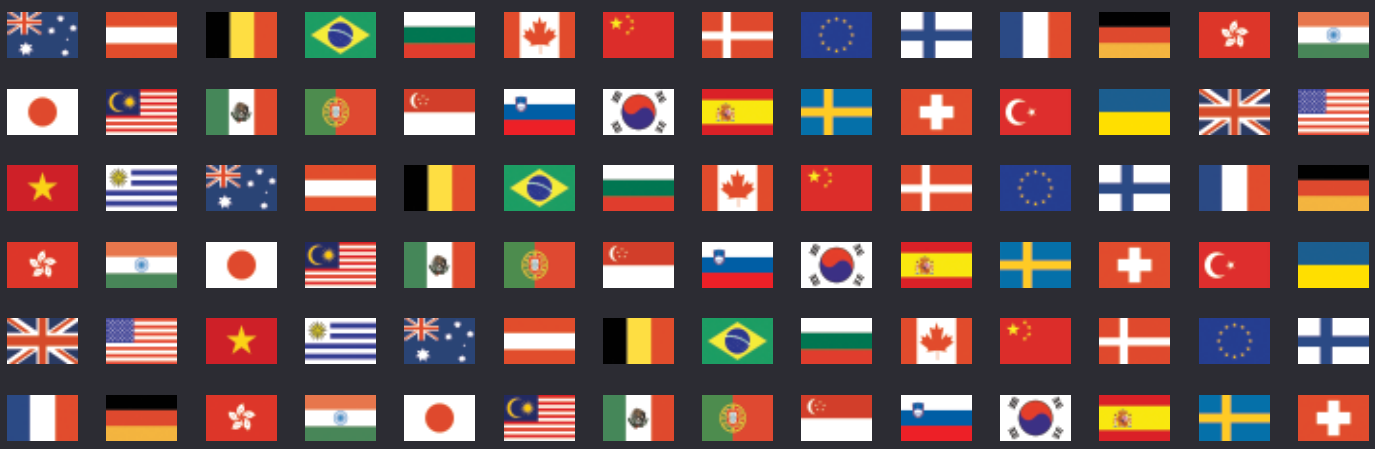
Cartel Regulation 2021

Contributing editor
Neil Campbell



LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2001
Twenty-first edition
ISBN 978-1-83862-310-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the twenty-first edition of *Cartel Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Bulgaria, France and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
November 2020

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Netherlands

Floris ten Have and Kaj Privé
Stibbe

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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 (the 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.

Relevant institutions

2 | 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.

Changes

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

There is a legislative proposal to transpose Directive (EU) 2019/1 (the ECN+ Directive) into national law. 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 will not lead to major changes to the Dutch regime. The most significant modifications relate to cooperation with other national competition authorities and the possibility to impose interim measures. The proposal is in the final legislative stage and should come into force before 4 February 2021.

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 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. Where a sustainability agreement would be incompatible with Dutch competition law, undertakings would have the opportunity under the proposed Act on Room for Sustainability Initiatives to request the Minister to transpose sustainable initiatives into law. The legislative proposal was submitted in July 2019 and has not yet been put to vote in the Dutch parliament.

Substantive law

4 | 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.

Joint ventures and strategic alliances

5 | 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.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | 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.

Extraterritoriality

7 | 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.

Export cartels

8 | 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.

Industry-specific provisions

9 | 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.

In addition, the European block exemptions also apply under national cartel law.

Government-approved conduct

10 | 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 governmental 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.

INVESTIGATIONS

Steps in an investigation

11 | 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.

If, on the basis of this 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. 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 or not 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.

Investigative powers of the authorities

12 | 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. The ACM requires prior judicial authorisation to enter private homes. In exercising its powers, the ACM must adhere to the principle of proportionality.

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, it is important to note that legal privilege under Dutch cartel law extends to in-house lawyers, as opposed to EU law.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | 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, national competition law and the recent Directive (EU) 2019/1 (the ECN+ Directive).

