

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2021 – The Netherlands

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As part of the series of posts on the main 2021 developments in key jurisdictions by many authors of the Kluwer Competition Law Blog, we provide you with an overview of the main developments over 2021 in the Netherlands.

In sum, we saw an upsurge in the enforcement of the competition rules in the Netherlands by the supervisory authority, the Authority for Consumers & Markets (“**ACM**”). Especially the Samsung decision in relation to ‘influencing’ the online prices of television sets was noteworthy, which case will be continued in court in 2022. Like in 2020, the Dutch courts published a high number of judgments. For example in relation to damage claims, the cartel prohibition, abuse of dominance and competition law fines imposed by the ACM. This thankfully led to many interesting developments for us to signal in this blog.

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

### 1. Main actions of the ACM in 2021

In accordance with the ACM’s [agenda](#) for activities in 2021, the ACM focused on the energy transition (sustainability), the digital economy and the effects of the COVID-19 pandemic on the economy.

It was yet again an active year for the ACM when it comes to competition enforcement and other related competition activities. As there is a lot to write about, we limited ourselves to the – in our view – most interesting and most debated developments of 2021.

#### Sustainability

Especially in the area of sustainability, the ACM yet again made a stance relating to the development of competition law and competition assessments in a sustainability context by publishing a [second draft of the sustainability guidelines](#) (which serves as a basis for further

discussions within Europe, see also our blog [here](#)) and a [legal memo](#) on the topic of what can be regarded to be a fair share for consumers within the meaning of Article 101(3) TFEU in a sustainability context. This topic is heavily debated within the European Union and is also relevant to the review of the European Commission's horizontal guidelines.

Even though the sustainability guidelines are not finalised yet, the ACM [stated](#) that – while the discussions in Europe are still ongoing – it will not act upon collective agreements that follow the draft sustainability guidelines in good faith (but might infringe competition law as it stands today). The ACM also frequently emphasises that its door is open to businesses who wish to discuss collective sustainability initiatives.

The ACM furthermore finalised the [Guidelines sustainability claims](#) (see also our blog [here](#)) and started enforcing these rules regarding misleading sustainability claims by [sending letters](#) to more than 170 companies in the energy, clothing and dairy sectors requiring them to check the compliance of their sustainability claims.<sup>[1]</sup> This is not as such a competition topic, but worth mentioning in relation to the fore- and ongoing sustainability developments.

### Merger control

2021 saw notably more merger notifications than 2020. [According to the ACM](#) the number of merger notifications in the first half of 2021 was almost as high as the 2020 total. The ACM also flagged an increase of mergers that require further investigation due to (potential) anticompetitive risks. Overall, 2021 saw a higher number of Phase II investigations, but the ACM also unconditionally approved most mergers following these Phase II investigations.

Noteworthy is the 2020 Sunweb and Corendon merger decision from our [2020 overview](#), which you may recall. Well, in the end the merger did not take place. Sunweb officially backed out because a suspensive condition of the purchase agreement was not met, but Corendon indicated that it believed that Sunweb got cold feet due to the corona pandemic. Either way, Corendon initiated interim relief proceedings but both the [District Court of first instance](#) and the [Court of Appeal](#) found that in light of the suspensive condition it could not order Sunweb to close the transaction.

On 4 March 2021 the District Court of Rotterdam found that the ACM's merger decision pertaining to the merger between Sanoma, a publisher, and Iddink, a distributor of educational materials lacked adequate substantiation. The ACM has filed an appeal against this judgment, but also carried out an additional investigation into the effects of the concentration. On the basis of this investigation, the ACM again conditionally cleared the merger in its [decision](#) of 26 August 2021, while attaching the same conditions to the merger. This time with a more detailed substantiation regarding the risk that Sanoma would sell the digital platform and educational materials of its publisher as a bundle after closing, which was signalled as a possible foreclosure strategy.

The ACM gave merger control [clearance](#) on 19 May 2021 for Cellnex' acquisition of Telekom Infra B.V. Both parties operate antenna sites for mobile network operators. The ACM found that the Dutch market provided sufficient competition and that a license was thus not required.

