

# CARTEL REGULATION

## Netherlands



# Cartel Regulation

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Quick reference guide enabling side-by-side comparison of local insights, including relevant law and institutions; application of the law and jurisdictional reach; international cooperation; specifics of investigations and cartel proceedings; criminal, civil and administrative sanctions; private damage claims and class actions; treatment of cooperating parties; defending a case; getting any fine down; and recent trends.

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## LEGISLATION AND INSTITUTIONS

### Relevant legislation

What is the relevant legislation?

The main source of Dutch cartel law is the Competition Act, which is inspired by the EU competition rules. The Dutch cartel prohibition is laid down in article 6 of the Competition Act and resembles article 101 of the Treaty of the Functioning of the European Union (TFEU), except for the effect on interstate trade criterion. If the effect on interstate criterion is satisfied, both the Dutch and the EU cartel prohibition apply.

*Law stated - 16 December 2021*

### Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Authority for Consumers and Markets (ACM) is in charge of the public enforcement of the Competition Act. The ACM deals with both the investigation and the sanctioning of cartels. ACM decisions are subject to internal administrative review by an independent committee of the ACM and are subsequently open to appeal before the Rotterdam District Court and to further appeal before the Trade and Industry Appeals Tribunal.

In addition, the Minister of Economic Affairs and Climate (the Minister) can issue policy rules on the general practice of the ACM and on the assessment of non-economic interests under the exception in article 6(3) of the Competition Act.

*Law stated - 16 December 2021*

### Changes

Have there been any recent changes, or proposals for change, to the regime?

The Directive (EU) 2019/1 (the ECN+ Directive) was transposed into national law in February 2021. The ECN+ Directive further harmonises the powers of the national competition authorities and seeks to ensure that the authorities have the appropriate enforcement tools at their disposal. The implementation of the directive did not lead to major changes to the Dutch regime. The most significant modifications to the Competition Act relate to cooperation with other national competition authorities and the possibility to impose interim measures. The implementation also led to a new government decree on leniency, which aligned the wording for obtaining leniency with the wording used in the directive. Moreover, the ACM can no longer deny leniency to ex-employees when the conditions for leniency are satisfied.

To reduce the possible conflict between competition law and sustainability, there is also a proposal pending for an Act on Room for Sustainability Initiatives. The legislative proposal was submitted in July 2019 and has not yet been put to vote in the Dutch parliament. The proposed legislation would apply in conjunction with the ACM's Draft Guidelines on Sustainability Agreements. In the Draft Guidelines, the ACM discusses the possibilities to conclude sustainability agreements in line with the Competition Act. The ACM published an updated version of the Draft Guidelines in January 2021 following a public consultation period. The ACM wishes to discuss a common approach to sustainability regimes at the European level before publishing its final guidelines.

In addition, a legislative proposal was submitted in March 2021 to include an explicit exception under the cartel prohibition for cooperation in the agricultural sector and fishing industry. The proposal also contains a provision on

private enforcement of competition law. The provision would establish that the Dutch implementation of Directive 2014/104/EU on antitrust damages actions also applies to exclusively national infringements of competition law. Parliament has not yet voted on the proposal.

*Law stated - 16 December 2021*

## **Substantive law**

### **What is the substantive law on cartels in the jurisdiction?**

Article 6 of the Competition Act resembles article 101 of the TFEU, except for the effect on interstate trade criterion. Article 6 prohibits agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition on (part of) the Dutch market. There are no specific provisions for distinct types of infringements and the prohibition covers both horizontal and vertical behaviour. Article 6(3) of the Competition Act is identical to the exception provided in article 101(3) of the TFEU. European Commission decisions, and the case law of the General Court and the European Court of Justice on European competition law, are generally followed when interpreting article 6.

Article 7 of the Competition Act contains a de minimis exemption, which also applies to hardcore cartels. Article 7(1) contains an exception for anticompetitive agreements with fewer than eight participants where the combined turnover does not exceed €5.5 million if the participants are mainly concerned with the supply of goods, or €1.1 million in all other cases. In addition, article 7(2) of the Competition Act exempts horizontal agreements between undertakings, whose combined market share does not exceed 10 per cent and provided interstate trade is not appreciably affected.

*Law stated - 16 December 2021*

## **Joint ventures and strategic alliances**

### **To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?**

Cooperation agreements are subject to scrutiny under the cartel prohibition. The ACM published new guidelines in 2019 on collaborations between competitors with a specific reference to the European Commission's guidelines on the applicability of article 101 of the TFEU on horizontal cooperation agreements. In earlier decisions, the ACM considered that joint ventures did not restrict competition if the cooperation led to newly developed activities that would not have existed if the parties had not collaborated.

If the cooperation qualifies as a full-function joint venture and thus constitutes a concentration, the merger regime applies. Article 10 of the Competition Act embodies an ancillary restraints exception for agreements that are directly related to and necessary for the implementation of a concentration. The undertakings concerned must assess whether these conditions are satisfied. If the concentration must be notified, the undertakings can ask the ACM if the relevant restrictions fall under the scope of article 10 of the Competition Act.

