PELS RIJCKEN

Dominance and Monopolies: Netherlands

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Introduction

Legal framework

In the Netherlands, the statutory framework with respect to abuse of dominance consists of two articles in the Dutch Competition Act (DCA). The prohibition on abuse of dominance is laid down in Article 24 of the DCA, which was modelled on Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 25 of the DCA provides for the possibility of an exemption from the application of Article 24 in respect of undertakings entrusted with the operation of services of general economic interest (insofar as the application of Article 24 would obstruct this operation), and thus substantively resembles Article 106(2) of the TFEU.[1] The competition rules are enforced by the Authority for Consumers and Markets (ACM).

The legislature expressly intended for the decision practice of the European Commission and the case law of the EU courts to be leading for the interpretation of Articles 24 and 25 of the DCA.[2] Furthermore, the legislature has indicated that the DCA should be neither more nor less lenient than the EU competition rules.[3]

The examples of abuse of dominance that are listed in Article 102 of the TFEU are not listed in Article 24 of the DCA but can be found copied almost verbatim in the explanatory memorandum to the DCA.[4]

Insofar as public or state-owned enterprises operate as 'undertakings' within the meaning of the DCA, they are bound by the same rules as private enterprises.[5] Since 1 July 2012, the DCA has been supplemented with certain special rules applicable to public enterprises, but these do not specifically relate to abuse of dominance.[6]

There is special legislation comprising rules on market power in respect of the telecommunications sector (telephone and internet services),[7] the electricity and gas sectors, the postal sector and the transportation sector. These sector-specific regimes are also supervised by the ACM. For the healthcare sector, pursuant to the Healthcare Market Regulation Act, the Dutch Healthcare Authority is tasked with supervision of healthcare companies with 'significant market power'.[8]

Finally, in 2024, the Dutch government submitted a bill will empower the ACM to apply the Digital Markets Act (DMA), in the sense of assisting the European Commission.[9]

Enforcement practice and policy

The Netherlands ranks among the countries with the lowest number of abuse of dominance interventions (i.e., decisions by the national competition authority establishing an infringement). That is the conclusion of a study by economic research organisation SEO, commissioned by the Dutch Ministry of Economic Affairs and published in 2011 (the SEO study).[10] In the years analysed in the study (2005 to 2009), only one out of 18 investigations into abuse of a dominant position resulted in an intervention, and that intervention was eventually overturned on appeal.[11]

The SEO study sought to explain the relatively low enforcement rate of abuse of dominance cases in the Netherlands, but failed to arrive at any conclusive observations;[12] however, it is probably linked to the prioritisation policy of the ACM, and its predecessor, the NMa,[13] before that, in combination with the ACM's historically strong focus on cartel enforcement. The ACM is not obliged to investigate every suspected infringement or complaint: it sets its priorities on the basis of economic significance, consumer interest, severity of the infringement and likely efficiency of an intervention.[14] The ACM had pointed out itself in an official reaction to the SEO study[15] that because of the leniency programme (which is not applicable to unilateral conduct), cartel cases are generally easier to prove than abuse cases. Furthermore, the ACM at the time suggested that the relatively elaborate special regulation in respect of sectors operated by former state monopolies has rendered the generic abuse of dominance framework less relevant in the Netherlands.[16]

In 2021 there seems to have been a trend break, because in that year the ACM took two decisions in which it found an abuse of dominance. Both of them were exploitative abuses. Another significant development from 2021 concerns a judgment from the Trade and Industry Appeals Tribunal (CBb), the highest appellate court in the Netherlands, in a high profile case of the ACM that was annulled by the Court. Concomitantly, the ACM announced in its 2021 enforcement priorities to focus more on the enforcement of abuse of dominance cases in 2022, especially in the pharmaceuticals and digital sectors.

In 2022 and 2023, however, the ACM did not take any (fining) decisions in which it found an abuse of dominance. Thus, 2021 seems to have been an exception in that sense.

There is also generally little private enforcement of the prohibition on abuse of dominance in the Netherlands. The SEO study, for example, found that there have been only 42 court cases that featured a claim of abuse of dominance in the five-year study period of 2005 to 2009 (claims that, in most cases, only served as an ancillary argument), none of which led to an actual finding of an abuse of dominance.[17] The past 10 years have not seen a significant increase in civil litigation regarding abuse of dominance. The case law in the Netherlands has been too sparse and fragmented to be able to deduce any clear trends, although in general it can be concluded that the claimant faces a high burden of proof, which is often not met. Generally, the ACM and the courts in the Netherlands try to adhere closely to the Commission's and EU courts' application of the concept of abuse of dominance, and have been following the Commission's lead in emphasising the importance of an effects-based analysis and attach great value to economic evidence in abuse cases. However, the two abuse of dominance cases that the ACM concluded in 2021 are based on exploitative theories of harms and have in part relied on qualitative assessments of the behaviour of the dominant undertakings in question (i.e., Apple and Leadiant).

Year in review

As mentioned, until recently, there have been very few abuse of dominance interventions in the Netherlands. After the ACM concluded two cases concerning an abuse of dominance in 2021, there were again no cases concluded by the ACM in 2022 and 2023.

