Restraints of trade and dominance in the Netherlands: overview

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A Q&A guide to restraints of trade and dominance in The Netherlands.

The Q&A gives a succinct overview of restraints of trade, monopolies and abuses of market power in The Netherlands. In particular, it covers the regulatory authorities and the regulatory framework, the scope of rules, exemptions, exclusions, statutes of limitation, notification, investigations, penalties and enforcement, third party damages claims, EU law, joint ventures and proposals for reform.

For information on merger control, regulatory framework and regulatory authorities, relevant triggering events and thresholds in The Netherlands, visit, *Merger control in The Netherlands: overview*.

This Q&A is part of the global guide to competition and cartel leniency. For a full list of jurisdictional Restraints of Trade and Dominance Q&As visit *www.practicallaw.com/restraintsoftrade-guide*. For a full list of jurisdictional Merger Control Q&As visit *www.practicallaw.com/mergercontrol-guide*.

For a full list of jurisdictional Cartel Leniency Q&As, which provide a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities in multiple jurisdictions, visit *www.practicallaw.com/leniency-guide*.

Restraints of trade

Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory framework
The regulatory framework is the Dutch Competition Act of 22 May 1997 (DCA). The cartel prohibition is laid down in Article 6 of the DCA.

Article 6(1) of the DCA prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part of it. Article 6(1) mirrors Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), except for the requirement of effect on interstate trade.

Article 6(2) of the DCA determines (in line with Article 101(2) of the TFEU) that agreements and decisions of associations of undertakings infringing Article 6(1) are null and void. Article 6(3) provides an exemption to the cartel prohibition similar to Article 101(3) of the TFEU.

With respect to agreements and practices which may affect trade between EU member states, national competition authorities and courts are obliged to also apply Article 101 of the TFEU. National competition law should not be applied more stringently or more flexibly than EU competition law.

Regulatory authority

The cartel prohibition is enforced by the Netherlands Authority for Consumers and Markets (ACM) (*www.acm.nl/en*). The ACM is the result of a merger in 2013 of the Netherlands Competition Authority (NMa), the Netherlands Consumer Authority (CA) and the Netherlands Independent Post and Telecommunications Authority (OPTA). The ACM has independent status from the Ministry of Economic Affairs.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

An agreement does need to be in the form of a formal (written) agreement to be legally binding (whether documented or oral) (similar to Article 101 of the TFEU). A "concurrence of wills" reflecting an informal or unwritten understanding will suffice, as long as this consensus has affected or had the objective of affecting the market behaviour of the undertakings concerned.

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

There is a general exemption for agreements or practices whose economic and/or technical benefits outweigh their restrictions on competition and pass on a fair share of those benefits to consumers (*Article 6(3), DCA*). As under EU competition law, undertakings must self-assess their activities and agreements and cannot apply to the ACM for individual exemptions. To assist companies in the self-assessment, the ACM has issued several (sectoral) guidelines and guidance papers.

In addition, there are a number of specific exemptions to the cartel prohibition. These apply to:

- Services of general economic interest (*Article 11, DCA*).

- All matters covered by European block exemptions (*Articles 12 and 13, DCA*).
- Certain types of co-operation in the retail trade and designation of shops in new shopping centres (national block exemptions based on Article 15 of the DCA).
- Collective labour agreements, sector agreements on pensions between employers' and employees' organisations and certain agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession (*Article 16, DCA*).
- Book prices. The Dutch Act on fixed book prices mandates publishers in the Netherlands to set consumer prices of new books and prohibits book dealers from providing discounts on these prices.

Exclusions and statutes of limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions
Article 7 of the DCA contains a specific exception to the Dutch cartel prohibition that covers:

- Agreements, decisions or concerted practices involving eight or fewer undertakings, provided that their combined turnover in the preceding calendar year did not exceed EUR5,5 million if their activities are mainly the supply of goods, or EUR1,100,000 in all other cases (*Article 7(1), DCA*).
- Agreements, decisions or concerted practices involving undertakings that are actual or potential competitors, provided that their combined market share does not exceed 10% of any of the relevant markets and trade between EU member states is not appreciably affected (*Article 7(2), DCA*).

Statutes of limitation
The limitation period is five years after the termination of the infringement. This limitation period is interrupted and starts running afresh whenever at least one of the undertakings concerned is notified of any action taken by the ACM for the purpose of an investigation or proceedings regarding the infringement. However, any fine will be time-barred when ten years has passed since the end of the infringement.

