

# ACM fine lowered with 99% due to COVID-19

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## Intro / Summary

The Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*, "CBB") reduced a fine imposed by the Dutch Authority for Consumers & Markets ("ACM") on an unidentified undertaking with 99%, from €1 million to €10,000,-. The ACM asked the court to lower the fine, after being urged by the fined undertaking, because of special recent circumstances, including the consequences of COVID-19.

This judgment is one of the first concrete signs of the impact of COVID-19 on cartel cases in the Netherlands. The case not only has impact from a legal perspective but also in practical terms. As the fine had already been paid by the undertaking, ACM now has to pay back €990,000,- to the fined undertaking. This potentially has a huge impact on state treasury if more reductions of fines are accepted due to COVID-19. Furthermore, although this might seem to be a victory for the appellant, the price the fined undertaking had to pay for the reduction of the fine was giving up its other grounds of appeal. As a result its violation of the competition rules is now a fact of law laying down a basis for potential civil damage claims.

In this blog we briefly discuss the case and flag potentially relevant developments which this case reflects.

## Background of the case: inability to pay?

### Facts

Following a leniency application, the ACM started an investigation into a potential cartel and concluded in 2017 that indeed the undertakings concerned were engaged in prohibited pricing agreements that reduced competition between them. This resulted in a fine of €2,798,000,- on the appellant, which eventually has been lowered by the ACM to an amount of €1,935,000,- after the appellant challenged the original amount. The District Court of Rotterdam confirmed ACM's findings in 2018, but lowered the fine even further to an amount of €1,000,000,-.

### Inability to pay-defense

In the appeal proceedings before the CBB, the appellant took the position that its financial position is currently so bad that the fine imposed by the ACM – and as reduced by the court – is no longer proportionate. According to the appellant, its bankruptcy is now imminent partly due to the fine, which had already been paid by the appellant. To evidence this, appellant requested the CBB to come to a judgment as soon as possible, while agreeing to abandon any other grounds of appeal insofar as they did not relate to the proportionality of the fine.

### Special circumstances according to ACM

It follows from the judgment that the ACM was willing to lower the fine to an amount of €10,000,- for the following reasons:

- The fact that, in view of the ongoing proceedings before the Rotterdam District Court concerning [the parent company], there is no possibility to speed up the procedure of the case as a whole, as a result of which appellant should have to wait too long before any certainty could be given about the level of its (final) fine;
- Appellant's current financial situation and the alleged urgency; and
- The COVID-19 crisis and its alleged consequences for appellant.

The ACM also agreed to withdraw its grounds of (counter) appeal.

### CBB ruling

As a result, the CBB only had to rule about the proportionality of the fine under the given circumstances. Taking into account the circumstances described above and the fact that the fine of €10,000,- as proposed by the ACM, has not been contested by the appellant, CBB comes to the conclusion that this is an appropriate fine. The CBB annuls the judgment under appeal insofar as it imposed a fine of €1,000,000,- on the applicant and lowers that amount to €10,000,-.

## Reflecting on COVID-19 consequences for cartel cases

Although this case at first sight might seem to be a straight forward inability to pay-case, we believe there are some interesting aspects to be flagged:

### • Impact for the competition authority

First of all, because applicant already paid the fine<sup>[1]</sup>, the ACM (or state treasury) now has to pay back 99% of the fine. Assuming that, especially after this judgment, more inability to pay-cases will follow, the impact of COVID-19 for the state treasury as regards income from competition law fines should not be underestimated.<sup>[2]</sup>

### • Impact for the cartel participants

As stated above, the price the appellant in this case had to pay for a – very quick and large – reduction of its fine is to give up its other grounds of appeal, including those regarding the violation of the competition law rules. The ACM's decision in which it was established that applicant committed a violation of competition law by engaging in a prohibited cartel is therefore now irrevocable.

This potentially provides a basis for civil damage claims from third parties who suffered from the cartel. The Directive governing actions for damages for infringements of competition law holds that all cartel members which have infringed competition law through joint behaviour will be held "jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated". There are, however, some exceptions, including for the immunity recipient, which the applicant clearly was not, and also for SME's: "if it would irretrievably jeopardise its economic viability and cause its assets to lose all their value".

### • Impact from a procedural point of view

This case also shows the flexibility of the Dutch highest appeal court. On 16 June 2020, the appellant sent a letter requesting for a court hearing as soon as possible. Within one month, on 9 July 2020, parties were invited to discuss the issue during a hearing. During this hearing, the parties agreed that the applicant will provide the ACM with insight in its financial position and the ACM will provide its views on the inability to pay-arguments. After some further communications back and forth, the CBB gave its judgment on 18 August 2020. Only approx.. 2 months later than the original request of appellant.

In our opinion this shows a very pragmatic approach of the court and willingness to cooperate where possible and necessary due to COVID-19.

Interesting to mention is also that the ACM and applicant did not agree on the interpretation of the inability to pay-doctrine, but the ACM was nevertheless willing to propose a fine reduction of 99% on the basis of the proportionality principle given the impact of the COVID-19 crisis, among others. Unfortunately, no further details about the parties' views regarding the inability to pay-doctrine have been published.

Please note that since several legal proceedings are still pending regarding the same cartel, including the publication of the ACM's decisions, no further information about the cartel itself is yet published.

[1] In contrast to the old regime, under the new regime in the Netherlands, you have to pay your fine within 6 weeks. Have you objected to the fine or filed a direct appeal with the court? If so, payment must be completed within 24 weeks after the fining decision was sent. If ACM hands down a decision on your appeal before the 24-week period has passed, payment of the fine must be completed on the day that the decision is sent to you. See [link](#) for more information about how to pay fines in the Netherlands.

[2] Although the total amount of fines the ACM had to pay back in 2019 was €45,571,087,- ([link to annual report 2019](#)). An amount of €990,000,- therefore does not seem have a high impact on the state treasury. Please note that the amount of fines the ACM has to pay back is quite high partly due to a new regime within the Netherlands as described in footnote 1.