*Law stated - 16 December 2021*

## **APPLICATION OF THE LAW AND JURISDICTIONAL REACH**

### **Application of the law**

#### **Does the law apply to individuals, corporations and other entities?**

Article 6 of the Competition Act applies to undertakings and associations of undertakings. The undertaking concept is similar to its EU counterpart. An undertaking is defined as every entity engaged in an economic activity, regardless of

its legal status and the way in which it is financed. Both individuals and corporations can qualify as an undertaking and various entities can also be seen as one single undertaking for the purpose of the cartel prohibition.

The Authority for Consumers and Markets (ACM) can also fine managers (including de facto managers) of undertakings for infringing the cartel prohibition. It is not required that the ACM fines the undertaking itself, but it must establish that the undertaking infringed the cartel prohibition.

*Law stated - 16 December 2021*

### **Extraterritoriality**

Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Article 6 of the Competition Act applies to restrictive behaviour that affects competition on (part of) the Dutch market. It is not required that the restrictive agreement is concluded in the Netherlands or that the parties are active on the Dutch market.

*Law stated - 16 December 2021*

### **Export cartels**

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such specific exemption or defence. As long as competition on (part of) the Dutch market is affected, the Competition Act applies.

*Law stated - 16 December 2021*

### **Industry-specific provisions**

Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements, but two national (non-industry-specific) block exemptions apply to:

- agreements offering temporary protection from competition in new shopping centres; and
- certain cooperation agreements in the retail sector.

The European block exemptions also apply under national cartel law.

In addition, a proposal is pending to include an explicit exception under the cartel prohibition for cooperation in the agricultural sector and fishing industry. The proposal was submitted in March 2021 and has not yet been put to vote in Parliament.

*Law stated - 16 December 2021*



## Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Article 6 of the Competition Act only relates to economic activity. Tasks that are part of a government prerogative and activities of a social nature are generally not considered economic activity. If the conduct does qualify as an economic activity, article 11 of the Competition Act provides for an exemption for agreements involving at least one undertaking entrusted with the operation of services of a general economic interest, which were delegated to it by law or an administrative agency. The exemption only covers restrictive practices necessary for the operation of the assigned service of general economic interest.

*Law stated - 16 December 2021*

## INVESTIGATIONS

### Steps in an investigation

What are the typical steps in an investigation?

The Authority for Consumers and Markets (ACM) can launch an investigation after a third-party complaint, a leniency application or on its own initiative. The ACM will start gathering information and, if necessary, it will send out requests for information and carry out on-the-spot inspections. Where the Commission generally selects the relevant data during the inspection, the ACM will make a further selection of the relevant data at its own premises.

If, on the basis of the collected information, the ACM finds there is a reasonable suspicion of an infringement, it will issue a report, comparable to a statement of objections under EU competition law. This report is sent to the ACM's legal department. The report's addressees are given the opportunity to access the file and to comment on the report in writing and possibly through an oral hearing. If the ACM conducts a dawn raid, there will also be an opportunity to access all documents in the ACM's investigation dataset through a data room procedure. The ACM's legal department will include the addressees' comments in its recommendation to the ACM's board on whether to impose a fine and the suggested fine level. The ACM's board will subsequently issue a decision.

The ACM has 13 weeks from the issuing of the report to decide whether to impose a fine. This period can be extended once by another 13 weeks. Failure to comply with these time limits does not preclude the ACM from imposing a fine, as long as the ACM is not time-barred from doing so.

*Law stated - 16 December 2021*

### Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The ACM's investigative powers are similar to those of the European Commission. Among other things, the ACM can request information, conduct interviews, copy data and documents, seal objects and premises, and enter premises. In exercising its powers, the ACM must adhere to the principle of proportionality. Due to the implementation of Directive (EU) 2019/1 (the ECN+ Directive), the ACM will require prior judicial authorisation not only to enter private homes but also to enter private premises, land or means of transport.

Every legal and natural person must cooperate with the ACM. A breach of this duty can lead to fines of up to €900,000

or 1 per cent of the total worldwide turnover, whichever is higher. The ACM recently imposed a record fine of €1.84 million on an undertaking, because of employees deleting messages and exiting WhatsApp groups during a dawn raid. The fine demonstrates the importance of adequate training for employees on the ACM's investigatory powers. Employees should also know that they are not required to answer questions that could incriminate their employer. This right to remain silent exists as soon as there is a reasonable expectation that an administrative fine could be imposed. In addition, legal privilege under Dutch cartel law extends to in-house lawyers, as opposed to EU law.

*Law stated - 16 December 2021*

## INTERNATIONAL COOPERATION

### Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Authority for Consumers and Markets (ACM) cooperates with other authorities in various international networks. The ACM has published an overview on international cooperation on its website, which is available in English. Within the European Union, the ACM cooperates with the European Commission and the other national competition authorities in the European Competition Network. The legal basis for this cooperation can be found in Regulation (EC) No. 1/2003 and in national competition law, specifically in the recent amendments to the Competition Act that are part of the implementation of Directive (EU) 2019/1 (the ECN+ Directive).

