

Main developments competition law and policy 2020: The Netherlands

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As part of the series of posts on the main 2020 developments in key jurisdictions by many authors of the Kluwer Competition Law Blog, we provide you with an overview of developments in the Netherlands.

In sum, we saw an upsurge in the enforcement of the competition rules in the Netherlands by the Authority for Consumers & Markets (“ACM”) in 2020. The ACM has been in good company of the Dutch State Secretary for Economic Affairs and Climate Policy Mona Keijzer, who was also quite active in the competition law field, especially when it regards digital platforms and gatekeepers. In addition, the Dutch courts also published many judgments in the year 2020. This thankfully led to many interesting developments for us to signal in this – therefore lengthy, apologies! – blog.

We divided the blog into three parts: the ACM (§1), the Dutch courts (§2) and the Dutch legislator (§3).[1]

1. Main actions of the ACM in 2020

Digital markets and energy markets in (sustainable) transition

As said, the ACM has been very active in the year 2020. Especially compared to previous years. In accordance with [its agenda](#) for 2020, ACM’s focus was on digital markets and energy markets in transition, i.e. sustainable energy. For example, the ACM conducted a market study into [Big Techs on the Dutch payment market](#), announced an investigation into users’ [freedom of choice regarding payment apps on smartphones](#), an investigation into the [functioning of algorithms](#) in practice and has taken a closer look at the [Mobility as a Service \(“MaaS”\)-market](#). The MaaS-market brings together the ACM’s two focus areas as MaaS is expected to stimulate the use of public transportation as well as, for example, the use of bike-sharing programs, and to lower people’s dependency on their own cars. In that way, MaaS contributes to sustainability while making use of digital possibilities. In 2020, the ACM launched a study into the ability of new entrants to offer innovative mobility services, but also investigated two digital platforms in the MaaS-market: [NS/Pon](#) and [NS/Municipal public-transportation companies](#). Both joint ventures were given the green light by the ACM, but on conditions of (FRAND)-access and portability rights for competitors (read our [blog here](#)).

As regards sustainable energy, the ACM has also made a big effort by taking a pioneering position and proposing [\(draft\) sustainability guidelines](#). Those guidelines intend to offer more leeway for environmental sustainability initiatives within the competition framework (read our [blogs here](#) and [here](#)). The ACM also drafted rules of thumbs for [sustainability claims](#) [2]

More traditional markets

In the more traditional markets, the ACM actively continued its enforcement activities. The ACM imposed several fines: € 82 million for a [hub-and-spoke cartel](#) between cigarette manufacturers (read our [blog here](#)), € 330,000 on construction companies for [bid-rigging in the civil-engineering sector](#) and € 24,000 for [bid-rigging by roofing contractors](#). The ACM launched investigations into a possible cartel related to price-fixing in the [home-decor sector](#) and a possible buyer cartel involving certain [reusable waste products](#), and closed investigations into the rates charged by [ATM operator Geldmaat](#) to other banks and into [drug manufacturer AbbVie](#). In the latter case the ACM closed its investigation because AbbVie committed not to force hospitals to purchase exclusively or to a large extent from AbbVie through discount schemes. Just before closing the AbbVie-investigation, the ACM, however, announced that it extends its investigation into [orphan drug CDCA-Leadiant](#) for abusing a dominant position in the pricing of the drug.

Other actions the ACM took in 2020 included, to name just a few[3], the allowance of joint arrangements for the handling of [motor vehicle claims](#), the [publication of draft guidance](#) for collaborations between telecom operators in the roll-out of mobile networks and a preliminary rejection of the enforcement request of [legal-protection insurance company SRK](#) (BrandMR) to take action against the Dutch Bar Association and The Hague Bar Association, because the Dutch Bar already announced that it would create the opportunity for legal-protection insurers to act for non-insured (partly) in response to the complaint.[4] Before, lawyers that are employed with legal-protection insurers could not represent clients that have not taken out legal-protection insurance.

COVID-19

COVID-19 inevitably also had an impact on ACM’s actions. Most notable are the [health insurers’ agreement](#) on the distribution of costs of the COVID-19 crisis for 2020, the [collaboration between hospitals, pharmacies and wholesalers](#) regarding the distribution of essential drugs for COVID-19 patients, the [collaboration between health insurers](#) to make arrangements to provide financial support to health care providers during the COVID-19 crisis and the [Sunweb-Corendon merger](#). The latter case is of interest, not only because it is a 3-to-2 merger, but also because the COVID-19 crisis erupted during the assessment of the acquisition of this tour operator, which crisis has a major impact on the travel industry. The ACM took as its starting point the market situation right before the outbreak of the pandemic, because according to the ACM *“it is difficult to predict what the effects of the crisis are and whether they will be permanent”*.

The ACM [regularly updates](#) consumers and the market on ACM’s oversight during the COVID-19 crisis (the [Dutch page](#) being most accurate).

