} She states that the ultimate result of competition law should be the increasing of consumer welfare.\textsuperscript{442} The key position of consumers shows in the prioritizing, manner of supervision and choice of instrument.\textsuperscript{443} The effect on consumers is the main catalyst of ACM action.\textsuperscript{444} One should compare this to the statements of the Court of Justice related to consumers. The Court of Justice stated numerous times that consumer harm does not need to be proven to show a restriction of competition by object.\textsuperscript{445} Moreover, competition law is “designed to not only protect consumers and competitors (…).”\textsuperscript{446} The consumer is important, but equal to other aspects like competition and market integration.\textsuperscript{447} These statements seem to indicate that the Court of Justice does not place consumers at the heart of competition law: consumer welfare is important, but not key. This shows a difference between the focus of the ACM and the focus of the Court of Justice with regard to competition law.

\textbf{4.2.3 The principle of legal certainty}

Even though the principle of legal certainty is not written in legislation, it is an important legal principle. Legislation should not be arbitrary; citizens bound by the law should be able to predict what kind of behaviour is allowed and what behaviour is not.\textsuperscript{448} Legal certainty requires the law to be clear, understandable, and avoid being open to multiple interpretations.\textsuperscript{449}

\begin{itemize}
  \item \textsuperscript{439} Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) p. 17 and Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger) p. 25-26
  \item \textsuperscript{440} CJEU 27 March 2012, C-209/10, ECR 2012 -00000 \textit{(Post Denmark)} par. 44
  \item \textsuperscript{441} ACM Strategie, September 2013, p.4
  \item \textsuperscript{442} ACM Strategie, September 2013, p. 2
  \item \textsuperscript{443} ACM Strategie, September 2013, p. 4
  \item \textsuperscript{444} ACM Strategie, September 2013, p. 4
  \item \textsuperscript{446} CJEU 4 June 2009, C-8/08, ECR 2009 I-04529 \textit{(T-Mobile)} par. 38
  \item \textsuperscript{447} CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECR 2009 I-09291 \textit{(GlaxoSmithKline)} par. 63
  \item \textsuperscript{448} P. Haan, T. Drupsteen, R. Schlossels, R. Zijlstra, ‘Bestuursrecht in de sociale rechtsstaat’, Deventer:
\end{itemize}
This principle of legal certainty applies to the law, but does it apply to policy as well? Some articles of the Competition Act are broad. The policy guidelines and decisions of the ACM are necessary to clarify these broad articles. Undertakings should be able to predict what kind of behaviour is allowed under competition law and enforced by the ACM, and which behaviour is not. This is important in competition law especially, as market interventions by the ACM can have immense consequences for the affected undertakings. Moreover, undertakings are expected to develop a self-assessment to see whether their behaviour meets the requirements of competition law. This will be significantly harder when the ACM policy is not clear.

In short, it is important that the ACM policy is predictable, and fulfills the conditions of the principle of legal certainty.

After some research, one can obtain from the policy documents of the ACM an overview of the interpretation of the goal of consumer welfare, albeit with some small variations in sustainability and healthcare cases.\textsuperscript{450}

The ACM decisions did not show similar consistency. The interpretations of consumer welfare were considerably different in the five investigated cases.\textsuperscript{451} In one case consumer welfare was best served by competition,\textsuperscript{452} in other cases competition was secondary to the welfare of consumers.\textsuperscript{453} In one case willingness to pay was deemed to be the best method of assessing the benefits of an agreement,\textsuperscript{454} in the other the benefits were calculated based on consumer surplus and saved costs.\textsuperscript{455}

The ACM interpreted the ‘consumer’ the same in all decisions: all users in the relevant market.\textsuperscript{456} The same cannot be said of the concept of consumer welfare as a whole, and the role of competition in ACM decision making.

The current lack of a consistent interpretation of consumer welfare in ACM decisions possibly affects legal certainty.

\textsuperscript{450} Paragraph 3.1
\textsuperscript{451} Paragraph 3.2
\textsuperscript{452} Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24 (Authorisation Decision Persgroep merger)
\textsuperscript{453} Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24, (MCH-Bronovo Merger) and Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, March 2015, case number 14.1059.22, (RGH-LLZ merger)
\textsuperscript{454} Analyse ACM van duurzaamheidsafspraken ‘De Kip van Morgen’, April 2014
\textsuperscript{455} Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013
\textsuperscript{456} Paragraph 3.2
CONCLUSION

At the end of my thesis, I draw a conclusion. On the following pages, the research in the thesis will be summarized and the research aims, as found in the introduction, will be repeated. Has the research met these aims? I will assess whether this thesis has added to the existing literature on the topic, as well as list the limitations of both the results and methods used. Finally, some policy recommendations will be given.