*Law stated - 16 December 2021*

### Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

There is close cooperation between the ACM and other competition authorities. For example, in recent years the ACM has cooperated with the German competition authority in investigating the towage sector. The ACM and its German counterpart coordinated the investigation and exchanged information. The ACM can supply information to foreign competition authorities, but the receiving authorities must safeguard the confidentiality of the information (where relevant) and can only use it for competition law purposes. The ACM also cooperated with the French competition authority in an apple sauce cartel in which a Dutch company was granted immunity. The ACM assisted the French authorities in dawn raids in the Netherlands.

The implementation of the ECN+ Directive further substantiated the cooperation between the national competition authorities in the European Union. Following implementation, national competition authorities can investigate undertakings on behalf of other competition authorities and can even be requested to enforce fining decisions or periodic penalty payments issued by other competition authorities.

*Law stated - 16 December 2021*

## CARTEL PROCEEDINGS

### Decisions

## How is a cartel proceeding adjudicated or determined?

The Authority for Consumers and Markets (ACM) is in charge of the investigation and the public adjudication of cartels. Within the ACM, there is a strict separation between the department conducting the investigation and issuing the report, and the department advising the ACM board on the possible fine. The ACM adjudicates cases by decisions, which are governed by national administrative law.

*Law stated - 16 December 2021*

## Burden of proof

### Which party has the burden of proof? What is the level of proof required?

The ACM must prove that an infringement took place, by precise and consistent evidence. However, if an undertaking invokes the exception under article 6(3) of the Competition Act, the undertaking must prove that the exception applies. The same is true if an undertaking contends that there is no appreciable effect on competition.

High standards of proof apply when the ACM seeks to establish an infringement. In 2019, for instance, the Rotterdam District Court quashed an ACM decision fining an undertaking for participating in a price-fixing cartel for forklift truck batteries. The ACM failed to prove that the undertaking participated in a single continuous infringement as there was insufficient evidence of the undertaking's intention to contribute to the common objectives of the cartel.

*Law stated - 16 December 2021*

## Circumstantial evidence

### Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

As stipulated under EU law, the principle of effectiveness requires that an infringement may be proven through direct evidence and indicia, provided that they are objective and consistent. In the absence of any coherent statement, circumstantial evidence can support an infringement decision. In addition, as under EU law, in the absence of clear indications of an actual agreement, there may still be sufficient evidence to prove a concerted practice.

*Law stated - 16 December 2021*

## Appeal process

### What is the appeal process?

Administrative law governs ACM decisions. As is customary under Dutch administrative law, ACM decisions are subject to a three-stage appeal procedure as follows.

- An addressee of the ACM's decision can file for administrative review by the ACM, within six weeks of the decision being sent. The decision will be re-examined by a team within the ACM that was not involved in the initial decision. During the review, it is possible to take part in a hearing. The administrative review is concluded with a decision on objections. The addressee can request the ACM to skip the administrative review and to allow direct appeal before the Rotterdam District Court. If another addressee files an objection and does not request direct appeal, the ACM will reject the request.

- The decision on objections can be appealed before the administrative law chamber of the Rotterdam District Court within six weeks of the decision being issued.
- Further appeal against the Rotterdam District's Court's ruling can be made to the Trade and Industry Appeals Tribunal.

Both administrative courts will reassess the earlier decision in full and may consider new facts and circumstances.

*Law stated - 16 December 2021*

## **SANCTIONS**

### **Criminal sanctions**

What, if any, criminal sanctions are there for cartel activity?

A breach of the Competition Act does not constitute a criminal offence under Dutch law.

*Law stated - 16 December 2021*

### **Civil and administrative sanctions**

What civil or administrative sanctions are there for cartel activity?

The Authority for Consumers and Markets (ACM) can impose administrative fines for infringements of the cartel prohibition. The undertaking concept plays an important role in the attribution of the fine. Usually, the ACM jointly and severally fines both the entity that committed the infringement and its parent company. As under EU law, this requires that the parent company exercised decisive influence over its subsidiary.

In 2019, the Trade and Industry Appeals Tribunal upheld an ACM decision fining a private equity company for an infringement committed by its portfolio company. The judgment provides a useful overview of liability attribution. Among others, the Trade and Industry Appeals Tribunal determined that it is not possible to sanction parent companies that are merely investors and not concerned with the management of its subsidiaries. In addition, it confirmed that attributing liability to parent companies is not contrary to the presumption of innocence or the double jeopardy principle.

The fine for undertakings is subject to a maximum amount according to article 57 of the Competition Act. In principle, the fine can reach up to €900,000 or 10 per cent of the undertaking's annual turnover, whichever is higher. Where a violation lasted for more than a year, these amounts will be multiplied by the number of years that the infringement continued to exist, with a maximum of four years. In addition, the maximum fine will be increased by 100 per cent if the undertaking previously infringed article 6 of the Competition Act or a similar provision in a five-year period before the statement of objections (SO) was issued. In the worst case, the maximum fine can amount to either €7.2 million or 80 per cent of the annual turnover, whichever is higher.