Notification

5. What are the notification requirements for restrictive agreements and practices?

Notification

Under the DCA, it is not possible to notify any potentially restrictive agreement or practice to the ACM to obtain clearance.

Informal guidance/opinion

It is possible to request the ACM to provide guidance in the form of an informal opinion. The ACM will only provide an informal opinion if the:

- Matter concerns a new or unresolved question with respect to the application of Article 6 of the DCA.
- Issue is considered to be of economic and/or social importance.
- Information provided is considered sufficient to provide an informal opinion without having to conduct in-depth research into the facts of the matter.

In the last few years, the ACM has made use of the possibility to provide an informal opinion with some regularity.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The ACM can start an investigation into a suspected anti-competitive practice on its own initiative, on the basis of third-party complaints or on the basis of requests for leniency. Investigations start with fact-finding.

Third parties

On a third-party complaint about an alleged infringement of Article 6 of the DCA, the ACM is not obliged to start an investigation. The ACM can set its own priorities and can reject complaints, for example, on the basis of lack of economic importance or lack of consumer interest. If a complaint is not followed up by an investigation, the complainant has the right to know the reasons for this decision.

Complaints do not need to be made in a specific form. However, the ACM website does provide for a complaint form that can be used to inform the ACM of a potential infringement (*www.acm.nl/nl/contact/tips-en-meldingen/tip-ons*).

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

In an investigation following a third-party complaint, the complainant(s) or other third parties do not have the formal right to:

- Submit observations.
- Have access to documents.
- Be heard during the course of this investigation.

The ACM, however, can contact relevant third parties during an investigation to gather information about an alleged violation.

8. What are the stages of the investigation and timetable?

Investigations start with fact-finding. Commonly used fact-finding tools are: requests for information to parties and/or carrying out on-the-spot inspections (either announced in advance or in the form of dawn raids).

If the ACM has reasonable suspicion that an infringement has occurred, it will normally send a report (similar to a statement of objections under EU competition law) to the undertakings concerned followed by an oral hearing. There is no set timeline for this part of the ACM's investigation.

Interested parties have access to a non-confidential version of the report and to non-confidential documents contained in ACM files. Interested parties can file a written reaction concerning the contents of the report with the ACM. After the oral hearing, the ACM reassesses the case and may decide to impose sanctions. This decision must be taken within eight months after the report is send to the undertakings concerned. There are, however, no legal consequences if this term is exceeded.

From the start of an investigation to the final decision, the procedure typically takes between two and three years. This varies from case to case and there are various examples where the investigation procedure lasted (much) longer.

Publicity and confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity
In general, the ACM does not publish statements about investigations into specific companies (for example, the sending of information requests is usually not published). When dawn raids are performed in a certain sector and the ACM receives questions about it, the ACM usually confirms the investigation on its website. The names of undertakings under investigations are normally not explicitly mentioned in press releases, but it does happen. It is not uncommon for the ACM to publish a press statement stating that it has issued a report ("statement of objections") to certain undertakings within a specific sector. The names of the undertakings involved are generally not mentioned, but there are exceptions to this practice.

After issuing a decision, a non-confidential version of the decision, prepared on the basis of input by the undertakings concerned, is published on the website of ACM. Information that is generally considered to be confidential includes, among others, the names of natural persons involved and commercially-sensitive business information. The published decision includes the names of the undertakings to which the decision is addressed.

Automatic confidentiality
Automatic confidentiality applies to the names of natural persons involved in the cartel, such as managers and employees of the undertakings concerned.

The Implementation Act Directive Private Enforcement of Competition Law has modified the Dutch Civil Code (Civil Code) to implement the EU Private Damages Directive. As a result of the Implementation Act, parties do not have to provide access to documents related to private enforcement of competition law if there are "urgent reasons" to refuse access. This exemption limits the general rules for access to documents (*Article 843a, Code of Civil Procedure*).

Access to leniency statements or settlement statements, which are held exclusively by a Competition Authority, is denied no matter what. Further, such documents cannot be used as evidence in a private anti-trust damages case (*Implementation Act*).

Access to the following information is denied until the Competition Authority has taken a cartel decision, or has otherwise terminated the public enforcement procedure:

- Information drafted specifically for use in a public enforcement procedure.
- Information a Competition Authority sends to parties.
- Settlement statements that have been withdrawn, that are held exclusively by a Competition Authority.

The documents cannot be used as evidence in a private anti-trust damages case before that time.