In 2023, the ACM indicated in its focus report that it would focus on (among other things) the energy transition, the digital economy, and sustainability. The ACM did not impose any fines for an abuse of dominance last year. After publishing its guidance for the healthcare-IT market in 2022, in which it clarified and underlined the rules regarding abuse of dominance, the ACM started 2023 with investigations into the conduct of three pharmaceuticals companies. These investigations did not lead to any fining decision, as the initial phase of investigations found insufficient evidence of violations.

Currently, the ACM is investigating the conduct of an international manufacturer of IT equipment. The investigations result from the suspicion that the manufacturer is restricting its retailers from selling reused equipment.

Moreover, the case around Apple continued. The investigation into Apple led to a decision concerning the Apple app store in 2021. In 2018, the ACM carried out a market study on app stores, and researched the ability of Apple and Google, as owners of the app store platforms, to influence the supply of apps. During the market study, the ACM received complaints about Apple favouring its own apps over those of external app providers, especially those providing Dutch news apps. This resulted in the ACM opening a formal investigation into Apple at the beginning of 2019. In August 2021, this investigation led to a decision in which the ACM determined that Apple abused its dominant position by setting unreasonable conditions in its App Store, meaning that dating app providers could only make use of Apple's own payment system and that the providers were not allowed to refer users to other payment options outside the application. The ACM ordered Apple to adjust these unreasonable conditions in its App Store with respect to dating app providers. At first, Apple did not comply with the ACM's decision and thus had to pay an incremental penalty. It took Apple until June 2022 to comply with the ACM decision. This decision will also be discussed further under the header 'Exploitative abuses'. In 2023, the ACM dismissed Apple's appeal, declaring Apple's objections unfounded.

As mentioned above, the case law on private enforcement of the prohibition of abuse of dominance is sparse. In 2023, two judgments relating to allegations of abuse of dominance were rendered by civil courts. In both cases the allegation was dismissed by the court because it was not sufficiently substantiated.

One interesting private enforcement case is the Buma/Stemra case, which was concluded in 2022 with a ruling by the Amsterdam Court of Appeal. In the beginning of 2024, the Dutch Supreme Court ruled in these proceedings, judging that the Amsterdam Court of Appeal's ruling was insufficiently motivated. These rulings are discussed in more detail under the header 'Discrimination'. The following table summarises cases currently active in the Netherlands.

Cases currently active in the Netherlands

Sector	Investigating authority	Conduct	Case opened
IT-equipment	ACM	Suspicion of restricting retailers from selling reused equipment	October 2023

Market definition and market power

In the Netherlands, the concepts of market definition and market power are applied in a manner that is substantially similar to the approach of the Commission and the EU courts; see the European Union chapter for more detailed information on European practice.

Market definition

As to market definition, the ACM and the courts tend to follow the principles embodied in the Commission's Notice on the definition of the relevant market and the standard jurisprudence of the EU courts.[18]

Market power

The definition of dominance is provided in Article 1(i) of the DCA and is modelled on the definition commonly applied in the EU, and as coined by the European Court of Justice (ECJ) in the *United Brands* case:

a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users.[19]

The methodologies and standards of proof employed in practice in determining whether an undertaking has a dominant position also closely follow European practice. Market shares are considered an important indicator, although not decisive on their own. Additional factors have been taken into account, such as the existence of intellectual property rights, the level of concentration of the market and barriers to entry.[20] In a 2017 ruling, the District Court of Amsterdam (also) relied on the advice of three appointed experts for its conclusion that online real estate platform Funda held a dominant position on the online housing market in the Netherlands. According to the experts, the combination of Funda's strong position and the significant entry barriers to the Dutch online housing market enabled Funda to behave independently.[21] The ruling was upheld on appeal.[22]

The ACM and the courts will normally also look for contraindications, such as countervailing power, when determining dominance.

Abuse

Overview

As with the concepts of market definition and market power, the ACM and the courts tend to closely follow the case law of the Commission and EU courts on the concept of abuse. There are no substantive areas in which Dutch practice may be said to clearly deviate from European practice. Still, over the years, some noteworthy decisions have been handed down with respect to the various types of abuse within the abuse of dominance spectrum itemised below.

Exclusionary abuses

Exclusionary pricing

In 2017, the ACM imposed a fine of €41 million on Dutch Railways (NS) for abuse of dominance in a regional tender process.[23] According to the ACM, NS wanted to prevent its competitors from winning the tender at all costs, as the tender process served as a pilot for a further decentralisation of the main railway network. NS was found to have abused its dominant position on the main