The ACM can also fine (de facto) managers of undertakings for infringing the cartel prohibition. It is not required that the ACM fines the undertaking itself, but it must establish that the undertaking infringed the cartel prohibition. Depending on the company's turnover, this fine can amount to up to €900,000, which can be doubled in case of recidivism. The ACM further takes into account the gravity of the violation, the role of the (de facto) manager and the manager's financial capacity.

In addition to administrative fines, the ACM may also sanction infringements by imposing orders under threat of periodic penalty payments. This sanction can be imposed in addition to the fine, but also separately. The ACM can also impose a preventive order under threat of periodic penalty payments, if there is appreciable risk of an infringement. The

ACM makes limited use of the possibility to impose orders under threat of periodic penalty payments. In this regard, the ACM can also accept commitments, which does not require an infringement to be established. Since the implementation of Directive (EU) 2019/1 (the ECN+ Directive), the ACM is also able to impose interim measures if, upon first examination, there is suspicion of an infringement and risk of serious and irreparable harm to competition. The explanatory memorandum to the proposal implementing the ECN+ Directive states that interim measures enable the ACM to take swift measures to prevent harm and that this could be used in digital markets, for instance.

Under Dutch civil law, there are no sanctions for cartels in the true sense of the word. Infringements of the cartel prohibition can lead to damages claims, but only to compensate for the loss suffered. In practice, antitrust damages litigation is prevalent and is increasingly initiated by claim vehicles (in combination with litigation funders) that actively acquire and pursue antitrust compensation claims from consumers and businesses in return for a percentage of the claim. In addition, agreements in breach of the cartel prohibition are null and void. The Dutch Supreme Court has ruled that it is not possible to convert anticompetitive provisions to provisions that are compatible with the cartel prohibition.

*Law stated - 16 December 2021*

### **Guidelines for sanction levels**

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The ACM Fining Guidelines 2014 (the Guidelines) lay down the ACM's fining policy. In accordance with the Guidelines, the ACM will first determine a basic fine. This basic fine varies between zero per cent and 50 per cent of the turnover that is related to the infringement. The ACM will adapt this percentage to the characteristics of the cartel. Among other things, it will consider the nature, gravity and duration of the infringement and the potential effect on competition. After the determination of the basic fine, the ACM can raise the fine if there are additional aggravating circumstances. For example, if an undertaking had a leading role in the cartel or if an undertaking previously infringed the prohibition. Conversely, the ACM can also lower the fine if an undertaking cooperated beyond its statutory obligation. Subsequently, the ACM must check whether the fine complies with the limits under article 57 of the Competition Act.

*Law stated - 16 December 2021*

### **Compliance programmes**

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The ACM encourages the use of compliance programmes, but it will not consider this as a specific reason to reduce the fine. The ACM stresses that having a well-thought-out compliance programme can limit the scope of an infringement and thus lower the amount of turnover that is relevant in determining the basic fine.

In 2021 the ACM published the Paper on Compliance Culture, which focused on four companies from different regulated sectors. The paper tries to explain how undertakings can ensure that they comply with consumer law, sector-specific regulation and competition law. The ACM discusses both the structure of compliance programmes and how these programmes are dealt with in practice. The ACM concludes with some practical recommendations for a successful compliance programme.

*Law stated - 16 December 2021*

### **Director disqualification**

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Dutch competition law does not provide for an order to disqualify directors of undertakings that infringed the cartel prohibition.

*Law stated - 16 December 2021*

### **Debarment**

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Article 2.87 of the Procurement Act enables the exclusion of undertakings that violated the cartel prohibition from a procurement procedure. This is a discretionary power that lies with the contracting authority. Article 2.87(d) explicitly allows debarment if there is a final and binding decision of the ACM or the European Commission establishing that the undertaking concluded an agreement that aimed to distort competition. In addition, participating in anticompetitive agreements can also qualify as serious professional misconduct according to article 2.87(c) of the Procurement Act.

If the ACM or the European Commission establish an infringement, the undertaking can be debarred any time within three years of the decision becoming final and binding. If not, this period begins to run from the moment the anticompetitive behaviour took place.

*Law stated - 16 December 2021*

### **Parallel proceedings**

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Violations of the cartel prohibition in the Netherlands are only sanctioned with administrative penalties. A breach of the Competition Act does not constitute a criminal offence under Dutch law.

*Law stated - 16 December 2021*

## **PRIVATE RIGHTS OF ACTION**

### **Private damage claims**

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Damage caused by anticompetitive behaviour can be recovered through tort law under article 6:162 of the Civil Code (CC), and actions for unjust enrichment, governed by article 6:212 of the CC. These actions are only compensatory. It is not possible to claim for punitive damages under Dutch civil law. A binding and final decision of the Authority for

Consumers and Markets (ACM) or the European Commission establishing that an infringement took place constitutes irrefutable evidence of the infringement in civil proceedings. If the ACM has not (yet) issued a decision on the matter, the burden of proof lies with the party that claims that the cartel prohibition is infringed. For the ACM to give a judgment, the claimant must support its allegation with relevant economic facts and circumstances to enable a sufficiently adequate and well-founded party debate.

