
# Cartels

## Enforcement, Appeals & Damages Actions

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# CONTENTS

# Netherlands

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## Overview of the law and enforcement regime relating to cartels

The Dutch equivalents of the European competition rules are laid down in the Dutch Competition Act (hereinafter: 'Act'). The latter has entered into force on 1 January 1998 and is enforced by the Authority for Consumers and Markets (hereinafter: 'ACM'), the Dutch Competition Authority.

The Dutch cartel prohibition is set out in Article 6 of the Act and has an identical formulation as Article 101 TFEU. The only difference is that the last section of Article 101(1) TFEU, which consists of examples of prohibited agreements and practices, has not been implemented in Article 6 of the Act. Nevertheless, these examples still analogously apply.

On the basis of Article 6 of the Act, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, are prohibited. As this formulation shows, the criterion of the effect on interstate trade does not have to be fulfilled, since Article 6 of the Act is only focused on the effects on competition within the Dutch market. Article 6 moreover applies to all anti-competitive agreements, irrespective of their form and it applies to both horizontal and vertical agreements. Thus, there is no exhaustive list that counts for the applicability of Article 6 of the Act.

Exceptions to the cartel prohibition as set out in Article 6 of the Act can be found in Article 6(3) and Article 7 of the Act. Article 6(3) of the Act is the equivalent of Article 101(3) TFEU and Article 7 is the Dutch *de minimis* exception. Article 7 of the Act excludes certain anti-competitive agreements between undertakings with a small turnover and/or small combined market share. However, the anti-competitive agreements may not affect the interstate trade. Furthermore, Articles 11–16 of the Act set out more exceptions of certain agreements to the cartel prohibition.

## Overview of investigative powers in the Netherlands

The ACM has various investigative powers that are geographically limited to the Netherlands. The rights of investigators are (mostly) laid down in Articles 5:17 to 5:20 of the General Administrative Law Act.[1] Firstly, the ACM has the power to investigate possible cartel conduct and probe an investigation. Officials of the ACM have, *inter alia*, the right to enter premises, to request and inspect information (including taking interviews), to demand access to documents and to take along data that is relevant for the investigation. Moreover, the ACM can raid private homes. Additionally, an undertaking and every related person is obliged to cooperate with the ACM and if they refuse to do so, the ACM can impose high fines on the undertaking. However, documents that fall under the legal professional privilege

cannot be copied or accessed, since the attorney-client privilege must be respected in any case. In that sense, an important difference between the investigative powers of the ACM and the European Commission is that the Commission can, unlike the ACM, demand access to documents between the investigated undertaking and its in-house lawyer.

### Overview of cartel enforcement activity during the last 12 months

The ACM has not been very active with regard to cartel enforcement in the last 12 months.

On 3 May 2019, the ACM announced that it had launched an investigation into irregularities in tender processes in the civil-engineering sector in the municipality of Amsterdam. The municipality of Amsterdam may have namely been harmed due to the prohibited price agreements by contractors in land, road and hydraulic engineering projects. The ACM had received tip-offs suggesting that, in a number of government tenders, prohibited agreements were made between various contractors about the level of prices and about who would receive the contract. If these claims are true, this distortion of competition may have led to higher prices, lower quality or less innovation, according to the ACM. The tender processes were held for projects worth between 100,000 and 2 million euros.[2]

On 18 November 2019, the ACM announced its second investigation into a possible cartel. The ACM stated in a news release that it had raided several large traders in the agricultural sector. By means of tips, the ACM was informed of the fact that these companies may have coordinated their purchase prices. According to the ACM, alignment of purchase prices is disadvantageous for farmers, because it gives them a lower price for their products.[3]

So far, the ACM has not provided any recent updates on the above-mentioned investigations into possible cartel conduct.

### Key issues in relation to enforcement policy

At the end of 2018, the ACM conducted a survey on various companies in the Netherlands in order to obtain a better understanding of the compliance willingness of these companies with the cartel prohibition. One of the findings of this survey was that many companies have a lack of knowledge of the competition rules. The ACM has therefore launched an awareness campaign called: 'Stop cartels. Prevent a fine'. With this campaign, the ACM aims to increase awareness, particularly among small- and medium-sized businesses about what types of agreements and practices are considered to be infringements.[4]