railway network by submitting a loss-making bid for a public transport contract in the Dutch province of Limburg. Instead of an *ex post* comparison of actual costs and actual revenue, the ACM had to use an *ex ante* approach to determine predation because the case concerned a bid for a concession that was ultimately not awarded to NS. The ACM compared NS's internal rate of return (IRR) when performing the concession with its weighted average costs of capital (WACC) and concluded that the IRR would be lower than the WACC. As a result, the concession's expected revenue would be insufficient to recover the anticipated costs. According to the ACM, this made it impossible for as-efficient competitors to match or outbid the NS bid without incurring loss. In addition to predatory pricing, the ACM also fined NS for a combination of other exclusionary conduct related to access requests to certain services and facilities owned by NS. The ACM's decision was, however, annulled on appeal. According to the Rotterdam District Court (RDC), the ACM did not prove the existence of dominance on the main railway network for which NS has a concession until 2024. In the judgment, the RDC found that the ACM had insufficiently considered the extent to which NS was restricted in exercising market power on the basis of the concession requirements and conditions which restricted NS in its pricing behaviour and required NS to achieve certain minimum quality standards. At the very least the ACM, the RDC considered, should have included the concession conditions in its assessment to consider if the conditions themselves demonstrated market power at the side of NS (since the concession conditions were negotiated between the Dutch State and NS, the market power of NS would have to be visible in the outcome of those negotiations).The judge also found that the relationship between the market for the exploitation of the main railway network and the adjacent regional market in Limburg on which the presumed abuse took place was not strong enough.[24] On appeal, the Trade and Industry Appeals Tribunal (CBb) found that the ACM had not demonstrated beyond a reasonable doubt that NS had a dominant position on the market for exercising the exploitation right for the main railway network. The CBb considered that the ACM did not take sufficiently into account the complex relationship between the Dutch State and NS, which are mutually interdependent, and it remained unclear whether NS would actually have been able to act to a significant extent independently in its market behaviour. The CBb therefore – although partly based on different grounds – upheld the ruling on appeal.[25]

Exclusive dealing

Loyalty rebates

In the *CR-Delta* case, the ACM held, inter alia, that certain rebates granted by the (dominant) Dutch 'cattle improvement cooperative' on its insemination services were of a loyalty-inducing nature and, therefore, anticompetitive. This view was later confirmed by the RDC. However, the CBb annulled the decision, ruling (in 2010) that despite the obvious loyalty-inducing aim of the rebates, the ACM should have examined whether the rebates were capable of having anticompetitive effects before concluding that the rebates were illegal (referring to the *Tomra* case law of the ECJ).[26] According to the CBb, the rebates were not capable of having these effects, as the rebates only accounted for a very small (merely 'symbolic') part of the total costs. Moreover, according to the CBb, competitors were able to (profitably) match the prices charged by CR-Delta, which, according to the CBb, clearly indicates the absence of any exclusionary effects of the rebates. For these reasons, the CBb overturned the decision of the ACM.

Other exclusionary acts

In early 2011, the ACM initially found that GasTerra, active spin-off of the state-owned Gasunie that is active in the wholesale trade and supply of natural gas, had used supply conditions in its contracts with energy distributors in the Netherlands that discouraged these distributors from combining their offer with gas obtained from other wholesale suppliers, thereby impeding the creation of competition in the wholesale gas market. However, on administrative appeal, the ACM became convinced that the lack of differentiation on the distributors' side was attributable to a number of other factors as well. For example, after the market had been liberalised, it simply took quite a while before alternatives to GasTerra's products and services became available on the market. Therefore, the ACM reversed its decision, arriving at the conclusion that it could not be established that GasTerra had abused its dominant position.[27]

Leveraging

Over the past 15 years, the ACM has performed only two in-depth investigations focused on alleged tying. In one of those cases, KPN, the former state monopolist in telecommunications, filed a complaint against four major cable television companies for alleged abuse of their (regional) dominant position by, inter alia, tying their analogue packages to their digital packages. The ACM dismissed the complaint because it found that the analogue and digital packages were part of one and the same market, and, therefore, there could be no case of tying.[28]

Refusal to deal

On the subject of refusal to deal, the 2022 judgment of the RDC confirms (again) that the Dutch courts closely follow the *Bronner* criteria[29] in their assessment. The case was between a foundation that is the manager of the national .nl domain and who is the only one that can issue domain names ending with .nl. The foundation also provides domain monitoring services and has sole access to the complete list of .nl domain names, the '.nl zone file'. The applicant operates a search engine, and for that purpose it requested the foundation to allow it to use the .nl zone file. The foundation refused to do so. The applicant asked the ACM to take enforcement action because it believed that the foundation abused its dominant position. The ACM rejected this enforcement request, because the ACM believed that the refusal to provide access to the zone file did not qualify as an abuse of a (possible) dominant position, as two of the three *Bronner* criteria were not met. The applicant submitted that the Bronner criteria do not apply in this case. In the Court's opinion, the *Bronner* criteria do apply in full.[30] Thus, the Court assessed whether the refusal to deal qualifies as an abuse of a dominant position according to the *Bronner* criteria. The Court considered that the claimant failed to demonstrate that the refusal to deal excludes all competition in the relevant market and that access to the service is indispensable for the claimant to carry out its activities. The Court also mentions that Article 102 TFEU (and Article 24 DCA) does not provide rules that guarantee a level playing field, nor can it lead to an obligation to supply or deal to achieve such a level playing field. The ACM thus established properly that not all of the (cumulative) *Bronner* criteria were met and that therefore, there was no abuse of a dominant position. Thus, the ACM did not have to analyse whether there was an objective justification for the refusal to deal or not.

Refusal to license and FRAND

On the subject of refusal to license, there is an interesting body of case law in which different Dutch courts have applied the relevant EU concepts differently.