In recent years, there have been several far-reaching judgments of the European Court of Justice (ECJ) on the scope of liability in private damages actions for infringements of competition law. Although the exact implications of these judgments on civil damages claims remain undecided, it appears that the right to compensation in follow-on cases can be more extensive than in regular private damages actions.

In 2014, the ECJ issued its judgment in the Kone case, which concerned follow-on claims in the aftermath of the lift cartel. The claimant in Kone sought compensation for umbrella effects caused by the cartel. The ECJ held that national law cannot categorically exclude compensation for umbrella pricing. In 2019, the ECJ held that the undertaking concept in EU competition law is also determinative in private damages actions for infringements of competition law ( Skanska ). The ECJ reached this conclusion after considering that restructuring, as had taken place in the Skanska case, should not preclude liability. Later that year, the Court of Appeal of Arnhem also applied the undertaking concept in follow-on litigation, even though no restructuring had taken place. In 2021, the ECJ issued another landmark judgment in the Sumal case, ruling that a subsidiary may under certain conditions be held liable for the damage caused by a competition law infringement for which its parent company has been sanctioned.

Furthermore, it is important to consider the implementation of Directive 2014/104/EU on antitrust damages actions. As a result of the implementation, Dutch tort law contains a rebuttable presumption that a violation of the cartel prohibition caused harm. In addition, it explicitly allows the pass-on defence and provides a lighter burden of proof for indirect purchasers. The implementation explicitly refers to infringements of article 101 of the TFEU, but also applies if the national cartel prohibition was violated at the same time. In 2021 a legislative proposal was submitted under which the implementation would also apply to exclusively national infringements of competition law. The proposal has not yet been put to vote in Parliament.

*Law stated - 16 December 2021*

### **Class actions**

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions can be organised in different ways in the Netherlands. Under the recently enacted Act on Redress of Mass Damages in a Collective Action, claim organisations can initiate collective actions to claim monetary compensation on behalf of an entire class of persons with similar interests. Before implementation of this new regime, claim organisations initiating a collective action could only request a declaratory judgment. Unless the representative entity could reach a collective settlement under the Act on the Collective Settlement of Mass Damages, claimants were required to go to court individually to obtain compensation. The new regime applies to events that happened on or after 15 November 2016.

In December 2020, the Amsterdam District Court declared a foundation inadmissible in a collective action under the old regime. The Court ruled that that it had not been shown that effective or efficient legal protection could be achieved through collective action. In short, the declaratory judgments, if granted, would be too unspecific to be of any real help to the individual members of the class. The judgment provides useful guidance in determining whether a group of claims can be bundled in a collective action, which will remain a key issue under the new regime.

Apart from the collective action, it is possible to bundle claims by assigning them to a claim vehicle. Claim vehicles are

involved in follow-on proceedings in the air cargo, truck and lift cartels, for example.

*Law stated - 16 December 2021*

## COOPERATING PARTIES

### Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

As part of the implementation of the Directive (EU) 2019/1 (the ECN+ Directive), a new government decree on leniency was issued, applicable to leniency applications submitted from February 2021. The new decree aligned the wording of the conditions for obtaining leniency with the wording used in the directive. Moreover, the Authority for Consumers and Markets (ACM) can no longer deny leniency to ex-employees when the conditions for leniency are satisfied.

The leniency programme is similar to the programme of the European Commission. Both companies and (de facto) managers can file a leniency application with the ACM for immunity or a significant reduction of the fine for a violation of the cartel prohibition.

A successful request to obtain full immunity requires that:

- the leniency applicant:
  1. has not destroyed, falsified or concealed relevant information about the cartel during the contemplation of making a leniency application and did not share the contemplated request or its content with other parties, other than to any other competition authorities;
  2. has ended its involvement in the alleged secret cartel immediately following its leniency application, at the latest, except for what would, in the ACM's view, be reasonably necessary to preserve the integrity of its investigation; and
  3. cooperates genuinely, fully, on a continuous basis and expeditiously with the national competition authority and refrains from any conduct that might impede the investigation or proceedings until the decision to impose an administrative fine has become final or until the ACM has terminated its enforcement proceedings;
- the leniency applicant has disclosed its participation in a secret cartel;
- the leniency applicant did not take steps to coerce other undertakings to join a secret cartel or to remain in it; and
- the leniency applicant is first to submit evidence, which:
  - enables the ACM to carry out a targeted inspection in connection with the secret cartel, provided that it did not yet have sufficient evidence in its possession to carry out such an inspection or had not already carried out such an inspection; or
  - in the ACM's view, is sufficient for it to find an infringement covered by the leniency programme, provided that the ACM did not yet have sufficient evidence in its possession to find such an infringement and that no other undertaking has previously qualified for immunity from fines under the above sub-bullet in relation to that secret cartel.