On 26 February 2019, the ACM published the 'Guidelines on cooperation between competitors'[5] (replacing the 2008 'Guidelines on cooperation between undertakings') and the 'Guidelines on agreements between suppliers and buyers'[6] (replacing the document 'The monitoring of ACM on vertical agreements 2015'). The 'Guidelines on cooperation between competitors' set out specific forms of cooperation. In addition to the publication of the abovementioned guidelines, the ACM has also announced that it will pay stricter attention to, among other things, price-fixing agreements between competitors when purchasing products (purchasing cartel) and (price) agreements between suppliers and buyers.[7]

Another recent development in the enforcement policy of the ACM is its 'Guidelines on price arrangements between self-employed workers'. The ACM explains in these Guidelines situations where self-employed workers can and cannot discuss certain topics in the context of competition law. Self-employed workers can be considered as undertakings, since they determine their products, prices, and service themselves. For that reason, the competition rules also apply to them. These guidelines are therefore a helpful development.[8]

### Key issues in relation to investigation and decision-making procedures

With regard to key issues in relation to investigation and decision-making procedures, two particular fining decisions of the ACM are relevant to mention, since they have made it to the Dutch headlines.

On 23 April 2019, two Rotterdam taxi companies RMC and Bios-group were fined on appeal for price-fixing.[9] In 2013, The ACM initially imposed fines of respectively more than 7.5 million and 600,000 euros on the two taxi companies for cartel conduct. RMC and Bios, however, denied the formation of the cartel and appealed. In 2016, the fining decision of the ACM was annulled in administrative appeal by the Rotterdam Court.[10] However, the ACM successfully lodged an appeal against this decision with the Trade and Industry Appeals Tribunal (hereinafter: 'CBb'). The CBb namely ruled on 23 April 2019 that the ACM had rightly established an infringement of the cartel prohibition in both cases. Nonetheless, the fines in both cases have been reduced by 10,000 euros due to the exceeding of the reasonable term. The fines for RMC amounted to 3,716,000 euros and 4,008,000 euros. The fine for the BIOS group amounted to 618,000 euros. In both cases, the role and function of market definition was central for the ACM. The CBb has determined that although market definition is a requirement, it is also an instrument. According to the CBb, the ACM has sufficiently demonstrated that the taxi companies did not have such a small market share and therefore did not fall under the *de minimis* clause.

Another recent fining decision of the ACM concerns the fine regarding a cartel of manufacturers of prefabricated concrete garages. On 1 June 2015, the ACM imposed a fine of 306,000 euros on one of the two manufacturers Juwel Betonbauteile GmbH, because it had concluded anti-competitive agreements with its competitor Rekers Betonwerk.[11] Juwel filed an objection against the fining decision. On 17 February 2016, the ACM rejected the objection.[12] Subsequently, Juwel submitted the matter for appeal to the Court of Rotterdam[13] and later to the CBb, but these proceedings did not succeed either. On 18 June 2019, The CBb confirmed the imposed fine of the ACM on Juwel Betonbauteile GmbH.[14] According to the CBb, the ACM was allowed to use a severity factor of 3.5 in the calculation of the fine. Since Rekers had notified the ACM of this cartel and fully cooperated with the investigation, Rekers was not fined. On the other hand, a fine of 306,500 euros was imposed on Juwel .

### Leniency/amnesty regime

When the ACM has determined that the cartel prohibition has been violated, it can impose fines on the basis of the Fining Policy Rule of the Minister of Economic Affairs.[15] In this context, the undertakings concerned can also apply for leniency on the basis of the Leniency Policy Rule,[16] which can lead to immunity or a reduction of the fines.

The ACM will grant the applicant for leniency full immunity, which means a reduction of 100% on the imposed fine, if it fulfils the following criteria:

1. the company is the first to apply for leniency;
2. the application concerns a cartel in respect of which the ACM has not yet started an investigation;
3. the company provides information to the ACM which enables the ACM to carry out a targeted inspection;
4. the company did not force other companies to take part in the cartel; and
5. the company complies with the obligation to cooperate.

In case the ACM has already started an investigation but did not yet send a report (statement of objections) to any of the parties involved in the cartel, it can still grant full immunity

if parts 1, 4 and 5 of the criteria mentioned above are met. Furthermore, the request must provide the ACM with documents dating from the period of the conduct which the ACM did not already have but is useful for the establishment of existence of the cartel.

Subsequent companies applying for leniency can receive a penalty reduction of up to 50%. In order to qualify for a penalty reduction, the request must be made before the ACM has sent a report to any company involved in the cartel. Furthermore, the information in the request must contain ''additional value'' and the company must comply with the obligation to cooperate. The second applicant for leniency can receive a fine reduction of at least 30% and at most 50%. The third applicant can get a reduction of 20–30%, and the fourth applicant can get 20% at most. The ACM will determine the percentage of the fine mainly on the additional value of the provided information.