Interplay between jurisdictions

14 | 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 will further substantiate the cooperation between the national competition authorities in the European Union. After implementing the ECN+ Directive, 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.

CARTEL PROCEEDINGS

Decisions

15 | 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.

Burden of proof

16 | 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.

Circumstantial evidence

17 | 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.

Appeal process

18 | 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.

SANCTIONS

Criminal sanctions

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

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

Civil and administrative sanctions

20 | 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. After the implementation of Directive (EU) 2019/1 (the ECN+ Directive), the ACM will also be able to impose interim measures if there is suspicion of an infringement and risk of serious and irreparable harm to competition at first examination. The ACM makes limited use of the possibility to impose orders under threat of periodic penalty payments. In this regard, it is important to note that the ACM can also accept commitments, which does not require an infringement to be established.

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 ligation 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.

Guidelines for sanction levels

21 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.

Compliance programmes

22 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 does stress 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.

Director disqualification

23 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.

Debarment

24 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.

Parallel proceedings

25 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.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 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 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. The ECJ's judgment in the ***Kone*** case 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.

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 2017, a public consultation was launched for a legislative proposal under which the application of the rules would be extended to infringements that do not affect interstate trade. Since then, however, no further steps have been taken.

Class actions

27 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.

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. In recent judgments, the District Courts of Appeal of Arnhem-Leeuwarden and Amsterdam ruled that claim vehicles should sufficiently substantiate the claims they are pursuing. This concerns both the factual background of the individual claims and the legal underpinning that the assignments can be invoked against the tortfeasor.

COOPERATING PARTIES

Immunity

28 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?

Both companies and (de facto) managers can apply for immunity or a significant reduction of the fine for a violation of the cartel prohibition. The programme can be found in the Leniency Guidelines of 2014 and is similar to the programme of the European Commission. The leniency programme will be replaced after the implementation of Directive (EU) 2019/1 (the ECN+ Directive). The Dutch government does not intend to make major changes to the current procedure.

A successful request to obtain full immunity requires that:

1 the leniency applicant is first to apply for immunity;
2 the Authority for Consumers and Markets (ACM) has not yet started an investigation into the cartel;
3 the leniency applicant provides information that enables the ACM to carry out a targeted inspection;
4 the leniency applicant has not forced other undertakings to participate in the cartel; and
5 the leniency applicant fully and continuously cooperates as required in the interest of the investigation or the proceedings.

The ACM can grant immunity if a leniency applicant comes forward after it starts an investigation if it has not yet issued a statement of objections (SO). In that case, the company must be able to share information dating back to a period of the conduct that is new to the ACM and on the basis of which it can establish the existence of the cartel. In addition, conditions (1), (4) and (5) above should still be satisfied.

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.

Subsequent cooperating parties

29 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 important additional evidential value and approach the ACM before the issuance of the SO. 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.

All leniency applicants have a duty to fully and continuously cooperate with the ACM's investigation.

Going in second

30 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 important additional evidential value and approach the ACM before the issuance of the SO. There is no leniency or amnesty plus programme available.

Approaching the authorities

31 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 will grant a marker if the applicant shares basic information on the cartel, such as the duration, the participating parties and the associated behaviour. In the marker, the ACM sets a deadline to complete the leniency application.

Cooperation

32 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 applicants must fully cooperate with the ACM. For instance, this means that an applicant will cease its involvement in the cartel (unless otherwise agreed with the ACM) and will abstain from any conduct that might hinder the investigation. In addition, the applicant should provide the ACM with all relevant information at its disposal as swiftly as possible and the information that the applicant can reasonably be expected to access.

Confidentiality

33 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. If the ACM shares information internationally, the confidentially safeguards of the receiving competition authority should match those applied by the ACM.

Settlements

34 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.

Corporate defendant and employees

35 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 as co-applicants in a leniency procedure. This possibility is also open to former employees if the investigation will not be jeopardised. Co-applicants must adhere to the same conditions as a company that applies for leniency.

