

Blog Martijn Snoep: Oversight over the regulator: how does it currently work, and what needs to be improved?

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Having independent market oversight is something to be treasured. Just take a look at countries where there is no separation (or no longer any separation) between the market authority and the executive branch of the government to see what can happen. Investigations are launched into companies that refuse to do the government's bidding. Companies with the greatest lobbying power will have their mergers cleared regardless of the harm they inflict. Sanctions are imposed (or deliberately not imposed), depending on political affiliations. Having independent market oversight is critical to liberal democracies and to the rule of law, as well as to the trust in fair and effective market oversight. Yet, who oversees the independent regulator?

In a recent article in Dutch financial newspaper *Financieele Dagblad* (FD), the question was raised about oversight over ACM's activities, which was prompted by a discussion about a possible new power for ACM. That is the backdrop against which this blog has been written: it's about how ACM's oversight works at the moment, and about what can be improved, in part based on a report about this very topic, which was compiled at the request of the Dutch ministry of Economic Affairs and Climate (EZK) and ACM.

How does oversight over ACM work at the moment?

First of all, the Dutch and European legislatures set the boundaries within which ACM conducts its own oversight as well as how it does so. If these legislatures believe ACM should do so otherwise, those boundaries can be changed through the regular democratic legislative process. In short, the legislature is always in control of the latitude that ACM has.

Second, the courts watch over these boundaries meticulously. Against most of ACM's major decisions, the companies involved or other interested parties file objections (review by ACM itself) and appeals (first with the District Court of Rotterdam and eventually with the highest administrative-law court in the Netherlands, the Dutch Trade and Industry Appeals Tribunal or CBB). They do so because the financial stakes are usually significant. In the review and appeal proceedings, it is carefully examined whether ACM acted within the boundaries set by the legislature, and whether ACM conducted oversight in the way it was intended. Dutch courts tend to take a critical look at such cases. They intervene in approximately one in four ACM decisions. That is because the boundaries are not always clear-cut. ACM and all other parties involved learn how to interpret those boundaries from the courts' clarifications.

Third, the minister and the ministry play important roles in oversight over ACM. They cannot give any instructions with regard to individual cases. Yet, they do have significant influence over ACM. That is a form of oversight. For example, each year, the ministry sets ACM's budget, and, within that budget, makes available the equivalent number of civil servants and resources. From a legal and

financial perspective, ACM is nothing more than the board, consisting of its three members, and the board's budget for its own expenses. Moreover, those board members are appointed and reappointed by the minister, and can also be suspended and dismissed by the minister. The board has set its own by-laws, which stipulate how decisions are taken, and how duties are divided between the board members. These by-laws require prior ministerial approval. The minister can also set policy rules with which ACM must comply when conducting oversight, and the minister can, on limited grounds, set aside ACM's own policy rules. The minister can also request all data and information that ACM has (except those that relate to individual cases), for example, when it suspects dereliction of duty on ACM's part. And finally, every five years, the minister commissions a third party to conduct an evaluation of ACM in terms of efficiency and effectiveness. That is done on the basis of interviews with a diverse group of stakeholders as well as on an analysis of information provided by ACM. An evaluation was completed just recently, this time for the 2020-2025 period. That evaluation reveals that, during the period under evaluation, ACM functioned effectively, and that it utilized its capacity efficiently.

Fourth, ACM's Advisory Board conducts oversight over ACM. On the basis of its own by-laws, the Board of ACM decided to create an Advisory Board, and appointed four members. At the request of the Board of ACM, this Advisory Board acts as a Supervisory Board. ACM's Advisory Board gives solicited and unsolicited advice to the Board of ACM regarding ACM's strategic course, operations, finances, its relations with relevant ministries, as well as major changes in the organization. The annual plan and the annual report are submitted to the Advisory Board before the Board of ACM finalizes them. The Advisory Board has discussions with the Board of ACM collectively and with individual board members about their performance, and gives advice on appointments and reappointments of the members. Finally, the Advisory Board draws up its own annual report, which is part of ACM's annual report.