The ACM will inform the leniency applicant of whether it will grant conditional immunity, at the latest, by the time it issues its report. If a leniency applicant does not fulfil its obligations under the leniency programme, the ACM may



revoke the leniency application. If the ACM rejects a request for immunity, the applicant may ask the ACM to treat its request as an application to reduce the fine. The first party to request such a reduction is eligible for a reduction between 30 and 50 per cent.

Leniency does not prevent liability under civil law. However, as part of the implementation of Directive 2014/104/EU, a leniency recipient enjoys a limited form of joint and several liability. The leniency recipient is only liable for the claims of its own direct and indirect customers, as long as this does not mean that the customers of other cartelists will not receive full compensation. This does not apply to other categories of damage, such as umbrella pricing. In addition, the recipient of leniency has limited contributory obligations towards the other cartelists.

*Law stated - 16 December 2021*

### **Subsequent cooperating parties**

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Subsequent parties may still benefit from a significant reduction of the fine. However, the parties must provide information with significant added value and meet all the conditions that apply for obtaining immunity, except for being the first to share information and the requirement not to have taken any steps to coerce other undertakings to join a secret cartel or to remain in it.

Depending on the timing, there are three categories of fine reduction:

- the first party to follow the initial leniency applicant is eligible for a reduction of between 30 and 50 per cent;
- the second party to request leniency can obtain a reduction of between 20 and 30 per cent; and
- any subsequent party can receive a maximum reduction of 20 per cent.

The ACM will inform the leniency applicant of whether it will grant conditional reduction of the fine by the time it issues its report, at the latest. If a leniency applicant does not fulfil its obligations under the leniency programme, the ACM may revoke the leniency application.

In addition, if the leniency applicant submits compelling evidence that the ACM uses to prove additional facts that lead to an increase in fines (compared to the fines that otherwise would have been imposed), the ACM will not consider these additional facts when determining the fine to be imposed on the leniency applicant.

*Law stated - 16 December 2021*

### **Going in second**

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Subsequent parties may still benefit from a significant reduction of the fine. However, the parties must provide information with significant added value or compelling evidence that the ACM uses to prove additional facts that lead to an increase in fines. There is no leniency or amnesty plus programme available.

*Law stated - 16 December 2021*

## Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency?  
Are markers available and what are the time limits and conditions applicable to them?

The parties must approach the ACM before the ACM starts an investigation or, at the latest, before it issues the SO. Markers are available to secure a place in the line. The ACM may grant a marker if the applicant shares basic information on the cartel (such as the duration, the participating parties and the associated behaviour) that offers a specific basis for a reasonable suspicion of involvement in a secret cartel. In the marker, the ACM sets a deadline to complete the leniency application.

*Law stated - 16 December 2021*

## Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The same cooperation obligations apply to the initial applicants for leniency and the parties that come forward afterwards. The applicant must fully cooperate with the ACM, which requires that the applicant:

- remains at the ACM's disposal to answer any request that may contribute to the establishment of fact;
- if applicable, makes employees and, as far as reasonably possible, former employees available for interviews with the ACM;
- does not destroy, falsify or conceal relevant information or evidence;
- does not disclose the fact of, or any of the content of, its leniency application before the ACM has issued a report, unless otherwise agreed; and
- submits a leniency application in accordance with requirements set out in the leniency programme.

*Law stated - 16 December 2021*

## Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The ACM will not disclose the identity of the leniency applicant until the issuance of the SO. The investigated undertakings will then have access to the file, including a non-confidential copy of the leniency request. In addition, the ACM will not use any information shared in an exploratory consultation or any information shared for a leniency request that was eventually declined. The ACM can still use this information if the company agrees or if the ACM obtained the same information in a different way. In general, the ACM will not publicise any confidential information, such as business secrets.

The ACM will only share a leniency application with competition authorities of other EU member states if the applicants have given permission to do so or if the other EU competition authority has received an application from the same applicant for the same cartel (provided that the applicant can no longer withdraw the provided information).

## Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The ACM can decide to simplify the procedure, which is similar to the European Commission's settlement programme. The undertaking or individual must acknowledge and terminate its involvement in the infringement, in exchange for a 10 per cent reduction of the fine and accelerated completion of the procedure. The ACM will only proceed to a simplified procedure if it expects that it will result in sufficient efficiency gains. The ACM's guidelines for a simplified resolution describe the procedure in detail. If several companies are involved in an investigation, it is usually only possible to simplify the procedure if all undertakings agree.

In addition, undertakings could offer commitments to the ACM, promising to change their behaviour. If the ACM accepts the commitments, it can no longer impose an administrative fine or an order under threat of periodic penalty payments.

Law stated - 16 December 2021

## Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

In general, a violation of the cartel prohibition does not lead to the sanctioning of employees. However, it is possible to fine (de facto) managers who can be linked to the infringement. On request, these individuals can be considered co-applicants in a leniency procedure. Co-applicants must adhere to the same conditions as a company that applies for leniency.

Under the former leniency programme, former employees could obtain leniency if this would not jeopardise the investigation. This requirement no longer applies under the new programme.