Dealing with the enforcement agency

36 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. This can also be done anonymously or through a lawyer. The undertaking can contact the leniency office to discuss the facts at hand or a hypothetical situation, and ask whether full immunity is still available. The leniency application can be submitted to the leniency office by email, fax, regular mail, telephone or in person.

DEFENDING A CASE

Disclosure

37 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.

Representing employees

38 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.

Multiple corporate defendants

39 | 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.

Payment of penalties and legal costs

40 | 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.

Taxes

41 | 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.

International double jeopardy

42 | 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.

Getting the fine down

43 | 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.

UPDATE AND TRENDS

Recent cases

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

At the beginning of 2020, the Trade and Industry Appeals Tribunal overturned a judgment of the District Court of Rotterdam, in which the latter had quashed a decision of the ACM imposing a fine of over €12.5 million on cold storage operators. According to the operators and the Rotterdam court, the ACM was time-barred from enforcement as it would have exceeded the five-year prescription period. The ACM argued that it had suspended the prescription period by issuing a request for information and a visit to the undertaking, whereby it had informed the undertaking of the scope of the investigation. The ACM stated that it was investigating the market for cold storage in general, and the production and storage of fruit juices specifically. The eventual fine was imposed for anticompetitive behaviour regarding cold storage of fish. The central question was whether the indicated scope of the investigation also covered the subject of the eventual infringement decision. The Trade and Industry Appeals Tribunal sided with the ACM and determined that the scope did encompass the cold storage of fish. The ACM had, therefore, successfully suspended the prescription period and was allowed to impose the fine.

In May 2020, the ACM fined four cigarettes manufacturers a total of €82 million for alleged indirect information exchange. According to the ACM, the manufacturers exchanged information about future retail prices through wholesalers and other buyers. This is the first time the ACM imposed a fine for indirect exchange of information. Another noteworthy aspect of the case is that the manufacturers are legally obligated to determine the retail prices for cigarettes, which they must communicate to their wholesalers and retailers. The manufacturers have filed an objection against the ACM's decision.

Regime reviews and modifications

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

There is a legislative proposal to transpose Directive (EU) 2019/1 (the ECN+ Directive) into national law. 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 will not lead to major changes to the Dutch regime. The most significant modifications relate to cooperation with other national competition authorities and the possibility to impose interim measures. The proposal is in the final legislative stage and should come into force before 4 February 2021.

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 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. Where a sustainability agreement would be incompatible with Dutch competition law, undertakings would have the opportunity under the proposed Act on Room for Sustainability Initiatives to request the Minister to transpose sustainable initiatives into law. The legislative proposal was submitted in July 2019 and has not yet been put to vote in the Dutch parliament.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In March 2020, the European competition authorities jointly issued a statement on the effect of covid-19 on their practice and the need for close cooperation during the pandemic. Undertakings can approach the ACM to discuss whether their collaboration is permitted. The ACM stated that it will not act if cooperation is in the general interest of people and undertakings. For instance, the ACM allowed the exchange of stock information by supermarkets. It may also be useful to check the temporary framework on business cooperation in the covid-19 outbreak issued by the European Commission in April 2020. Both the ACM and the European Commission stress that undertakings cannot take advantage of the current situation.

The financial effects of the covid-19 pandemic are also taken into account by the competition authorities. In August 2020, the Trade and Industry Appeals Tribunal reduced a €1 million fine for a cartel violation to €10,000. The undertaking argued that the fine was no longer proportionate as it would cause an immediate danger of bankruptcy. The Trade and Industry Appeals Tribunal consulted the ACM on the proportionality of the fine. The ACM proposed to adjust the fine to €10,000. Apart from the fact that the level of the fine could be reduced due to a pending appeal that would not be judged upon soon and the financial emergency that the undertaking was facing, the ACM explicitly considered the effects of the corona crisis as exceptional circumstances to justify the reduction.

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ISBN 978-1-83862-310-4