In 2019, the Court of Appeal of The Hague ruled several times on the refusal to license a standard essential patent (SEP) on fair, reasonable and non-discriminatory (FRAND) terms.[31] In those cases, the Court applied the framework the ECJ developed in the *Huawei v. ZTE* case on abuse of a dominant position in relation to an SEP.[32] In two proceedings brought by Philips, the Court of Appeal of The Hague held that the *Huawei v. ZTE* framework does not imply that the owner of the SEP needs to substantiate why its offer to license the SEP is FRAND. Therefore, it does not need, for example, to disclose licence agreements concluded with other licensees to demonstrate that its offer was non-discriminatory. Instead, it is up to the party requesting the licence to prove that the offer that is made is not FRAND. The outcomes of the Dutch cases are in contrast to the manner in which German courts apply the *Huawei v. ZTE* criteria.

Also in 2022, the Amsterdam Court of Appeal ruled on the refusal to license in a case between DPG and Blendle.[33] DPG is a media company and publisher of several Dutch newspapers. DPG also offers an online application in which it provides access to newspaper articles digitally. Blendle is a 'digital news kiosk' that gives subscribers access to a selection of articles from various Dutch and foreign newspapers and magazines. The judgment revolves around the question of whether DPG can be obliged to continue supplying newspaper articles (content) to Blendle. DPG terminated a licence agreement with Blendle after Blendle introduced a subscription model that cannibalised DPG's own

online business model. This made Blendle a competitor, rather than just a distribution channel, which was reason for DPG to terminate the agreement. Blendle submitted that this was a form of self-preferencing or refusal to license. In a judgment by the preliminary relief judge, the claims were dismissed because both dominance and abuse could not be established. The Amsterdam Court of Appeal also dismissed the claim, because there was no (absolute) refusal to supply. DPG was indeed willing to make the content available to Blendle, but under the condition that Blendle would offer the articles in the way it initially did. Moreover, the Court ruled that there was an objective justification for DPG's refusal, because it had a legitimate business interest for refusal (i.e., readers who subscribe to Blendle to read newspaper articles will usually not also subscribe to a newspaper provided by DPG).

Discrimination

In November 2021, The Hague Court of Appeal confirmed The Hague District Court's judgment and dismissed the claim by beer wholesaler Groobo that Heineken abused its dominant position or is guilty of unfair commercial practices by charging a lower price for beer sold to catering companies. The Court of Appeal stated that Groobo mentioned (virtually) nothing about the relevant market and about the dominant position that Heineken is said to hold on that market, while Heineken disputed in both instances that it holds any position of power in the Netherlands. Therefore, it could not be proven that Heineken holds a dominant position on a relevant market. Furthermore, Groobo had not explained what Heineken's 'abuse' could consist of. The Court explained that the mere circumstance that Heineken gives different discounts to its various customers, that the discounts given to catering companies may be higher than the discounts given to third party wholesalers like Groobo, and that some catering companies partly resale the beer purchased from Heineken to third party wholesalers, does not in itself constitute abuse within the meaning of the DCA. The Court found that Groboo had not given sufficient concrete leads or indications that could lead to a substantiation of their claim that there is abuse of a dominant position.[34]

In a judgment from May 2022, the Amsterdam Court of Appeal held that the collective rights organisation Buma/Stemra abused its dominant position with regard to the association of Associated Business Music Distributors (ABMD). ABMD is an association of companies that provide background music for business users. They pay a licence fee per customer to Buma/Stemra. Online streaming services, such as Spotify, also pay a licence fee to Buma/Stemra to use the music, but this fee is lower, as the streaming services offer subscriptions that only license private use. In practice, however, this is not enforced, and businesses also play music publicly via streaming services. ABMD argued that Buma/Stemra abused its dominant position because it applies different licence fees for private and business use and at the same time tolerates the use of private subscriptions for commercial purposes. The District Court of Amsterdam ruled earlier that Buma/Stemra is indeed acting unlawfully by tolerating that private subscriptions are used to play music in public, while charging different rates. As a monopolist, Buma/Stemra can be expected to treat comparable cases equally. Buma/Stemra therefore had to charge the same fee and pay damages to the ABMD members. However, according to the District Court, Buma/Stemra had no obligation to take enforcement action against misuse of a private subscription.[35]

In appeal, the Amsterdam Court of Appeal concluded that Buma/Stemra has an economic dominant position in the first place (jointly). The Court of Appeal only considered that for permission to play music commercially in the Netherlands, a company is dependent on Buma/Stemra. Thus, the dominant position is given. Subsequently, the Court of Appeal ruled that Buma/Stemra had abused its dominant position by allowing the introduced system of licensing to continue, which created an unequal situation between the ABMD members and the online streaming services.

According to the Court of Appeal, it is irrelevant that the inequality is a consequence of unforeseen behaviour by third parties. The argument that Buma/Stemra did not aim to worsen the competitive position of the ABMD members does not hold either; it is sufficient that Buma/Stemra took a 'real chance that its position would lead to foreseeable disadvantage of the ABMD members'. The Court of Appeal ruled that Buma/Stemra had acted unlawfully and ruled that it must pay damages for the past 12 years to ABMD members. In addition, unlike the District Court, the Court of Appeal ruled that Buma/Stemra must also actively take measures to stop the commercial use of music provided

by a streaming service licensed for private use only. Buma/Stemra should therefore adjust its future license agreements, check for compliance by subscribers and enforce in the case of violation. Buma/Stemra filed an appeal in cassation against the Court of Appeal's ruling.