Law stated - 16 December 2021

## Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An undertaking that considers applying for leniency can contact the ACM's leniency office for an exploratory consultation. The undertaking can contact the leniency office to discuss the facts at hand or a hypothetical situation. The leniency programme stipulates that undertakings can only inquire whether full immunity is still available through a lawyer. The leniency application can be submitted to the leniency office by email, fax, regular mail or telephone or in person.

Law stated - 16 December 2021

## DEFENDING A CASE

### Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The Authority for Consumers and Markets (ACM) will inform the investigated undertakings of the scope of the infringement and the alleged conduct in the statement of objections. Thereafter, the undertakings can access the (non-confidential) documents in the ACM's file.

In 2020, the preliminary relief judge of the Rotterdam District Court ruled that – in view of the rights of defence – the investigated undertaking should also have access to datasets of the other undertakings investigated in regard of the alleged cartel. In that particular case, the Court ruled that the ACM could grant this access through a physical data room procedure in the premises of the ACM. In 2021, the ACM announced that such a data room procedure will be standard practice in cases where the ACM intends to impose a fine. In this announcement, the ACM also gave a short description of the set-up of this procedure.

*Law stated - 16 December 2021*

### Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

A lawyer may represent multiple parties under investigation, as long as there is no conflict of interest. This follows from the Act on Lawyers and the Rules of Conduct of Members of the Bar. A lawyer must withdraw from a case if a conflict of interest arises, unless prior consent was given by the represented parties, who must be sufficiently equal. If a lawyer needs to withdraw from a case, he or she can no longer represent other former counterparties in the same conflict.

Irrespective of the legal obligations to which a lawyer is bound, it also advisable for employees to seek independent counsel if a conflict of interest is likely to arise.

*Law stated - 16 December 2021*

### Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

A lawyer may represent multiple parties under investigation, as long as there is no conflict of interest. This follows from the Act on Lawyers and the Rules of Conduct of Members of the Bar. A lawyer must withdraw from a case if a conflict of interest arises, unless prior consent was given by the represented parties, who must be sufficiently equal. If a lawyer needs to withdraw from a case, he or she can no longer represent other former counterparties in the same conflict.

*Law stated - 16 December 2021*

### Payment of penalties and legal costs

## May a corporation pay the legal penalties imposed on its employees and their legal costs?

It is disputed whether undertakings can indemnify their employees for fines imposed by the ACM. This arrangement could be considered contrary to good morals or public policy, and could be declared null and void as it could undermine the deterrent effect that fines should have. A similar discussion exists regarding the insurance of fines. In a past case, the ACM raised the basic fine to 5 per cent, because the undertaking declared that it would pay the fines imposed on managers.

*Law stated - 16 December 2021*

## Taxes

### Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Administrative fines imposed by the ACM are not deductible under Dutch tax law. In general, private damages payments are deductible if there is a sufficient link with the activities of an undertaking where a boundary is drawn for activities that are carried out in the capacity of a private person. There is no case law as of yet on the tax deductibility of private damages for violations of the cartel prohibition specifically.

*Law stated - 16 December 2021*

## International double jeopardy

### Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

If anticompetitive behaviour is already sanctioned in other jurisdictions, the ACM can still impose a fine. The ACM may choose to limit itself to the effects on the Dutch market and only take into account the turnover in the Netherlands in setting the fine. In addition, cross-border cartels will often trigger the parallel application of article 101 of the TFEU. In 2019, the European Court of Justice determined that the principle of double jeopardy does not stand in the way of imposing dual fines for infringements of both national and EU competition law.

Regarding private damages, it is important to observe international private law. If a competent foreign court was seized first concerning the same cause of action and the same parties, the Dutch court must decline jurisdiction in favour of the first seized court under the Brussels I-bis regulation. If the national regime applies, the judgment must be capable of recognition and, where applicable, enforceable in the Netherlands. In addition, Dutch tort law does not allow punitive damages actions, only compensatory damages actions. Damages actions aim to provide the claimant full compensation, but it does not go beyond that. The courts must consider previously awarded claims or settlements in other jurisdictions when deciding on whether a claimant is entitled to compensation. Overlapping liability should, therefore, not result in overcompensation.

*Law stated - 16 December 2021*

## Getting the fine down

### What is the optimal way in which to get the fine down?

Apart from the leniency procedure, the attitude of the undertaking under investigation may justify a reduction of the

basic fine. The ACM Fining Guidelines 2014 explicitly state two factors that are relevant in this regard. First, an undertaking whose cooperation goes beyond what is legally required may be eligible for a reduction of the fine. Second, the ACM takes into account whether an undertaking deliberately compensates for the damage suffered. The ACM may consider other circumstances in its assessment. In addition, undertakings could discuss with the ACM the possibility of a simplified procedure. If the ACM deems it appropriate, this will lead to a 10 per cent reduction of the fine.

*Law stated - 16 December 2021*

## UPDATE AND TRENDS

### Recent cases

What were the key cases, judgments and other developments of the past year?