The ACM ended 2021 by blocking two concentrations in the healthcare sector. It [blocked](#) the acquisition of Mauritskliniek by Bergman Clinics, both independent treatment centres, to prevent

Bergman Clinics from obtaining an even stronger bargaining positions versus health insurers. It also [blocked](#) the acquisition of Eurocept Homecare and Excellent Clinics by Mediq, as the acquisition would have allowed Mediq to become an unavoidable contracting party for ambulatory electronic infusion pumps for patients that receive care at home. The strengthening of Mediq's market position in this manner would have had a negative effect on prices and quality.

ACM's [new working method](#) in merger control cases published on 6 October 2021 also cannot be missed in this overview. The new working method introduces updates, such as the possibility to notify mergers online, and includes further information in relation to the dataroom procedure and referrals to the European Commission pursuant to Article 22 of the Merger Regulation.

### Digital markets

The Chairman of the ACM, Martijn Snoep, recently [stated](#) that he considers protecting people and businesses against abuse of market power in the digital economy one of its most important duties. Well, this indeed shows from the number of investigations and enforcement activities that the ACM launched in this area in 2021. A few of these are described below. We start off in December 2020, when the ACM closed off 2020 with a [Position Paper on Supervision of Algorithms](#), which you can read more about [here](#). Algorithms are of relevance to the ACM when they have an effect on consumers and market participants, e.g. when they determine prices, steer supply and demand in the energy market or personalise offerings to consumers. The position paper is a starting point from which the ACM will further develop its oversight of algorithms.

As was also the case in [2020](#), in 2021 the ACM had attention for Mobility as a Service (“**MaaS**”). On 8 March 2021, the ACM published its [market study](#) that identified the public transportation services that MaaS-providers had access to and under what conditions. It also identified bottlenecks, such as that MaaS-providers are not always able to purchase public transport services against the same tariffs that are available on the national contactless smart card for public transport in the Netherlands. The ACM stated that it will closely monitor whether the identified bottlenecks in the market study will be sufficiently addressed by market participants in the near future. See also our colleagues' blog [here](#).

Furthermore, in 2021 the ACM [published](#) an updated market study into the roll-out of Fiber-to-the-Home (“**FttH**”) in the Netherlands. The annex to the report contains guidelines on how FttH could be coordinated within applicable telecommunications and competition laws and is well worth a read (more on this [here](#)).

And then there was the kind of ground-breaking decision of the ACM for 2021. On 14 September 2021, the ACM [fined](#) Samsung almost € 40 million for exercising undue influence on online retail prices of television sets of seven retailers. This is the first time the ACM imposed a fine in relation to conduct that could be seen as resale price maintenance (“**RPM**”), a hardcore restriction in light of the cartel prohibition. The ACM concluded that the objective of Samsung's conduct was to restrict competition leading to a climate in which retailers were discouraged to lower prices. The ACM found that Samsung's conduct had an effect on the large majority of the total sales of Samsung television sets in the Netherlands (see also our blog [here](#)).

The ACM definitely ended the year with a bang with the publication of its [decision to impose an order subject to a penalty](#) on Apple to adjust the unreasonable conditions in its App Store that

apply to dating-app providers. More specifically, the ACM found that Apple abused its dominant position by not allowing dating-app providers to use alternative payment systems. The decision was only published on 24 December 2021, while taken four months earlier, after the District Court [ruled](#) (partially) against the injunction requested by Apple on the decision and its publication earlier that day, see also our colleagues' blog [here](#).