In March 2024, the Dutch Supreme Court ruled in Buma/Stemra's cassation appeal. Contrary to the Court of Appeal's judgment, the Supreme Court found that it being foreseeable that this inequality would disadvantage the ABMD members was insufficient for establishing the worsening of the competitive position, as Article 102(c) TFEU requires an assessment of the concrete impact of the price disparity on the competitive situation.[36]

Exploitative abuses

In 2018, the ACM opened an investigation against Leadiant, suspecting it of having a dominant position on the market for CDCA-based drugs for the treatment of the rare genetic metabolic disorder CTX and having abused that position by charging excessive prices for its prescription drug CDCA-Leadiant in the Netherlands. The ACM discovered that Leadiant, since it started offering CDCA-based drugs, raised prices from €46 per pack in 2008 to €3,103 per pack in 2014. After Leadiant was granted the orphan drug and marketing designation and Leadiant released CDCA onto the Dutch market under a new trade name, Leadiant started charging and collecting an even higher price of €14,000 for the same drug under a different name. This high price could not be justified by high investment costs or innovation purposes. Furthermore, the ACM found that Leadiant's CDCA drug was characterised by low costs in comparison to the revenues, low risks and a very high return. According to the ACM, the price Leadiant charged in the infringement period was not only excessive, but also unfair, taking into account the fact that CTX patients are highly dependent on the CDCA-drug given the serious course of the disease. All in all, the ACM concluded that this was a very serious violation and set a fine of €19,569,500.[37] The decision was upheld in administrative appeal.[38]

Another investigation into an alleged exploitative abuse concerned the investigation regarding the App Store conditions of Apple. By decision of 24 August 2021, ACM imposed an order subject to penalties on Apple for abusing its dominant position in the market for app store services on the iOS mobile operating system on behalf of dating app providers. According to the ACM, Apple is on this market, to a high degree, able to act independently from dating app providers and to dictate (any) conditions regarding to the App Store, because the dating app providers have no realistic alternative to the App Store (they have no choice but to multi-home) as dating consumers will expect dating apps to reach both iOS and Android users. According to the ACM, the abuse consisted of the obligation imposed by Apple on dating app providers to have Apple settle the payment for purchases within an app and the prohibition to refer to (own) payment options outside the app. The ACM established that these conditions were unfair and limited the freedom of choice of the dating app providers. In addition, the ACM established that the conditions are not necessary for the goals that Apple claimed to be pursuing (such as safety and privacy concerns). The ACM obliged Apple to adjust the unfair terms and conditions within two months in such a way that dating app providers that offer their dating app in the Dutch App Store can choose for themselves which party they want to settle payments for digital content and services sold within the app. It should also be possible to refer within the app to payment systems outside the app. The ACM ordered Apple to put an end to the violation and adjust its conditions. In the event of non-compliance, Apple was imposed to pay a periodic penalty of €10 million per week, up to a maximum of €100 million in total.[39] On 24 December 2021, a preliminary relief judge of the RDC ruled on the request of Apple to suspend the decision of the ACM pending its appeal. The preliminary relief judge largely upheld the ACM decision and for the most part agreed with the ACM's reasoning. The RDC ruled that the ACM had validly concluded that Apple held a dominant position. Crucially in this regard, the Court accepted the market definition proposed by the Dutch regulator, the provision of iOS services for dating app providers. Furthermore, the court confirmed that the conditions that Apple imposed on dating app providers were unfair within the meaning of Article 102 TFEU, because the conditions disrupted the customer relationship between the app providers and the consumer and the conditions limit the dating app providers' freedom of choice to simply accepting Apple's terms and conditions and thus using Apple's payment systems. With regard to the order subject to periodic penalty payments, the preliminary relief judge ruled that the

interests put forward by Apple did not provide grounds for suspending the ACM's decision in its entirety. The Court considered that Apple would be sufficiently able to further defend itself in proceedings on the merits against what Apple considered to be an 'experimental' application of competition law. The RDC, however, reasoned that the order did not require major adjustments to the app store and the required adjustments would not be irreversible in nature. The RDC did rule that it had doubts with respect to a (not further defined) part of the alleged violation in the decision of the ACM ('part b'). This part of the decision has not been made public yet because the RDC accordingly suspended this part of the decision. The RDC therefore reduced the penalty in proportion to the suspended part of the order, to a maximum of €5 million per week and €50 million in total.[40] After the judgment, Apple adjusted its conditions for dating app providers. However, at first, the adjusted conditions still violated the requirements set by the ACM. Therefore, Apple had to pay the maximum incremental penalties of €50 million in total. Apple then made some additional adjustments and now the conditions do comply with the requirements set by the ACM. The decision was upheld in administrative appeal.[41]

Remedies and sanctions

The DCA and various sector-specific regulatory regimes grant the ACM powers to impose fines for abuse of market power.[42] The fines are administrative, and not criminal, in nature, although the procedural rules that have been applicable to the imposition of fines since 1 July 2009 do take into account the fact that administrative fines are considered a 'criminal charge' within the meaning of Article 6 of the European Convention on Human Rights.[43]

In addition to the statutory regimes, the ACM relies on a policy rule concerning the determination of fines: the 2014 ACM Fining Policy Rule issued by the Ministry of Economic Affairs.[44] The fine calculation method applicable to infringements of the cartel prohibition and the abuse of dominance prohibition that follows from these guidelines resembles the EU approach (as laid down in the fining guidelines of the Commission)[45] in several respects, but not entirely. According to the Fining Policy Rule, the basic fine is calculated as a percentage (from zero per cent up to 50 per cent) of a company's turnover during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating factors. Fines may reach up to a maximum of €900,000 or, if greater, 10 per cent of the worldwide annual turnover of the undertaking concerned.