Aims of the research

The starting point of my thesis was the debate in Dutch academic literature on the new policy goal of the recently merged ACM: consumer welfare. The aim was to put this debate into context by sketching the debates on consumer welfare in economics, and in both the American and European legal traditions. Furthermore, I wanted to provide some insights into the interpretation of the concept of consumer welfare by the ACM and assess its accordance with Dutch and European competition law.

My research question was: Has the ACM crossed legal boundaries in European or Dutch competition law through her choice and interpretation of her policy goal, which is consumer welfare?

Thesis structure

Broadly, the structure of this thesis was as follows. First, a legal framework was drawn with the relevant legal articles. Second, the context of the debate on consumer welfare was sketched, after which the policy documents of the ACM were analyzed to find the characteristics of the ACM interpretation of this concept. Then five ACM decisions were researched, to find out the embedded view on consumer welfare within the reasoning of the ACM. Fifth and lastly, the characteristics of this interpretation were assessed under the relevant legal provisions.

Results of the research

The research has shown that the paradigms of economics, the American and European legal tradition, all had a different view on consumer welfare. Also, in all of these paradigms, the concept of consumer welfare was multi-interpretatable, and lead to many discussions among academics in the field.

The research on the policy documents has indicated that the position of the ACM towards consumer welfare is relatively consistent throughout these documents. But in the five ACM decisions, the interpretation of consumer welfare seemed to show significant differences from case to case.
After some research I was able to discern four characteristics relating to consumer welfare which featured in both the policy decisions and a substantial part of the decisions discussed. Based on my research, the interpretation of consumer welfare of the ACM consists of, among others, the following four characteristics:

- The consumer is at the heart of the decision-making, as the effect of the conduct on consumer is decisive in deciding on whether or not there is a restriction of competition. The notion of consumers is interpreted broadly, covering all users of the product in the relevant market.
- Welfare is interpreted broadly as well. It can appear as product variety in the market, quality of the product, price reductions for consumers or sustainability considerations.
- When a certain conduct restricts competition, it might be justified. The ACM performs the assessment of benefits in this justification procedure with a cost-benefit analysis.
- Competition is deemed instrumental to the goal of consumer welfare.

The legal assessment suggested that the prominence of the policy goal of consumer welfare led to the legislative goal of the ACM457 in Dutch law playing second fiddle. Further, the interpretation of consumer welfare seemed to differ from the rulings of the Court of Justice of the European Union on the interpretation of European competition law. The incoherence of the consumer welfare interpretation in the investigated decisions may lead to problems with the principle of legal certainty.

Returning to the research question: has the ACM crossed legal boundaries in European or Dutch competition law through her choice and interpretation of her policy goal, which is consumer welfare? No, the ACM has not crossed legal boundaries. None of the characteristics of consumer welfare as found in the research were outright incompatible with Dutch or European law. Nevertheless, the research has found some divergence of the ACM interpretation with Dutch law, European law and the legal principle of legal certainty.

Relevance of the research

Thus far, the academic debate on consumer welfare in the Netherlands was rather broad. It covered many topics, and it seemed as if every contributor to the debate held a slightly different view of consumer welfare. To bring a little more focus to this academic debate, some information on the interpretation of consumer welfare was needed. Nor had the accordance with law of this policy goal been addressed in the

\[457\] Article 2(5) of the Act Instituting the ACM
debate thus far, like the chairman of the ACM commented.\textsuperscript{458} On a broader perspective, this research could provide material for delimiting the room for manoeuvring of other national competition authorities in the Union to set their own policy goals.

**Have the research goals been met?**

The first goal, of providing context to the debate in Dutch academia, has been met. Prominent developments both within economics and the two legal traditions of the United States and the European Union have been explained.

The second and third aim of my research concerned providing insights into the interpretation of the concept of consumer welfare by the ACM and assess its accordance with Dutch and European competition law. These goals have been met to some extent.

A number of characteristics of the ACM interpretation of consumer welfare have been discerned. However, these are rather broad and they are limited in number. This has to do with the differences in the interpretations of consumer welfare in the discussed decisions. Even though these characteristics of the ACM interpretation of consumer welfare are still broad, there used to be no research on the matter at all. Especially the definition of ‘consumer’ has been clarified by the case analysis.\textsuperscript{459} The interpretation of welfare is still open to many interpretations, however. Overall, this research has provided for a considerable foundation for further research into the characteristics of the interpretation of consumer welfare by the ACM.

The goal to provide a legal analysis of the compatibility of the interpretation with Dutch and European competition law has also been met to a certain extent. The legal analysis depended on four characteristics of consumer welfare I was able to discern from policy documents and decisions. The legal boundaries were quite clear, and therefore I was able to formulate three clear, though preliminary, conclusions.