2. Main Dutch court judgments in 2020

The Dutch courts have also produced quite a few judgments. We counted approximately 129 judgments which relate to competition law. Examples are the court’s confirmation of [forbidden vertical price-fixing](#) by the [Woezel & Pip](#)-brand owner, the lowering of a fine with 99% due to COVID-19 (read our [blog here](#)), the proceedings about an [alleged abuse of \(joint\) dominance](#) by Buma, Stemra and Sabam for applying different license conditions for streaming services and the Dutch Trade and industry Appeals Tribunal (“CBB”), the highest administrative law court in the Netherlands, confirmation that the ACM rightly [unconditionally cleared](#) unconditionally cleared Stichting Exploitatie Nederlandse Staatsloterij’s (SENS) acquisition of Stichting Nationale Sporttotalisator (SNS). In its judgment, the CBB ruled that the ACM had sufficiently justified its decision to leave the market definition open and agreed with ACM’s conclusion that the merger would not significantly impede effective competition.

We highlight four judgments:

Funda: about self-preferencing, rankings and abuse of dominance

- In 2020, the Court ruled that the Dutch online real estate platform Funda did not abuse its dominant position by *inter alia* self-preferencing the ranking of advertisements of the members of the Dutch Association of Real Estate Agents (NVM) on the platform and applying higher tariffs and more limited website functionalities to members of the real estate association VBO Makelaars. Relying on a judgment by the Court of Justice of the European Union in the case of [MEQ/Autoridade da Concorrência](#), the court noted that it should have been demonstrated that the alleged discriminatory conduct by Funda concerning its platform had an actual negative effect on the competitive position of the “abused” party on the downstream market for real estate agencies as mere discriminatory conduct by a dominant company is insufficient to establish an abuse, which it failed to do so (read the [blog](#) of our colleagues [here](#)).

Cold storage cartel: about the market investigation standard

- In 2020, the CBB published four judgments related to the [cold storage industry cartel](#). In this cartel case, the ACM imposed fines totalling € 12.5 million in three decisions on four companies in the cold storage industry (freezing and refrigerated storage). Furthermore, five executives were imposed personal fines. The conduct included anticompetitive arrangements and competitive sensitive information sharing. The most recent judgments in April 2020 (see [here](#) and [here](#)) are interesting since, contrary to the district court, the CBB concluded that the ACM had conducted a sufficient market investigation to be able to determine whether the alleged conduct had the object of restricting competition. Furthermore, the CBB ruled that sufficient access to the ACM case file had been granted, although this was solely via its attorney.

North Sea Shrimp cartel: about personal liability for directors

- On 23 September 2020, the Dutch District Court of Noord-Nederland held a former director of one of the North Sea shrimps’ cartelists personally liable for damage of over € 13 million. According to the Court, the director’s personal involvement in the cartel qualified as improperly fulfilling his duties as a director. This justifies his personal liability to pay damages to the bankruptcy estate based on Dutch corporate directors’ liability rules. This judgment is of interest for several reasons. Firstly, because it shows that (former) directors involved in competition law infringements may be personally liable for a cartel fine, even though the European Commission did (and can)not impose personal fines. Secondly, because the judgment shows how civil and/or corporate liability for competition law infringements could be established and how to calculate the damage (read our [blog here](#)).

Telecoms: about collective dominance and ex-ante regulation

- In September 2018, the ACM concluded in its market analysis decision on Wholesale Fixed Access that Dutch telecom providers KPN and VodafoneZiggo were obliged to grant other providers access to their networks. According to the [CBB judgment](#), however, ACM failed to demonstrate the existence of collective dominance, and that KPN and VodafoneZiggo would tacitly coordinate their behaviour absent ex-ante regulation. The CBB established that the [Airtours](#)-criteria should be applied to establish collective dominance, while the use of the modified Greenfield approach and the game theory were not sufficient to demonstrate tacit coordination. As a result of ACM’s failure to meet the requisite standard of proof, the fixed networks of KPN and VodafoneZiggo are currently free from access regulation.[5]

3. Main actions Dutch legislator in 2020

Next to the ACM and the courts, the Dutch legislator has also been active when it comes to competition law. Again, we highlight four developments:

Non-paper interventions on platforms with gatekeeper position

- The State Secretary of Economic Affairs and Climate Policy published a [non-paper](#), together with her French counterpart, on ex-ante regulation of digital platforms with considerable market power and a gatekeeper position (structuring platforms). In the discussion document they elaborate on the issue of intervention. According to the non-paper, intervention is justified when the asymmetric bargaining power of structuring platforms leads to negative consequences and before the damage becomes irreversible. They propose to define the scope of intervention against a number of simple and objective criteria, revise the classical methods of market definition, a flexible and proportionate case-by-case approach (incl. remedies), implement a set of principle-based obligations and prohibited practices, ensure effective sanctions in case of infringement and proper tools for the competent

authority.