The ACM may impose an order subject to periodic penalty payments; for example, if undertakings fail to cooperate during the investigation process. Such an order may also be imposed in the form of a structural measure, as referred to in Article 7 of Regulation 1/2003, if that measure is proportionate to the violation committed and is necessary to actually end the violation.[46]

The ACM can also fine individuals up to €900,000. These fines can be imposed if it is established that these persons have expressly ordered the abuse to be committed or, alternatively, have failed to take adequate preventive measures, and by doing so deliberately accepted the risk that the abuse would be committed.[47]

Furthermore, in 2024, the Dutch government submitted legislation that will empower the ACM to apply the DMA, in the sense of assisting the European Commission.[48] It gives the ACM the power to perform and exercise the powers conferred by the DMA on national authorities.

Procedure

Investigation and sanctioning phase

The ACM may examine infringements of Article 24 of the DCA *ex officio* or following a complaint. The ACM will apply its prioritisation policy in deciding whether to pursue a case (see under the header 'Introduction').

There is no fixed time limit for an investigation. It may take months but will usually take longer. The investigation is carried out by a case team at the ACM Competition Directorate. If an infringement is established and it is subsequently decided to pursue the case, a report will be issued (the equivalent of a statement of objections in European Commission proceedings). The addressed undertakings (and other interested parties, such as complainants) will have the opportunity to present their views on the allegations in the report, in writing and at an oral hearing.[49] The legal department of the ACM presides at the oral hearing. The department acts partly as an internal review body 'independent' of the case team of the Competition Directorate. It has no involvement with the investigation and the drafting of the report and is tasked with the preparation of the decision subsequent to the oral hearing. Ultimately, however, it is the board of the ACM that decides in full discretion on the basis of the proposal from the legal service.

The stage from the launch of the investigation until the issuance of a decision (establishing an infringement) can take a long time in the Netherlands. The duration is rarely less than a year.

Since the entry into force of the 'ECN+' Directive and the subsequent amendment of the DCA, the ACM also has the authority to intervene during an ongoing investigation by means of an interim measure, as to immediately stop the harmful behaviour.[50] The provisional measure may be useful if developments in a market move quickly.

Appeal

Decisions of the ACM may first be submitted to administrative review before an 'independent' administrative review committee (administrative review), which will render an opinion to the ACM. The subsequent (renewed) decision of the ACM may be appealed to the RDC. Ultimate appeal lies with the CBb. Parties may agree with the ACM to directly appeal the ACM's decision before the District Court so that there is no need to follow the administrative review procedure.

Because of the elaborate appeal procedures in the Netherlands, as described above, it often takes a very long time (i.e., more than three years) from the date of a decision of the ACM until the date of a ruling of the appellate court, the CBb.

Informal guidance

There are no formal procedures for obtaining guidance in individual cases. It is possible to informally sound out the opinion of the ACM (e.g., in a meeting). Sometimes the ACM publishes guidance in an informal guidance letter. To date, these have been limited to merger control cases and cases pertaining to the possible application of individual exemptions of the cartel prohibition. It is not inconceivable that the ACM may also start handing out informal guidance letters in abuse cases.

Private enforcement

Third parties may base an action for damages or submit injunctions before the civil courts directly on Article 24 of the DCA (as with Article 102 of the TFEU).[51] So far, there is no specific regime for private enforcement of national competition law infringements. The Dutch Act implementing the EU

Damages Directive[52] entered into force on 10 February 2017 and only applies to cases where there has been a breach of EU competition law.[53]

A consultation on a bill to also apply these provisions to civil damages actions in cases solely featuring infringements of domestic competition law was closed in November 2017.[54] For now, general Dutch tort law applies to such actions. Also pursuant to general Dutch tort law, claimed damages can only be compensatory in nature: there is no such thing as punitive or 'treble' damages in the Netherlands.

The *EMS v. Equens* ruling by the District Court of Central Netherlands is one of the rare cases in which damages were actually awarded for an infringement of the prohibition on abuse of dominance. In this case, the District Court ruled that Equens abused its dominant position in the market for network services for credit card transactions by making it more difficult for customers to switch to acquirers other than its own subsidiary, PaySquare.[55] The case was brought before the Court by European Merchant Services (EMS), a customer of Equens and a competitor of PaySquare. The Court first established the dominance of Equens on the market for network services for payment transactions by considering that customers could not easily switch networks, as 70 per cent of the payment terminals used by customers were based on a protocol managed by Equens. The Court subsequently ruled that Equens had abused its dominant position by introducing a 'queue procedure', pursuant to which customers could only switch to another acquirer with PaySquare's assistance. PaySquare would subsequently use the time it would take to disconnect the customer's payment terminal to make a counter offer, and as a result, the switch was often prevented or delayed. The Court thereupon ruled, however, that Equens would have to pay EMS only €77,000 in damages, based on lost profits.[56]

Private enforcement of Article 24 of the DCA is attempted relatively frequently in the Netherlands, but these attempts are mostly unsuccessful. Claimants often fail to meet the evidentiary thresholds. As explained above, Dutch courts tend to follow EU practice and trends, and therefore attach considerable weight to economic evidence. Claimants only rarely make the effort of building a convincing economic narrative to support a claim of abuse of dominance.