Dutch civil courts assess requests for the disclosure of leniency statements in line with the legislation. Recent Dutch cases tend towards a strict approach towards disclosure of leniency documents.

Confidentiality on request
See above.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

ACM officials are authorised to enter premises, ask for information, demand inspection of documents and take data with them. The officials may require the undertaking to make available the content of filing cabinets, desk drawers, briefcases, suitcases and so on. This applies to business locations, private homes, (personal) vehicles and mobile phones of employees.

During a dawn raid, ACM officials have the right to copy any document that they consider to be relevant taking into account the scope of the investigation. However, any document or other information that does not fall within the scope of the investigation or is legally privileged can only be briefly checked by the officials to be able to determine that it is indeed outside the scope of their investigation or legally privileged (in relation to ACM investigations, legal privilege applies to all lawyers admitted to the Dutch Bar, irrespective of whether they are in-house or external counsel).

Directors and/or employees are obliged to co-operate with the investigation. However, if there is a reasonable suspicion that the party under investigation has committed an infringement of the DCA, the principles of protection against self-incrimination apply. This means that the ACM officials must inform management and employees of the undertaking concerned that they have the right not to answer questions if the answer would directly incriminate either themselves or the undertaking. Ex-employees do not enjoy a similar right to remain silent, unless they are personally subject to prosecution and potentially to fines.

To enter and search a private home without the permission of the occupant, the ACM requires prior authorisation by a judge (*Article 51, DCA*). If entry is refused, ACM officers can request assistance from the police.

If the investigation cannot be completed within one day, the ACM officials can seal any objects (for example, filing cabinets or whole rooms) that they consider to be relevant for their investigation and continue the next day. This to make sure that evidence that the officials have not yet been able to copy is destroyed or removed. Breaking a seal placed by ACM officials during a dawn raid can lead to a fine of up to EUR900,000, or in case of undertakings, 1% of the turnover, whichever is higher.

Any use by the ACM of investigative powers must be proportionate to the aim to be achieved (*Article 5:13. General Administrative Law Act (Awb)* and *Article 6, ECHR*).

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

Dutch competition law does not offer formal settlement procedures. Parties being investigated may, however, submit a settlement proposal for consideration. This may or may not lead to discussions with the ACM on entering the "simplified case conclusion procedure". It is up to the ACM, ultimately, whether or not to discuss a settlement. The ACM appears to be more amenable to a settlement if any of the following apply:

- The case concerns non-hard-core infringements.
- The infringing parties lack a sophisticated understanding of competition law.
- Settling could do away with years of litigation.
- A behavioural solution is readily available.

In a 2015 ACM decision, in the Natural Vinegar cartel, a company and two of its employees were fined, but got a 10% reduction on the overall fine because they, among other things, acknowledged the alleged facts, the legal qualification of the misconduct and (probably) agreed not to litigate. In many ways, this procedure appears to reflect the European Commission's settlement procedure (Regulation (EC) 622/2008).

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

Dutch competition law provides for a remedies (commitments) procedure comparable to a commitments decision under Article 9 of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).

In particular, if commitments offered resolve a certain issue quickly to the benefit of end consumers, and do not harm other third parties, the ACM will be inclined to accept them. In short, the ACM should be convinced that the decision to settle the case is more prudent than issuing an infringement decision. The ACM prefers structural over behavioural commitments (the ACM should be able to sufficiently monitor the application of the commitments). Further, the ACM will only accept commitments offered if it is convinced that the undertakings concerned will refrain from any further infringements in the future as a result of abiding by the commitments.

Decisions on commitments typically do not acknowledge violations of competition law, meaning cartel victims wishing to bring follow-on damages claims must still prove unlawful conduct.

If the commitments are broken, the ACM can impose a fine amounting to the higher of 10% of the undertaking's total turnover or EUR 900,000.

Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

The cartel prohibition is enforced by the competition authority in administrative procedures based on the DCA and the Dutch General Act on Administrative Law (*Algemene wet bestuursrecht).* There are no criminal law sanctions for cartel infringements in The Netherlands.

Orders
The ACM has the power to impose a binding instruction on undertakings to comply with the Competition Act and to impose an order subject to a (periodic) penalty for non-compliance.

Fines
On 1 July 2016, a new law increasing the maximum fines that the ACM can impose entered into force.