\textsuperscript{458} "Het juridische kader waarbinnen ACM opereert, komt in een economenblad minder aan bod. Toch is ook die invalshoek niet onbelangrijk, omdat uiteindelijk veel zaken voor de rechter beslecht worden. De enkeling die daar wel wat over zegt, maakt duidelijk dat juristen en economen nog steeds veel van elkaar kunnen leren.” (Translation: The legal framework in which the ACM operates, will feature less in an economic journal. This approach is important too, as ultimately many cases are decided before a judge. Those who do mention this, show that economists and legal experts can still learn a great deal from each other’s field of expertise.) From: C. Fonteijn, ‘Ten Geleide’, ESB Dossier Consumentenwelvaart als beleidsdoelstelling, ESB 2014, vol. 99, p. 1

\textsuperscript{459} Among academics there was confusion on this subject: “What the ACM means by ‘consumer’ is even less clear. It does not address this adequately in the policy documents.” From: E. van Damme, ‘De betovering van de consumentenwelvaart’, ESB Dossier Consumentenwelvaart als beleidsdoelstelling, ESB 2014, vol. 99, p. 9
Has this research added to the existing academic work?

The analyses on the interpretation and accordance with law of the concept of consumer welfare by the ACM did add to the existing academic work. The analyses will assist in creating a better focus in the academic debate on the policy goal of the ACM, as there is increased clarification on what is meant by consumer welfare. This thesis contains useful information for the ACM itself, on the possibly problematic areas of their policy goal with the law. Further, this analysis is also helpful for other national competition authorities who wish to set a policy goal, by clarifying the boundaries of European law in such matters.

What are the limitations to the research?

There are a number of limitations to the research in this thesis. The analysis of the ACM policy documents may have been one-sided as the documents were solely viewed from a competition law perspective. The ACM is not only the national competition authority, but also the market regulation authority and the consumer protection authority. Some considerations in the policy documents may be related more to these fields of law.

The same is true for the case analysis. I only investigated competition law cases to find the interpretation of consumer welfare, where a more comprehensive analysis would have included cases from the other legal areas as well. Furthermore, the analysis was limited due to the small number of five cases. In order to truly establish the concept of consumer welfare as interpreted by the ACM, more cases will need to be researched. The kind of cases chosen also plays a role. I have chosen quite complex cases. Such complex cases may contain an interpretation of consumer welfare different from the standard ACM case. Especially healthcare remains a peculiar area in competition law. It could be questioned whether the reasoning of the ACM in such cases may be used in a broader context.

The four characteristics of consumer welfare are based on my interpretation of the policy documents and the decisions. The legal analysis in turn, is based on these four characteristics. Some may argue that this waters down the relevance of the legal analysis, as this is based on my interpretation of the documents.

With regard to future research on the matter, I recommend a broader and more comprehensive approach, involving market regulation and consumer protection cases as well. Also the number of investigated cases would be higher.

Policy recommendations for the ACM
On the one hand, the policy documents provide for a mostly consistent and clear view on what consumer welfare is. It has to be kept in mind that policy goals are necessarily broad in order to cover all activities of the entity. In this light, the efforts of the ACM in the policy documents to describe consumer welfare should be applauded. The ACM has published a substantial number of policy documents which feature the practical application of consumer welfare in ACM decision-making.\footnote{The latest being: ACM ‘Het toezicht van de ACM op verticale overeenkomsten’, April 2015, but also: ACM Position Paper Mededinging & Duurzaamheid, July 2013}

On the other hand, the ACM decisions leave the reader wondering how the ACM interprets consumer welfare in practice as every case seemed to have a different focus related to consumer welfare. One possible explanation for this difference in clarity between policy documents and decisions is that the ACM is still in a transitional phase after the merger in 2013. It will take time for the ACM to fully develop a decision-making practice encompassing a coherent interpretation of consumer welfare in both theory and practice. This matter should receive continuous attention of the ACM.

In the policy documents, the ACM could provide more information on the relation of consumer welfare towards competition. The role of competition in the decisions varied, and policy documents did not explain how ‘competition as a means to reach consumer welfare’\footnote{ACM Strategie, September 2013, p. 7} should take shape in practical decision-making. Also, the ACM could show how competition legislation is interpreted in accordance with consumer welfare. This would clarify the somewhat abstract statements in the policy documents.

I would recommend the ACM to feature her legislative goal of article 2(5) of the Instituting Act in more policy documents. Also, she should keep an eye to European competition law, especially the rulings of the Court of Justice. Divergence between EU competition law and Dutch competition policy is not recommended.