Outlook and conclusions

The ACM stated in its focus report for 2024 that the digital sector is – again – one of its main priorities for 2024 (in terms of dominance), whereby it will increasingly focus on (*ex ante*) enforcement. The ACM indicated that it will refine the responsibilities for platform companies and that it will focus on keeping platform markets open and fair by curbing the market power of online platforms sooner. The ACM will take action on unfair behaviour by online platforms (like it did with Apple), it will investigate the usage of 'dark patterns' within online platforms and will focus on ensuring compliance with the new European regulations, such as the DMA, the DSA, the P2B, the Data Act and the Data Governance Act. The ACM indicated that it will specifically focus on possible 'vendor lock-in'. The ACM has also indicated the healthcare sector and energy transition and sustainability as priorities for the coming years. Furthermore, the ACM wants to explore whether additional instruments are needed and feasible to protect and encourage competition in markets with specific features and for small acquisitions.

Next to that, at the end of 2023, the ACM indicated that it started an investigation into the conduct of a manufacturer of IT equipment. The investigation revolves around the suspicion that the manufacturer is restricting its retailers from selling reused equipment.

Moreover, as mentioned earlier in this chapter, the Dutch government has submitted legislation implementing the DMA that will empower the ACM to apply the DMA, in the sense of assisting the European Commission. The legislation is currently under consideration by the Parliament.

Footnotes

1. ^ Although such an exemption has to be applied for at, and granted by, the Authority for Consumers and Markets (ACM) to take effect under Article 25 of the Dutch Competition Act (DCA); this exemption may also be requested once a procedure investigating a possible breach has been started.
2. ^ Explanatory Memorandum to the DCA, No. 24 707, p. 71.
3. ^ ibid.
4. ^ ibid.
5. ^ See, for example, the decision of the Dutch Competition Authority (NMa) of 12 September 2002 in Case No. 2493 (*Vereniging Eigen Huis v. Gemeente Amsterdam*), in which the municipality of Amsterdam was held to be an undertaking insofar as it was involved in the sale of land.
6. ^ 'NMa to monitor market law and government', see www.acm.nl/nl/publicaties/publicatie/10776/NMa-start-toezicht-Wet-Markt-en-Overheid/. A transitional exemption period of two years applied with respect to activities already started at the point this legislation came into force.
7. ^ The ACM decided that the two telecoms incumbents, Vodafone Ziggo and KPN, had collective significant market power (SMP) to regulate access to their networks. On appeal, the Trade and Industry Appeals Tribunal applied the Airtours criteria and came to the conclusion that there was no collective SMP; decision of 17 March 2020, ECLI:NL:CBB:2020:177 (*Vodafone Ziggo and KPN/ACM*).
8. ^ The Healthcare Market Regulation Act is available (in Dutch) at www.nza.nl/regelgeving/wetgeving/wmg.
9. ^ The submitted legislation is available (in Dutch) at https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel:36495.
10. ^ The study is available (in English) at http://www.seo.nl/en/publications/an-international-comparison-of-the-abuse-of-dominance-provision/.
11. ^ Case No. 3353, decision of the NMa of 6 March 2008; and the decision of the Trade and Industry Appeals Tribunal of 7 October 2010, AWB 07/596, LJN: BN9947 (*CR-Delta*).
12. ^ The study mentions that the following hypotheses could not be proven: (1) differences in the tools and resources available to the five competition authorities and their deterrent effects; (2) whether Dutch firms have violated the abuse of dominance provision to a lesser extent, as compared to other jurisdictions; and (3) the explanation that the NMa chose to intervene in few abuse of dominance cases in the period studied, or resolved a relatively high number of cases informally.
13. ^ The ACM is the result of a 2013 merger of three previously independent authorities: the Dutch Competition Authority (the NMa), the postal and telecoms authority and the consumer authority.
14. ^ Prioritisation policy of the ACM, available (in Dutch), Stcrt.2023 No. 15184 of 25 May 2023. This policy was discussed and confirmed in a recent judgment by the Rotterdam District Court of 29 July 2021, ECLI:NL:RBROT:2021:7277 (ACM/Riedel).
15. ^ Reaction of the ACM to the SEO study, available (in Dutch) at www.eerstekamer.nl/overig/20121123/brief_van_de_nma/document.
16. ^ id., Paragraph 3.
17. ^ SEO study, p. 15.
18. ^ Commission Notice on the definition of relevant market for the purposes of Community competition law OJ C 22.2.2024.
19. ^ European Court of Justice, 14 February 1978, Case C-27/76 (*United Brands v. Commission*).
20. ^ This also follows from the Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 25.
21. ^ Decision of the District Court of Amsterdam of 21 March 2018, ECLI:NL:RBAMS:2018:1654.
22. ^ Decision of the Amsterdam Court of Appeal of 26 May 2020, ECLI:NL:GHAMS:2020:1337.
23. ^ Case No. 16.0691.31, decision of the ACM of 22 May 2017.