### Administrative settlement of cases

The possibility to settle in cartel cases is not established by law. However, the ACM has the possibility to simplify the fining procedure for cartel cases.[17] This simplified procedure is similar to the settlement procedure which the European Commission can apply when deciding on cartel cases under Article 101 TFEU. The ACM will issue an abbreviated fining decision. In return, the undertaking(s) concerned will receive a 10% settlement reduction on the fine. The ACM has used this simplified procedure with respect to cartel cases several times in the past years.[18]

Not all cases involving fines are suitable for simplified resolution. In this respect, the ACM has discretion. The simplified procedure is only applied in cases where the concerned parties are prepared to acknowledge its participation in the cartel. Additionally, the ACM will only consider the simplified procedure if the concerning party has terminated the violation. Moreover, only when the ACM will expect sufficiency gains will it consider simplifying the fining procedure. When the ACM considers cases suitable for a simplified procedure, it will contact the parties involved in order to assess whether they are interested. However, a cartelist can also express its interest for a simplified procedure to the ACM on its own initiative.

### Third party complaints

The ACM can decide to start a cartel investigation upon receiving specific tips or complaints by third parties. Third parties can report cartels via the website of the ACM and also (anonymously) by phone. The ACM, however, has discretionary power whether or not to 'act' on complaints or tips.

### Civil penalties and sanctions

In case of identifying a cartel, the ACM can either impose 1) an administrative fine, or 2) an order subject to a penalty for non-compliance. The ACM cannot impose civil penalties and sanctions on undertakings and related persons. This power is only vested to judges in civil court proceedings.

Anti-competitive agreements are void by virtue of Article 6(2) of the Act. Dutch civil law is applicable to legally void agreements. The judge will have to determine the consequences of the nullity of the anti-competitive agreements. This may include compensation for loss or injury to claimants, who have suffered damages due to the anti-competitive conduct. Affected parties can claim compensation only before the civil court.

*Administrative fine*

When calculating the administrative fine, the ACM first determines the so-called 'basic fine'. The amount of the basic fine depends on the turnover related to the violation. Furthermore, the ACM takes into account 1) the severity of the violation, 2) the circumstances under which the offence was committed, 3) the duration of the violation, and 4) the (financial) circumstances of the participant of the cartel. Subsequently, the basic fine can be adjusted upwards or downwards in case of aggravating or mitigating circumstances.

The imposed fine on cartelists is bound by a statutory maximum. The administrative fine cannot be higher than 900,000 euros, or 10% of the annual turnover of the company involved in a cartel, whichever is the highest. The fine can be multiplied by the amount of years the violation took place, with a maximum of four years. Therefore, in practice, a participant of a cartel can be sanctioned with a fine that amounts to 40% of its annual turnover. Additionally, the fine can be increased by 100% if the participant of a cartel has been sanctioned for a similar violation in the preceding five years.

*Order subject to a penalty*

Similar to Article 7 of Regulation 1/2003, the ACM can impose structural and behavioural remedies on the participants of a cartel, which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy, or where any equally effective behavioural remedy would be more burdensome than the structural remedy for the undertaking concerned.

## Right of appeal against civil liability and penalties

Cartelists have the right to appeal against civil liability and penalties before Dutch courts. Passing-on defences are, for instance, popular defences among infringers of the cartel prohibition. It is possible to rely on the passing-on defence if the cartelist can show that its direct purchaser has passed the overcharge on to subsequently their customers. If this defence succeeds, the cartelist will not have to pay the damage twice. However, as the dispute between TenneT and ABB has shown, it is difficult to successfully invoke this defence in proceedings, since the Gelderland District Court had ruled that the passing-on defence had failed.[19] A more recent example of the invocating of the passing-on defence is the dispute between DGL against Kone and Otis surrounding the lifts cartel. The Court of Rotterdam ruled that it could not give a decision on the passing-on defence at issue, given the nature and scope of the cartel and the relevant market and the nature of the defence. In these circumstances, the court ruled that it was up to Kone and Otis to support the passing-on defence by proving and substantiating the facts of the case.[20]

With the introduction of Article 161a Rv (Dutch Code of Civil Procedure) in the Dutch legal system after the implementation of Directive 2014/104/EC, an irrevocable decision of the ACM adopting an infringement provides irrefutable evidence of the established infringement in proceedings seeking damages for the violation of the cartel prohibition. This presumption of evidence is beneficial for parties who seek to obtain compensation, since demonstrating their losses due to the cartel is not without difficulties. Moreover, Article 6:193l of the Dutch Civil Code sets out that cartels are presumed to cause damage. It is up to the cartelist to oppose this presumption. To conclude, cartelists do have the right to appeal their civil liability and penalties, although considering the above-mentioned, it has to be noted that it is burdensome to successfully appeal these decisions.