In September 2021, the ACM imposed a fine of nearly €40 million on Samsung Electronics for vertical price coordination. This the ACM's first-ever fine for this type of violation. According to the ACM, Samsung used automated price monitoring systems, such as spider software, to keep an eye on retail prices. Samsung would have contacted retailers to prevent prices deviating too much from those that are recommended. Samsung would also have followed up on complaints of diverging prices from competitor retailers. It is interesting that the summary decision refers to 'price coordination' instead of resale price monitoring (RPM). The absence of threats or incentives in Samsung's price persuasions may have restrained the ACM from explicitly qualifying this conduct as RPM. In any case, the decision shows the need for companies to double-check whether their automatic pricing mechanisms and policies are compliant with competition law.

Another noteworthy ACM fining decision was issued in October 2021. The ACM imposed a fine of almost €4 million on two major collectors of used cooking oil for an alleged buying cartel. According to the ACM, the buyers agreed on purchase prices, shared competitively sensitive information and divided their suppliers. The ACM also fined three individuals who exercised de facto leadership to a total of €190,000. The ACM has lowered the fines for both the undertakings and the individuals for their cooperation in the investigation.

Both decisions confirm the stricter focus on resale price maintenance and buying cartels that was announced by the ACM. These are also not the only investigations of the Dutch competition authority on these matters. An example of another buying cartel case is the ACM investigation launched in 2019 regarding alleged cooperation between purchasers of agricultural products. Another (publicly known) vertical restraints investigation in the home decor sector was recently closed for lack of evidence. However, upon closing the investigation, the ACM gave an explicit warning to suppliers not to pressure retailers into following their retail price recommendations or to inform retailers of the resale prices of other retailers.

*Law stated - 16 December 2021*

### Regime reviews and modifications

Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Directive (EU) 2019/1 (the ECN+ Directive) was transposed into national law in February 2021. The ECN+ Directive further harmonises the powers of the national competition authorities and seeks to ensure that the authorities have the appropriate enforcement tools at their disposal. The implementation of the directive did not lead to major changes to the Dutch regime. The most significant modifications to the Competition Act relate to cooperation with other national competition authorities and the possibility to impose interim measures. The implementation also led to a new government decree on leniency, which aligned the wording for obtaining leniency with the wording used in the





















directive. Moreover, the ACM can no longer deny leniency to ex-employees when the conditions for leniency are satisfied.

To reduce the possible conflict between competition law and sustainability, there is also a proposal pending for an Act on Room for Sustainability Initiatives. The legislative proposal was submitted in July 2019 and has not yet been put to vote in the Dutch parliament. The proposed legislation would apply in conjunction with the ACM's Draft Guidelines on Sustainability Agreements. In the Draft Guidelines, the ACM discusses the possibilities to conclude sustainability agreements in line with the Competition Act. The ACM published an updated version of the Draft Guidelines in January 2021 following a public consultation period. The ACM wishes to discuss a common approach to sustainability regimes at the European level before publishing its final guidelines.

In addition, a legislative proposal was submitted in March 2021 to include an explicit exception under the cartel prohibition for cooperation in the agricultural sector and fishing industry. The proposal also contains a provision on private enforcement of competition law. The provision would establish that the Dutch implementation of Directive 2014/104/EU on antitrust damages actions also applies to exclusively national infringements of competition law. Parliament has not yet voted on the proposal.

*Law stated - 16 December 2021*

## Jurisdictions

	<b>Argentina</b>	Marval O'Farrell Mairal
	<b>Australia</b>	Allens
	<b>Austria</b>	Baker McKenzie
	<b>Belgium</b>	Strelia
	<b>Brazil</b>	OC ARRUDA SAMPAIO Sociedade de Advogados
	<b>Bulgaria</b>	Wolf Theiss
	<b>Canada</b>	McMillan LLP
	<b>China</b>	DeHeng Law Offices
	<b>Costa Rica</b>	Dentons Muñoz Zacapa
	<b>Cyprus</b>	Trojan Economics Consultants Ltd
	<b>Denmark</b>	Bruun & Hjejle
	<b>European Union</b>	Dechert LLP
	<b>Finland</b>	Frontia Attorneys Ltd
	<b>Germany</b>	Glade Michel Wirtz
	<b>Hong Kong</b>	Linklaters LLP
	<b>India</b>	Saikrishna & Associates
	<b>Japan</b>	Nagashima Ohno & Tsunematsu
	<b>Malaysia</b>	Zaid Ibrahim & Co
	<b>Mexico</b>	Valdes Abascal Abogados
	<b>Netherlands</b>	Stibbe
	<b>Portugal</b>	Gómez-Acebo & Pombo Abogados
	<b>Singapore</b>	Drew & Napier LLC
	<b>Slovenia</b>	Odvetniska druzba Zdolsek
	<b>South Korea</b>	Yoon & Yang LLC
	<b>Spain</b>	Cuatrecasas



 <b>Turkey</b>	ELIG Gurkaynak Attorneys-at-Law
 <b>Ukraine</b>	Sergii Koziakov & Partners
 <b>United Kingdom</b>	Clifford Chance
 <b>USA</b>	Dechert LLP
 <b>Vietnam</b>	LNT & Partners