Fifth, ACM's internal checks and balances are important for oversight over ACM's oversight. All major decisions are prepared by a case team, and are taken by the Board of ACM in the weekly board meetings. Most major decisions go through a separate internal review process by another team before the Board of ACM looks at them. In the board meetings, the case team, the review team, the directors of the units involved, the Chief Economist, and the director of the Legal Department each have a seat at the table. In that way, all perspectives are shared, and also taken into consideration by each of the board members. Decisions are taken by the Board of ACM on the basis of a majority vote. No special voting rights are afforded to the Chair of the Board or to the board member that has the specific domain of the case at hand in its portfolio.

Finally, transparency is essential for oversight over ACM's oversight because it adds to the necessary accountability and the ability to ask ACM critical questions. All of its decisions are substantiated extensively, and are published on its website. Interested parties have access to all underlying, non-confidential pieces of evidence. The ACM annual plan and the annual report contain a lot of information about priorities, evaluations, and effects. For specific domains, such as energy and the digital economy, ACM publishes 'focus documents', which contain more details about planned interventions. ACM is regularly invited to hearings of various standing committees of the Dutch House of Representatives to give explanations, and ACM is always ready to answer critical questions from reporters and others.

In short, there is already significant oversight over ACM's oversight (and rightly so), but that doesn't mean that everything is perfectly organized. Since that separation between ACM and the executive branch of the government is so crucial, oversight over ACM must be statutorily enshrined, and the roles of the minister and the ministry and ACM must be defined more clearly. Now is the time for making those improvements in order to protect that independence to the fullest extent.

What needs to be improved?

At the request of the ministry and ACM, two external advisors (former career civil servants Hans Borstlap and Johan de Leeuw) assessed in early 2025 whether ACM's current management and governance structure is sufficiently effective and future-ready. And, if that was not the case, what would be needed to become more effective and future-proof?

Their conclusions were clear: the scope and complexity of ACM's duties call for a clear and unequivocal management and governance structure, and the current structure falls short of that. There are too many ties and dependencies with the ministry, thereby putting pressure on ACM's independence and professionalism. According to these external advisors, a future-proof management and governance structure calls for a democratically legitimized and statutorily enshrined positioning of both the Advisory Board and the ACM organization.

According to the external advisors, the following is needed, among other things:

1. ACM must be granted the status of autonomous administrative authority under Dutch law (in Dutch: zelfstandig bestuursorgaan, or zbo) with its own staff and its own annual plan and budget (meaning a long-term budget). The current situation where, in a legal and financial sense, ACM is merely composed of the three board members to whom personnel and resources are made available by the ministry must therefore end. As a result, it will become clearer for ACM and the ministry who is responsible for what, and how the organization is managed. All other major regulators in the Netherlands (the Dutch central bank DNB, the Dutch Authority for the Financial Markets AFM, the Dutch Healthcare Authority NZa, and the Dutch Data Protection Authority AP) are fully-fledged autonomous administrative authorities, too.
2. As an autonomous administrative authority with its own legal personality and its own staff, ACM will also need to have its own budget. That means having its own annual account, its own accountant, and a financial and policy-based annual report published at pre-determined points in time. This must be laid down in law.
3. Without prejudice to the minister's responsibility for the system itself, the external advisors recommend granting ACM's Advisory Board a statutory basis for oversight over ACM. In this model, the Advisory Board's members must be appointed by the minister, after nomination by the Advisory Board. Given the minister's responsibility for the system itself, the minister remains responsible for the appointment, suspension, and dismissal of board members, but the Advisory Board is granted the power to nominate a candidate.
4. The minister's formal powers to intervene in ACM's actions must be reduced, for example a) the mandatory approval of the Board's by-laws and b) the power to set policy rules with regard to ACM's execution of its duties.

It would be going too far to discuss all of these recommendations. The point is that oversight over ACM must be improved, since the current model is not effective or future-proof enough in light of safeguarding ACM's independent position.

What are the next steps?

When presenting the report to the Dutch House of Representatives in July 2025, the then-caretaker minister of Economic Affairs indicated that any further decisions would have to be taken by his successor. The plan for the required statutory adjustments has largely been developed by the external advisors, and is currently awaiting approval. A more detailed bill can subsequently be sent to the Dutch parliament. Now is the time to do so.

<https://www.acm.nl/en/publications/blog-martijn-snoep-oversight-over-regulator-how-does-it-currently-work-and-what-needs-be-improved>