After announcing that it will draft guidelines to clarify the competition framework and obligations for ICT-suppliers and other market parties in June 2021, the ACM published an [interim report](#) in December 2021. The interim report describes the ACM's research so far and its interim findings on market problems and possible solutions in relation to Hospital future Information Systems and Electronic Patient Files ("**HIS/EPF systems**"). Market parties are invited to state their views on the interim rapport and by doing so help shape the guidelines. Competition risks that the ACM identified so far: limited interoperability between HIS/EPF systems used by different hospitals, unreasonable technical and contractual limitations imposed by the providers of these systems and self-preferencing via e.g. bundling and high tariffs. The ACM sees possible solutions for these market problems in strengthening the negotiation position of hospitals through more corporation and cooperation between providers of HIS/EPF systems to increase interoperability. These solutions should i.a. prevent vendor-lock in. The final guidelines are expected to follow mid-2022.

#### (More) traditional markets

After announcing in [2018](#), repeating in [2020](#) and in [2021](#) that the ACM would scrutinize the overpricing of medicines, the ACM finally came to a tangible enforcement result in 2021. On 1 July 2021 the ACM imposed a [fine](#) on Ladiant (the manufacturer of the orphan drug CDCA-Ladiant). The ACM concluded that Ladiant abused its dominant position because it increased the price of its drug with a factor 15 between 2009 and 2017. Ladiant announced that it will [appeal](#) the decision. See also our colleagues' blog [here](#).

From abuse of a dominant position (Article 102 TFEU), we move to cartel agreements (Article 101 TFEU). [Two major collectors of cooking oil](#) were fined on 5 October 2021 for colluding to keep purchase prices of used cooking oil as low as possible. The ACM caught wind of the cartel agreement by receiving information from the Netherlands Food and Consumer Product Safety Authority.

The ACM also [upheld](#) its fine decision in the cigarette manufacturers cartel. The ACM imposed a fine of over € 82 million on four cigarette manufacturers in 2020 (see also our [blog](#) here). The cigarette manufacturers subsequently objected the decision. The cigarette manufacturers argued i.a. that the information was already de facto public and that wholesalers shared the information for their own gain. The ACM, however, concluded that the exchanged information was not yet public and that the cigarette manufacturers shared the information for their own gain and also used the information to determine the future prices of cigarette packs. The ACM thus found again that the four cigarette manufacturers had distorted competition, declared the objections unfounded and upheld the fine decision.

In November 2021 the ACM announced [terminating](#) its investigation into a possible supermarket wage cartel. The ACM found indications that supermarkets had made arrangements in February 2021 about a limited wage increase of 2.5% for their staff, which indicates a wage cartel. However,

employees and employers subsequently reached an agreement on a new collective labour agreement with retroactive effect, which led the ACM to terminate its investigation.

The ACM also assessed alleged unfair competition by the government in 2021 based on the Public Enterprises (Market Activities) Act (“**Wet M&O**”), as laid down in the Dutch Competition Act. We highlight one case. On 9 February 2021 the ACM [rejected an enforcement request](#) in relation to the Land Registry’s (*Kadaster*) offering of the further developed KLIC-viewer free of charge. The KLIC-viewer concerns software containing information about underground cables and pipes. Several companies asked the ACM to step in as they considered the offering of a further developed KLIC-viewer, namely not only a desktop version but also an online version, by the Land Registry as unfair competition from the government. Taking into account [CJEU Compass/Databanken](#), the ACM found that the offering of the online KLIC-viewer does not constitute an economic activity (and thus falls outside the scope of the Wet M&O). On 7 October 2021 the ACM [upheld](#) this decision following objections.

### Covid-19

The ACM [regularly updates](#) consumers and the market on the ACM’s oversight during the COVID-19 crisis (the [Dutch page](#) being most accurate). COVID-19 has had and is still having a huge impact on market parties and on the ACM itself. For example, the [health insurers consulted the ACM](#) on their intention to work together on arrangements to provide financial support to health care providers during the COVID-19 crisis, which the ACM allowed.

In October 2021 (pre-Omicron) the Chairman of the ACM [announced](#) during a congress for competition lawyers that as the pandemic seems under control, the ACM will be making company visits as per usual. Given recent increases in COVID infections, it is unclear how the ACM views company visits at the moment.