Legislative proposals: ECN+ and prolongation Dutch Public Enterprises Act

Several legislative proposals have been published or acts have been adopted. For example:

- A bill to implement the ECN+ directive ([Directive \(EU\) 2019/1](#)) has been adopted. This directive empowers EU competition authorities in order to become more effective and to ensure the proper functioning of the internal market. The implementation deadline is 4 February 2021. The main changes that ECN+ brings for the Netherlands concern the (further) provision of mutual assistance between national competition authorities, laying down a legal basis for provisional measures, limitation of the right of annulment of the Minister and the requirement to obtain judicial authorisation for the inspection of private vehicles, buildings and sites.
- A proposal to prolong the Dutch Public Enterprises (Market Activities) Act (as incorporated in the Dutch Competition Act) to 1 July 2023. This act for example requires municipalities to charge the overall costs when conducting economic activities such as rental of sport facilities or campsite pitches. A proposal for material changes of the act is also expected in 2021.

Act against undesired control in the telecommunications sector

- Also worth noting is the Act against undesired control in the telecommunications sector (as implemented in the Dutch Telecommunications Act), which entered into force on 1 October 2020. The Act introduces a notification requirement applicable to anyone who has the intention to acquire 'a controlling interest' in a 'telecommunications party' if such interest results in 'relevant influence' in the telecommunications sector and the possibility for the Minister to prohibit the acquisition if the controlling interest could result in a 'threat to the public interest' (read our blog [here](#)).^[6]

License PostNL - Sandd merger

- Finally, the Minister of Economic Affairs & Climate Policy granted a license for the acquisition of rival post operator Sandd by PostNL. This was the first time since the introduction of the Dutch Competition Act that the Minister used its power to grant a merger license based on compelling reasons of general interest outweighing the expected restrictive effects on competition. The approval of the acquisition was granted by the Minister following the earlier refusal by the ACM to approve the transaction. However, on 11 June 2020, The District Court of Rotterdam [annulled](#) the decision of the Minister (read the blog by our colleague Piet-Hein Eijssen [here](#)).

Outlook 2021

In sum, in 2020 we saw an upsurge in the enforcement of the competition rules in the Netherlands. The perception of some of the ACM as a toothless enforcer seems soon to be a relic of the past. This trend, which is reshaping antitrust rules in the Netherlands, will most likely continue in 2021.

The ACM, for example, already announced an investigation into a possible cartel in the home decor sector, in addition to the investigation into excessive pricing by CDCA-Leadiant and the payment app sector (see above). We furthermore expect final guidance from the ACM on collaborations in relation to sustainability initiatives and the roll-out of mobile networks (see also above).

It appears that the next wave of antitrust investigations could focus on digital markets, as that area remains high on the ACM's agenda. It will be interesting to see how the ACM grapples with digital markets, gatekeepers and, for example, algorithms in 2021, some of which are unexplored territory for antitrust analysis.

Please note that although this blog contains many of the 2020 developments in competition law in the Netherlands, this blog is not intended to be and is not exhaustive.

[1] Another positive development is that the ACM publishes more and more of its work in English. We, therefore, included a link to the source in English where possible.

[2] Furthermore, the ACM [reflected](#) on the welfare of today's chicken and that of the 'Chicken of Tomorrow' (which refers to a - highly debated - [analysis](#) of the ACM in 2015 in which the ACM blocked a collective sustainability initiative on the basis of competition law) and [analysed](#) a [study](#) (the Agro-Nutri Monitor 2020) to provide insight into pricing and obstacles for organic agricultural production.

[3] Other developments regard, amongst others, the [urging](#) of the Royal Dutch Association of Civil-law Notaries (KNB) to adjust the information on passing on a fee for the Notarial Quality Fund to its members, a follow-up check on the commitments of KLM and Schiphol with regard to information sharing, the follow-up on the commitments of the [ready mix concrete firms](#): to eliminate serious risks for unfair competition (e.g. jointly operating plants), the [rejection](#) of the enforcement request of Tele2 to take action against KPN for an alleged abuse of its market power (margin squeeze and discrimination), the publication of [updated Guidelines](#) on collective procurement of drugs to inform hospitals and health insurers about the leeway within the competition rules for collective procurement of medicines for specialist medical care.

[4] In December 2020, the ACM [concluded](#) that the experiment of the Bar Association involving lawyers with legal-protection insurance is a step in the right direction, but wonders whether businesses other than legal-protection insurers are able to have their lawyers work under similar conditions. A broader and more differentiated selection of legal-protection services may stimulate innovation and can lead to a better price-quality ratio. That could lower the barrier for individuals seeking justice to request legal assistance. The ACM will therefore assess over the next few years whether there is a more widely shared need among market participants and individuals seeking justice for new options for legal assistance.

[5] There are many more important judgments to be mentioned, but some of them are more national or procedural in nature and have therefore not been included in this blog. For example, in relation to the Dutch Public Enterprises (Market Activities) Act the CBB confirmed ACM's decision that [municipality Veenendaal](#) should charge the integral costs for its parking facilities.

[6] Also related to the Dutch Telecommunications Act, it is worth mentioning the [amendment](#) of the Act following the implementation of the [European Electronic Communications Code](#), more specifically the introduction of access regulation when replication of networks would be economically inefficient or physically impracticable. This provides the ACM with an additional instrument to enhance competition in the telecommunication market. The amendment entered into force on 21 December 2020.