24. ^ Decision of the District Court of Rotterdam of 27 June 2019, ECLI:NL:RBROT:2019:5089 (NS/ACM).
25. ^ Decision of the Trade and Industry Appeal Tribunal of 1 June 2021, ECLI:NL:CBB:2021:560.
26. ^ Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN: BN9947 (*CR-Delta*).
27. ^ Case No. 4296_1, decisions of the NMa of 5 January 2011 (213) and 21 January 2011 (197) and the decision on appeal of the NMa of 30 June 2011 (214) (*GasTerra*).
28. ^ Case No. 5702, decision of the NMa of 20 July 2007 (207).
29. ^ Decision of the ECJ of 26 November 1998, Case C-7/97, ECLI:EU:C:1998:569 (*Bronner*).
30. ^ Decision of the Rotterdam District Court of 7 July 2022, ECLI:NL:RBROT:2022:5481.
31. ^ Decisions of the Court of Appeal of The Hague of 7 May 2019, ECLI:NL:GHDHA:2019:1065 (*Philips/Asus*); of 2 July 2019, ECLI:NL:GHDHA:2019:3613 (*Philips/Wiko*); of 24 December 2019, ECLI:NL:GHDHA:2019:3535 (*Philips/Asus*); and of 24 December 2019, ECLI:NL:GHDHA:2019:3537 (*Philips/Wiko*).
32. ^ Decision of the ECJ of 16 July 2015, Case C-170/13, ECLI:EU:C:2015:477 (*Huawei Technologies Co Ltd v. ZTE Corp and ZTE Deutschland GmbH*).
33. ^ Decision of the Amsterdam Court of Appeal of 2 August 2022, ECLI:NL:GHAMS:2022:2244.
34. ^ Decision of the The Hague Court of Appeal of 2 November 2021, ECLI:NL:GHDHA:2021:2005.
35. ^ Decision of the District Court of Amsterdam of 12 December 2018, ECLI:NL:RBAMS:2018:8995.
36. ^ Decision fot the Dutch Supreme Court of 1 March 2023, ECLI:NL:HR:2024:300.
37. ^ A summary of the decision can be found (in Dutch) at https://www.acm.nl/sites/default/files/documents/samenvatting-besluit-misbruik-van-economische-machtspositie-door-leadiant.pdf.
38. ^ The decision can be found (in Dutch) at https://www.acm.nl/nl/publicaties/besluit-op-bezwaar-boete-leadiant-voor-excessieve-prijs-geneesmiddel-cdca.
39. ^ A summary of the decision can be found (in Dutch) at https://www.acm.nl/sites/default/files/documents/samenvatting-besluit-misbruik-economische-machtspositie-door-apple.pdf.
40. ^ Decision of the District Court of Rotterdam of 24 December 2021, ECLI:NL:RBROT:2021:12851.
41. ^ A summary of the decision can be found (in Dutch) at https://www.acm.nl/nl/publicaties/samenvatting-besluit-op-bezwaar-misbruik-economische-machtspositie-apple.
42. ^ See Article 56 of the DCA and the Act establishing the Authority for Consumers and Market.
43. ^ These rules, laid down in the General Administrative Law Act, comprise the 'right to remain silent' and the *ne bis in idem* principle.
44. ^ Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the ACM (unofficial English version available at www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/), as amended by the Policy Rule of the Minister of Economic Affairs of 28 June 2016, No. WJZ/16056097.
45. ^ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1 September 2006.
46. ^ Dutch Competition Act, Articles 56 and 58a.
47. ^ ACM Policy Guidelines Administrative Fines, pp. 4 and 5.
48. ^ The submitted legislation is available (in Dutch) at https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel:36495.
49. ^ Article 59 of the DCA in combination with the rules laid down in Chapter 5 of the General Administrative Law Act.
50. ^ Article 11 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorites of the Member States to be more

effective enforcers and to ensure the proper functioning of the internal market and article 58b of the DCA.

51. ^ For example, in *KPN v. NL.tree* (22 March 2006), the District Court of The Hague ordered KPN to withdraw internet access offers to educational institutions that were deemed to be predatory and to amount to a price squeeze. The Court also ordered KPN to desist from making abusive offers in the future.
52. ^ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
53. ^ Law of 25 January 2017, amending Book 6 of the Civil Code and the Code of Civil Procedure, in connection with the transposition of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Implementation of the Private Law Enforcement of Competition Law Directive), Bulletin of Acts and Decrees 2017, Vol. 28.
54. ^ Draft regulation: Bill on amendment of the Competition Act in relation to market and government, merger control and private enforcement.
55. ^ Decision by the District Court of Central Netherlands of 10 July 2013, ECLI:NL:RBMNE:2013:3245.
56. ^ Decision by the District Court of Central Netherlands of 30 December 2013, ECLI:NL:RBMNE:2013:7536.