Under the new rules:

- The maximum fine is EUR900,000 or, if higher, 10% of a company's turnover.
- For cartel infringements, the maximum fine is multiplied by the number of years in which the cartel was in place subject to a maximum of four years. As a result of the new rules, the maximum fine for cartel infringements is now 40% of a company's worldwide annual turnover.
- Where an infringement is committed within five years of a previous similar infringement, the statutory limit is doubled, raising the maximum fine for repeat offenders to 80% of the undertaking’s annual global group turnover.
- Obstructing investigations can be punished by fines of up to EUR900,000 or, for undertakings and associations of undertakings, 1% of the annual turnover if that amount is larger.

Dutch legislation only specifies maximum fines. It is for the ACM to decide the appropriate level of a fine on a case-by-case basis. The ACM is free to set fines at a lower amount than the legal maximum and has in some cases considered it appropriate to impose only a symbolic fine. Dutch courts have full jurisdiction to review the proportionality of competition fines and have in numerous cases lowered fines significantly.

Outcomes other than a fine are possible. The ACM advocates a problem-solving strategy. On a case-by-case basis, the ACM selects the instrument or a combination of instruments that offers the highest probability of producing a structural solution to the problem. This could be a fine, but also a commitment, a warning, a vision document or educating businesses and consumers.

Personal liability
Fines of up to EUR900,000 can be imposed on directors and de facto managers for breach of the cartel prohibition. Criminal sanctions and disqualification orders are not available in relation to cartel infringements.

Immunity/leniency
The ACM applies a leniency programme that is very much like the European Commission's leniency procedures. Full immunity from administrative penalties is available if the following conditions are met:

- The applicant must be the first to disclose the cartel.
- The leniency application must relate to a cartel that has not yet been investigated by the ACM.
- The leniency application must enable the ACM to start targeted inspections in relation to the alleged cartel.
- The applicant must not have compelled any other undertaking to participate in the cartel.
- The applicant must fully co-operate on a continuous basis throughout the procedure.

Full immunity can also be granted if an investigation has already started but no formal report (statement of objections) has been issued, provided that the application provides ACM with documents that stem from the period of the practice in question that had not already been in ACM's possession, and on the basis of which ACM is able to prove the existence of the cartel.

The ACM can also grant a reduction of either 30% to 50%, 20% to 30% or a reduction with a maximum of 20%. The relevant conditions that must be met to be granted various levels of reduction are set out in the ACM leniency policy rule.

Impact on agreements
Agreements and decisions of associations of undertakings infringing Article 6(1) of the DCA are null and void and therefore unenforceable (*Article 6(2), DCA*).

Third party damages claims and appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages
Article 101 of the TFEU and Article 6 of the DCA are directly applicable, meaning third parties can rely on these provisions directly before court and can claim damages for losses suffered as a result of these provisions having been violated.

The relevant material rules can be found in Book 6 of the Civil Code (*Burgerlijk Wetboek*). The procedural rules are mainly to be found in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

Materially speaking, when claiming private anti-trust damages, Article 6:162(1) of the Civil Code is of paramount importance. It states that any person who commits an unlawful act against another person that can be attributed

to him/her, must repair the damage that this other person has suffered as a result. Most private anti-trust damages claims are brought based on this legal ground for liability.

Other possible legal grounds on which to base a claim for private anti-trust damages include:

- Group liability for a joint tort (*Article 6:166, Civil Code*).
- Undue payment (*6:203, Civil Code*).
- Unjustified enrichment (*Article 6:212, Civil Code*).

Special procedures/rules

In procedural terms, Dutch law does not possess procedures specifically geared towards private anti-trust damages.

Interested third parties (for example, customer or competing undertakings) can start an action for damages at Dutch civil courts, for losses suffered as a result of infringements of the Competition Act. They can do so either after the European Commission or Authority for Consumers and Markets (ACM) has issued a decision confirming the infringement (which is most common) or as a stand-alone action. For the latter option, the claiming third party generally finds it much more difficult to prove the alleged infringement underlying its damage claim, as it does not have a Commission or ACM decision to support the claim.

A Commission or ACM decision is generally accepted as binding proof of the infringement itself (but it generally does not provide evidence for the level of damages suffered). This is in line with the EU directive on actions for damages under national law for infringements of the competition law provisions of the member states and of the EU.

Dutch civil courts have the power to grant injunctions for damages claims on the basis of Article 6 of the DCA. The courts can request the ACM to intervene in these proceedings to provide a reasoned opinion on, for example, the interpretation of Article 6 of the DCA if there is no ACM decision in the relevant case.