### Criminal sanctions

The Dutch Competition Act does not establish criminal sanctions for breaches of competition law. Participation in a cartel can result in administrative sanctions for both the companies involved and their employees which have played a role in the cartel as *de facto* leader of the anti-competitive activities or gave instructions. The ACM can fine employees at a higher and lower working level in a company. Persons at a higher level of the company are concerned with 'knowledge of' and 'failure to act', whilst managers at a lower level are directly involved with the infringement.

An example of a case where the ACM fined an undertaking and its two directors, is its fining decision concerning the web shop T.O.M. B.V. Although this example is not necessarily connected to sanctions in the context of cartels, it still shows the power of the ACM to impose high fines on undertakings and its related employees. The imposed fine on T.O.M. B.V. and its two directors initially amounted to 500,000 euros for unfair commercial practices. However, this fine was reduced by the Rotterdam Court in 2017 and eventually determined by the Trade and Industry Appeals Tribunal in 2019 to a fine of 150,000 euros to T.O.M. B.V. and to a fine of 50,000 euros to each of the directors.[21]

### Cooperation with other anti-trust agencies

In the current globalised economy in which businesses behaviour transcends geographical borders, the ACM cooperates with other European National Competition Authorities (hereinafter: 'NCAs'). In the context of cooperation, the ACM informs other NCAs of new cartels of abuses in specific sectors as well as assists them and exchanges information for investigations. A recent example of cooperation is the joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in the digital world.[22] The memorandum addresses some current challenges of NCAs facing fast-moving digital market.

Considering the crucial role of NCAs for the well-functioning of the European internal market, the European Commission has enacted Directive (EU) 2019/1 (ECN+ Directive) in view of empowering the NCAs to ensure a consistent application of European competition rules. For NCAs to become more effective enforcers, the ECN+ Directive harmonises and extends their powers and equips competition authorities with the necessary tools for enforcement.

### Cross-border issues

It has to be noted that Article 101 TFEU can still apply in parallel with Article 6 of the Act, when the trade between Member States is affected by anti-competitive agreements in the Netherlands.

Current cross-border issues mainly relate to Big Tech and their omnipresence on the whole European market. Having no geographical borders to halter the operation of their businesses, Big Techs can enter any market. One sector potentially at risk in the Netherlands is the payments market in the aftermath of the revised Payment Services Directive ('PSD2') being applicable since February 2019. Well aware of both the pro-competitive and anticompetitive consequences that the entry of Big Techs on the Dutch payments market might carry, the Dutch Minister of Finance has requested the ACM to launch a market study into the activities of major tech firms. Bearing in mind the strong position of companies such as Apple, Google, Amazon and Facebook, the study will focus on eventual plans of Big Techs to enter the Dutch

payments market and what impact those plans would have on businesses and consumers in the Netherlands. Further, the ACM will consider what new payment options will be made available. Any barriers of entry for small businesses as a result of the establishment of Big Techs on the market will be assessed as well. Finally, the ACM will examine the Chinese Big Techs such as Tencent and Alibaba in the same context.[23]

### Developments in private enforcement of antitrust laws

For private enforcement of competition law in the Netherlands, individuals may rely on the Dutch Civil Code, the Dutch Competition Act and the Dutch Code of Civil Procedure both amended by the Act implementing Directive 2014/104/EU (also known as the 'Damages Directive').

Civil procedures in relation to cartel cases are being used more frequently. These procedures provide for an action of damages either based on Article 6:162 of the Dutch Civil Code for "unlawful acts" of undertakings or based on Article 6:212 of the Dutch Civil Code on "unjust enrichment". Moreover, private parties can initiate civil procedures for interim relief as set out by Article 3:296 of the Dutch Civil Code.

As of today, the burden of proof rests on the claimant as long as it is reasonable and fair. However, the president of the ACM suggests that the Authority's decisions should be made binding on Dutch courts during civil proceedings as evidence of an infringement of competition law, thereby relieving the burden of proof on claimants.