## **2. Main Dutch court judgments in 2021**

In 2021 a whopping 151 judgments that contained a reference to competition (*mededinging*) were published and 48 that contained reference to competition law (*mededingingsrecht*). As you’ll understand, we have had to make a selection. We highlight four noteworthy cases below.

### *Amsterdam Court of Appeal accepts jurisdiction in damages claim concerning abuse of dominance case on the Greek beer market*

On 16 February 2021, the Amsterdam Court of Appeal [reversed](#) a judgment of the Amsterdam District Court in which the District Court declined jurisdiction in a damage claim brought by Macedonian Thrace Brewery S.A. (“**MTB**”) against Athenian Brewery S.A. (“**AB**”), a Greek subsidiary of Heineken N.V. (“**Heineken**”). MTB commenced civil proceedings in the Netherlands claiming compensation for damages allegedly caused by both Heineken and AB for an abuse of dominance infringement on the Greek beer market. Although the Greek competition authority did not include Heineken in its abuse of dominance investigation and infringement decision, the Court

of Appeal ruled that the District Court has jurisdiction regarding the civil claims of MTB against the non-Dutch entity AB. This is because they are sufficiently closely connected to MTB's claims against Heineken, which is domiciled in Amsterdam. In doing so, the Court of Appeal applied a low threshold for accepting jurisdiction of Dutch courts in competition law damage claims. Interestingly, the Court of Appeal also considered that for assessing jurisdiction it is of limited importance whether Heineken exercises decisive influence over AB, whether Heineken and AB form one undertaking within the meaning of Article 102 TFEU and whether Heineken's position is similar to the defendant in the Skanska case. Also read our colleagues' blog [here](#).

*Amsterdam District Court establishes the liability of the cartelists in first step towards the award of damages for loss caused by the Trucks Cartel*

In this latest instalment of the Trucks Cartel saga – which started in 2016 with the European Commission's fine decision in the Trucks Cartel – the Amsterdam District Court [established](#) on 12 May 2021 liability of the cartelists. This is the first step in the actual award of damages. The cartelists argued that the cartel could not have caused any loss whatsoever because there was never any effect on the prices of the trucks. The District Court, however, rejected the cartelists' arguments in this regard. The District Court considered that by colluding on the setting of gross list prices the increase in actual purchase prices was inevitable and it is not plausible that information was exchanged for other reasons than pure gain. We discussed this judgement in more detail [here](#).

*Highest Dutch Court upholds annulment of € 41 million abuse of dominance fine imposed on railway incumbent*

On 1 June 2021 the Dutch Trade and Industry Appeals Tribunal (“**CBb**”), which is the highest administrative court in the Netherlands, [upheld](#) the annulment of the nearly € 41 million abuse of dominance [fine imposed](#) by the ACM on the railway incumbent Nederlandse Spoorwegen (“**NS**”).

Although NS is, until 2025, the sole concession holder for the exploitation of the main rail network (“**MRN**”) in the Netherlands, the CBb ruled that the ACM failed to establish that NS holds a dominant position on the market for the exercise of the right to exploit the MRN. This judgment shows yet again that the burden of proof for establishing an abuse of dominance infringement is high and that Dutch courts do not shy away from critically scrutinizing competition law fining decisions. Furthermore, this ruling confirms that for establishing a dominant market position the market share only is not sufficient. All relevant market conditions and other relevant (e.g. regulatory and policy) factors need to be analysed before final conclusions can be drawn on dominance. Also read our colleagues' blog [here](#).

*Highest Dutch Court upholds fines on cold storage companies*

Back in 2015 the ACM imposed [fines](#) of around € 12,5 million on companies active in the cold storage industry for infringing the cartel prohibition. The CBb has now [ruled](#) that the fine set by the ACM was correct and appropriate. The CBb concludes that the companies in question exchanged information about pricing and offers with other parties active in this business and, in view of the



legal and economic context, this exchange of information was anti-competitive by object.

### 3. Main actions Dutch legislator in 2021

Below we discuss three noteworthy legislative developments in 2021.