The main statutory limitation period for a right of action to claim private anti-trust damages is five years from the day following the one on which the cartel victim first became aware of the inflicted damage and the identity of the person liable for this damage. In other words: the limitation period can start to run either before or after a cartel decision is published. Claimants can interrupt a limitation period fairly easily by a written warning. An additional statutory limitation period, in any event, is 20 years from the day on which the event occurred that caused the damage (*Article 6:193s, Civil Code*).

Collective/class actions

Dutch law stipulates that under certain circumstances, a foundation or an association with full legal personality can bring a representative action to safeguard the shared interests of other persons, provided that it is competent to safeguard those shared interests, as must be apparent from its Articles of Association (*Article 3:305a(1), Civil Code*). This article, however, declares damage claims inadmissible. This action can therefore only be used to obtain a partial judgment, which establishes, for example, unlawfulness on the part of the cartelists, as one of the constitutive elements of tort under Dutch law, after which separate proceedings are necessary to obtain private anti-trust damages.

Dutch law also offers scope for collective settlements. In case of mass (umbrella) claims, parties may be willing to settle collectively (*Articles 7:907-7:910, Civil Code* and *Articles 1013-1018, Code of Civil Procedure*). The Court of Appeal in Amsterdam can declare such a collective settlement binding on all actual and potential cartel victims, subject to an opt-out procedure within a certain timeframe. Again, claimants must be represented by a foundation or

an association to obtain this result. On the other hand, the court can assume jurisdiction even if only a few (potential) "anchor" claimants are located in The Netherlands. This may trigger claimants looking for the most favourable EEA jurisdiction to bring their private anti-trust claims. There is no certification process.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure
ACM decisions in cartel cases are normally subject to a three-stage appeal process:

- Addressees of a decision (and other interested parties) can, within six weeks of the notification of the decision file for administrative review with the ACM. The ACM reviews the decision on the basis of the appeal. With respect to decisions imposing a sanction, a committee of independent experts may advise the ACM.
- Against the administrative review decision an appeal can be lodged before the administrative law chamber of the Rotterdam District Court within six weeks of the notification of that decision.
- The judgment of the Rotterdam District Court can be appealed in final instance before the Trade and Industry Appeals Tribunal.

When filing an administrative review application, an applicant can request that the ACM allows a direct judicial appeal to the Rotterdam District Court. It is for the ACM to decide whether or not to agree with the request for a direct judicial appeal.

Third party rights of appeal
Any person whose interests are directly affected by the decision of the ACM can appeal against that decision. The procedure and timing are the same as for the undertakings concerned (*see above, Rights of appeal and procedure*).

Monopolies and abuses of market power

Scope of rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory framework
The regulatory framework is the DCA (*see Question 1*).

Article 24 of the DCA (which is the Dutch law equivalent of Article 102 of the TFEU) prohibits undertakings from abusing a dominant position. Dominance itself is not prohibited, only the abuse of it. Article 24 of the Competition Act closely follows the EU law regime with respect to abuse of dominance.

The ACM also has the authority to apply Article 102 of the TFEU directly in cases where there is a potential effect on trade between member states.

Regulatory authority
The ACM is the regulatory authority responsible for enforcing Article 24 of the DCA. In the healthcare sector, there is an additional regulator, the National Healthcare Authority (*Nederlandse Zorgautoriteit*). The ACM, however, has the exclusive authority to investigate possible infringements of Article 24.

17. How is dominance/market power determined?

In line with EU case law, a dominant position under Article 24 of the DCA is "a position held by one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part of it, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users" (*Article 1(i), DCA*). It follows that a dominant position can be held by one or more undertakings. Article 24 therefore also applies to situations of collective dominance.

Dominance within a market will depend on a close examination of the conditions of competition within the relevant market, including factors such as market shares, the position of competitors, barriers to entry and the bargaining strength of customers.

As a starting point in the analysis, to determine whether a rebuttable presumption of dominance exists, the ACM applies a market-share threshold. As a rule of thumb, dominance will not generally be considered to exist below a market share of 40%. Above 50%, however, a rebuttable presumption of dominance exists.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

Article 24 of the DCA does not include a list of examples of behaviour that is considered abusive. However, the specific categories included in Article 102 of the TFEU are also applicable under the Dutch competition law regime. Therefore, abuses under Article 24 of the DCA may consist of:

- Exclusionary abuses, which include:
  - predatory pricing;
  - exclusive purchasing obligations;
  - loyalty/fidelity rebating;
  - tying and bundling;
  - refusal to supply.
- Exploitative abuses, which include:
  - excessive pricing;
  - discrimination between customers; and
  - unfair trading conditions.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

The prohibition of abuse of a dominant position does not provide for any exemptions, but does allow for the specific possibility of obtaining a waiver (*Article 25, DCA*). A waiver can be granted on request to undertakings entrusted with the supply of services of general economic interest. Here, the DCA varies slightly from Article 106(2) of the TFEU, which exempts such undertakings from the prohibition. Requests for an exemption on the basis of Article 25 of the DCA rarely occur.