Several follow-on damages claims have been brought to the Dutch courts in recent years, hence demonstrating that the Dutch framework for private competition law enforcement and associated damage claims are favourable. On 1 April 2019, the new bill on collective redress actions ('WAMCA') has been published in the Netherlands. This bill makes it even easier to collectively settle mass claims through the Dutch courts. The WAMCA will enter into force on 1 January 2020 and shall apply to collective redress actions that are brought on or before 1 January 2020 for situations that have taken place on or after 15 November 2016.

### Reform proposals

Dutch internet platforms such as Booking.com, Bol.com or Thuisbezorgd.nl have been growing rapidly over the last years. The presence of these internet platforms resulted in big developments in the digital economy by continually changing and innovating several sectors. Even though such progress might create competitive markets and thereby offer more choices to consumers, it also increases the possibility for big internet platforms to enhance their market position and consequently to abuse it. In this regard, the ACM calls upon a more adequate and rapid enforcement system and tools than is currently available in view of the fast-changing digital economy. The ACM suggests an evaluation of current *ex ante* and *ex post* regulation, and to assess whether a system of self-regulation could be a solution too.

Moreover, the ACM is concerned with the rising use of algorithms and the risk that those could act as automated cartels through collusion of prices. The use of such algorithms raises the question of who shall be deemed responsible in case of breaches of competition law, and how we can ensure those algorithms will guarantee a stable market in the future. The ACM requests a timely policy and determines to what extent a toolkit should be adapted or expanded to respond to the risks of pricing algorithms.[24]

On another subject, to try to get big companies to cooperate as well as preventing them to abuse their power, Martijn Snoep – President of the ACM – suggests another approach

than the imposition of fines to halter anticompetitive behaviour. A more collaborative and dynamic approach based on preventing or promptly ceasing anticompetitive behaviour could convince companies to work on a more collaborative basis with NCAs and the European Commission. A preventive approach similar to the system of merger reviews would be more adequate than levying gigantic fines on companies.

* * *

**Endnotes**

1. An English translation of the Dutch General Administrative Law can be found on the website of the ACM, www.acm.nl.
2. ACM, 'ACM investigates tender processes for civil engineering in Amsterdam', Press release 3 May 2019, www.acm.nl.
3. ACM, 'ACM has launched an investigation into a buying cartel in the agricultural sector', Press release 18 November 2019, www.acm.nl.
4. ACM, '*Onderzoek naar de naleving van het kartelverbod bij bedrijven in Nederland*', Press release 1 October 2019 (in Dutch only). The survey about the observance of the cartel prohibition among business in the Netherlands can be found on the website of the ACM, www.acm.nl.
5. The 'Guidelines on agreements between suppliers and buyers' is only available in Dutch and can be found on the website of the ACM, www.acm.nl.
6. ACM Guidelines 2019, arrangements between suppliers and buyers. The guidelines can be found on the website of the ACM, www.acml.nl.
7. See the press release on the website of ACM, www.acm.nl.
8. ACM Guidelines 2019, price arrangements between employed workers, www.acm.nl.
9. CBb 23 April 2019, ECLI:NL:CBB:2019:151.
10. Rb Rotterdam 13 October 2016, ECLI:NL:RBROT:2016:7663.
11. Decision ACM 1 June 2015, Case number 14.0409.31.
12. Decision ACM 17 February 2016, Case number: 14.0409.31.1.01.
13. Rb Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907.
14. CBb 18 June 2019, ECLI:NL:2019:237.
15. Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (2014 ACM Fining Policy Rule).
16. Policy Rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112586, on the reduction of fines in connection with cartels (Leniency Policy Rule).
17. ACM's Guidelines for simplified resolution of cases involving a fine, www.acm.nl.
18. See ACM's fining decision in the case of 25 June 2015 in case 14.0705.27, ACM's fining decision of 22 December 2015 in case 15.0327.31, ACM's fining decision of 26 May 2016 in case 15.1118.52, and ACM's fining decision of 30 June 2017 in case 7615.
19. Rb Gelderland 29 March 2017, ECLI:NL:RBGEL:2017:1724.
20. Rb Rotterdam 29 May 2019, ECLI:NL:RBROT:2019:4441, para. 4.50.
21. CBb 5 February 2019, ECLI:NL:CBB:2019:47.
22. Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital word, www.acm.nl.
23. ACM, 'Market study into major tech firms on Dutch payments market', press release 22 October 2019, www.acm.nl.
24. ACM, Insights 2018, www.acm.nl.

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