Ultimately, the ACM is the enforcer of competition law, consumer protection law and market regulation in the Netherlands. She has got strict legislative tasks assigned to her, and she should stay within the boundaries of these tasks. Consistent, transparent and effective enforcement of these legislative tasks is ultimately the goal ACM should strive for.
BIBLIOGRAPHY OF WORKS CITED

Literature


Jong, de M.A., ‘De Wet Stroomlijning Markttoezicht ACM’, *Tijdschrift Mededinging in de Praktijk* 2014, nr. 5 pp. 10-16

Kleinhout, A., 'De Autoriteit Consument en Markt één ziet meer dan drie? Enkele bestuursrechtelijke aspecten van de samenvoeging van de NMa, OPTA en de Consumentenautoriteit', *Actualiteiten Mededingingsrecht* 2011, nr. 9 pp. 170-180


**Policy documents & decisions**

ACM Beoordeling fusies en samenwerkingen in de zorg, September 2013

ACM Boetebeleidsregel and Beleidsregel Clementie, August 2014

ACM Jaarverslag 2013, May 2014

ACM Jaarverslag 2014, March 2015

ACM Marktvisie, April 2013

ACM Position Paper Mededinging & Duurzaamheid, July 2013

ACM Speerpunten, April 2013

ACM Strategie, September 2013

Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', April 2014

Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenoemden afspraak tot sluiting van 80er Jaren kolencentrales in het kader van het SER Energieakkoord, September 2013


Besluit Autoriteit Consument en Markt inzake melding voorgenomen concentratie Bronovo – Medisch Centrum Haaglanden, September 2014, case number: 13.0512.22

Besluit Autoriteit Consument en Markt inzake melding voorgenomen concentratie Reinier Haga Groep en Lange Land Ziekenhuis, March 2015, case number: 14.1059.22

Besluit Autoriteit Consument en Markt inzake vergunning voorgenomen concentratie De Persgroep Publishing N.V. en Mecom Group Plc., February 2015

Besluit Autoriteit Consument en Markt inzake vergunning voorgenomen concentratie Bronovo en Medisch Centrum Haaglanden, December 2014, case number: 13.0758.24

Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, case number 14.1067.24

Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, case number 14.0810.22

Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, case number 14.059.22

Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 37, eerste lid, van de Mededingingswet, September 2013, case number 13.0512.22

Besluit van het Bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 41 van de Mededingingswet, December 2013, case number 13.0758.24
Energieonderzoek Centrum Nederland, Externe Notitie ‘Effecten van versneld sluiten van de vijf oudste kolencentrales’, September 2013

European Commission ‘Guidelines on Vertical Restraints’ 2010 OJ C 130/01


European Commission ‘Communication of the 30th of August 2014 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union’ (De Minimis Notice) 2014 OJ C291

European Commission ‘Notice on cooperation within the Network of Competition Authorities’, 2004, OJ C101/43

European Commission ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ C 031, 05/02/2004

NMa Richtsnoeren voor de zorgsector, March 2010

SER ‘Energieakkoord voor duurzame groei’, September 2013

Kamerbrief L.F. Asscher en J. Klijnsma, ‘Resultaten sociaal overleg’, 11 April 2013

Talks


N. Kroes, ‘The European Commission’s enforcement priorities as regards exclusionary abuses of dominance – current thinking’, Competition Law International 2008
LIST OF JURISPRUDENCE REFERRED TO

Court of Justice of the European Union

CJEU 15 July 1964, C-6/64, Jur. 1964 00585 (Costa ENEL)

CJEU 30 June 1966, C-56/65, Jur.235,249 (Société Technique Minière)

CJEU 21 June 1974, C-2/74, Jur. 1974 00631 (Reyners)

CJEU 4 December 1974, C-41-74, Jur. 1974 01337 (Van Duyn)

CJEU 8 April 1976, C-43/75, Jur. 1976 00455 (Defrenne)

CJEU 13 February 1979, C-85/76, Jur.1979 00461 (Hoffmann La Roche)

CJEU C-202/07 P, 2 April 2009, Jur. 2009 I-02369 (France Télécom)

CJEU 4 June 2009, C-8/08, Jur. 2009 I-04529 (T-Mobile)

CJEU 6 October 2009, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, Jur. 2009 I-09291 (GlaxoSmithKline)

CJEU C-280/08 P, 14 October 2010, Jur. 2010 I-09555 (Deutsche Telekom)

CJEU C-52/09, 17 February 2011, Jur. 2011 I-00527 (TeliaSonera)

CJEU 27 March 2012, C-209/10, Jur. 2012 -00000 (Post Denmark)

CJEU 13 December 2012, C-226/11, Jur. 2012 -00000 (Expedia)

General Court of the European Union

GC 7 June 2006, T-2013/01 and T-214/01, Jur. 2006 II-01601 (Postsparkasse)

GC 27 September 2006, T-168/01, Jur. 2006 II-02969 (GlaxoSmithKline)


United States Supreme Court

Reiter v. Sonotone Corp. 442 U.S. 330 (1979)