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

It is not possible to notify any potential dominant position or abuse of a dominant position to the ACM to obtain clearance (except Article 25 of the DCA) (*see Question 19*).

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

There are no notable procedural differences between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices.

22. What are the regulator's powers of investigation?

See Question 10.

Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

The maximum fine that the ACM can impose on undertakings that infringe Article 24 of the DCA and/or Article 102 of the TFEU is the same as the maximum fine for restrictive agreements and practices, that is, the higher of EUR900,000 or 10% of the undertaking's total worldwide annual turnover.

According to the 2014 ACM Fining Policy Rule, the basic fine is calculated as a percentage (zero to 50%) 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.

The ACM can impose an order subject to periodic penalty payments; for example, when undertakings fail to co-operate during the investigation process.

The ACM can also fine individuals up to EUR900,000. Such fines can be imposed if it is established that these persons have expressly ordered the abuse to be committed or have failed to take adequate preventive measures and by doing so deliberately accepted the risk that the abuse would be committed.

Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages
Third parties can base an action for damages or injunctions before the civil courts directly on Article 24 of the DCA (as with Article 102 of the TFEU). There is no specific regime for enforcement of competition law infringements. See *Question 14*.

EU law

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

The powers of the ACM and the Dutch courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under the DCA, are basically the same. The only difference is that that Articles 101 and 102 of the TFEU only apply when there is an effect on trade between EU member states. This interstate effect must be demonstrated by the ACM.

Joint ventures

26. How are joint ventures analysed under competition law?

Full-function joint ventures are caught by the merger control provisions of the DCA. The concept of full function joint ventures is the same as under Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation) (that is, a joint venture that performs on a lasting basis all the functions of an autonomous economic entity).

Co-operative joint ventures (not full function) are not subject to the merger control rules of the DCA, but they can fall under Article 6 of the DCA and/or Article 101 of the TFEU.

Inter-agency co-operation

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The ACM works closely together with other European competition authorities and the European Commission in the European Competition Network (ECN). This collaboration is not only aimed at sharing knowledge, but also at realising a consistent application of European competition rules. The ACM is also a member of the European Competition Authorities Association (ECA) and the International Competition Network (ICN).

As an exception to the general rule that information collected about companies under the DCA should remain confidential and can be used only for the purposes of the DCA, the ACM can share information with foreign competition authorities. Such information can only be shared:

- If the confidentiality of the information is sufficiently protected.
- Adequate assurances are given that the information will not be used for purposes other than the enforcement of (foreign) competition law.
- The provision of such data is in the interests of the Dutch economy.

Recent cases and trends

28. What are the recent developments, trends or notable recent cases concerning abuse of market power?

In June 2017, ACM imposed a fine of almost EUR41 million on NS (Dutch Railways). The case relates to a tendering procedure for a train and bus transport concession in the province of Limburg. Based on internal e-mails and other documents, ACM found that NS had submitted a loss-making bid to obstruct its competitors. The NS has lodged an appeal.

The ACM has identified prescription drug prices as one of its key priorities for 2018 to 2019. The ACM has published two working papers on excessive drug prices (*Reconciling competition and IP law: the case of patented pharmaceuticals and dominance abuse* and *Lower drug prices can improve innovation*). Following these working papers, the ACM launched in June 2018 a sector inquiry into rheumatism drugs which, according to the ACM, have the highest costs for both hospitals and patients.

Proposals for reform

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

There are no current proposals for reform.

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Non-professional qualifications. MA in Modern History, Radboud University Nijmegen.

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Languages. Dutch, English, Greek.

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Publications. *Distributieoveernkomsten. EU – België – Nederland (2018).*

Recent transactions. Banning's merger control team handles all aspects of EU and national merger control, from initial analysis through to Phase II investigations. The team regularly assists clients with making filings to competition authorities. Recent experience includes filings in the following sectors: agricultural markets, animal foods, automotive, international transport, building materials, supermarkets, franchising and recruitment and outplacement services.

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