#### Clemency for fines concerning cartels

Until February 2021 the clemency rules for fines concerning cartels were set out in the [Clemency Policy](#). As of February 2021, the Clemency Policy has been replaced by the [Clemency Decree](#), which implements [Directive \(EU\) 2019/1](#) to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The Directive contains two noteworthy amendments for clemency in the Netherlands. Firstly, natural persons may now qualify for the same reduction of fines as the companies in which they (have) work(ed). Secondly, if the conditions for granting immunity are met, the Decree no longer provides the possibility to waive the immunity of former employees in the interests of the investigation.

#### Tightened supervision of investments, mergers and acquisitions in vital industries or sensitive technology

There are legislative developments both at EU[2] and national level in regard to further supervision of (foreign) investors and investments. In the Netherlands, the legislator has [proposed legislation](#) in relation to applying safeguards to investments, mergers and acquisitions in vital industries or companies possessing sensitive technology. The Dutch proposal aims to complement the already existing (sectoral) screening mechanisms[3] by creating a safety net for sectors that are not yet regulated and to create cohesion between the already existing mechanisms. The legislative proposal will mainly be of relevance to companies involved in vital infrastructure and companies that develop sensitive technology. The proposal is currently being discussed in the Dutch Parliament.

#### The Dutch Recovery and Resilience plan

The Netherlands [has not yet submitted](#) its national recovery plan to the European Commission. In a [letter](#) dated 30 April 2021 – the due date for submission – the Dutch Minister of Economic Affairs and the Minister of Finance informed the Executive Vice-President of the European Commission that they decided to leave the finalization of the recovery plan to the new government, which was being formed on the basis of the results of the 17 March 2021 election. While the details of the Dutch recovery plan are to be worked out by the new government with support from the newly elected parliament, the competent Ministers have already alluded that it should be an ‘ambitious plan that contains investments and reforms addressing the 2019 and 2020 CSR’s (Country Specific Recommendations)’. Also see our [blog](#) here.

#### 4. Outlook 2022

In conclusion, as in 2020 and 2021, the expectation for 2022 is that the output of the ACM in the field of competition law will increase again. We expect interesting litigation in relation to ACM's Samsung and the cigarette manufacturers decisions. Sustainability and digital markets, with a focus on algorithms, gatekeepers and online platforms, continue to be trending in 2022, and the housing market is a new focus of the ACM. It is interesting to see what comes out of this in relation to competition law. The ACM will in any event follow-up on its [preliminary study](#) into the functioning of the municipal-land market. For now, all we know is that the ACM will carry out a further study into market power on the municipal-land market for residential construction in 2022. Finally, we expect the investigation of the ACM into alleged cartelistic behaviour in the [food processing sector](#) to continue in 2022.

All in all, 2022 promises to be another exiting year in the field of competition law in the Netherlands, which we will happily report upon again in the 2022 overview blog.

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[1] The enforcement actions of the ACM in this context continued in the clothing sector by [launching an investigation](#) into six major clothing companies that have the highest number of misleading sustainability claims.

[2] In the European Union the [proposal](#) for a regulation on foreign subsidies distorting the internal market is underway.

[3] Such as the WOZT Telecommunications Sector (Undesirable Control) Act (Stb. 2020, 165) notification obligation of transactions in the telecommunications sector.

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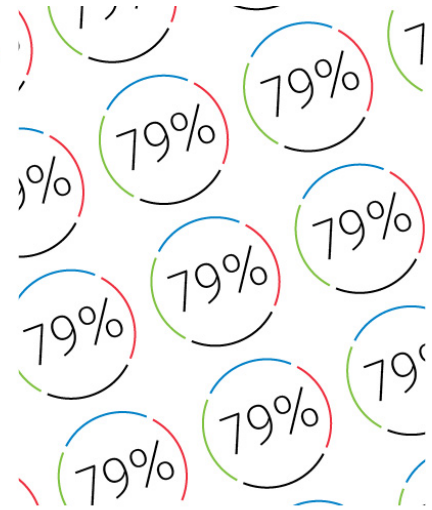


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