Kluwer Competition Law Blog

# Main Developments in Competition Law and Policy 2022 – The Netherlands

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The Dutch Authority for Consumers & Markets (*Autoriteit Consument & Markt*, 'ACM') seems to have tuned down its antitrust enforcement activities in 2022; it did not impose a single fine for violation of the cartel prohibition or abuse of dominance but it upheld one fine in administrative appeal, i.e. the Samsung case. And of course, it continued its discussions with Apple about compliance with the penalty order imposed in 2021, for the infringement of abuse of a dominant position vis-à-vis the dating app Tinder. At the same time, the ACM rejected several complaints, i.e., requests for investigating alleged violations of competition law, on the basis of prioritisation. Apart from the unavoidable merger decisions (mostly one-page clearances), the ACM appears to have used its resources in the area of competition mainly for informal guidance on sustainability initiatives, market studies and policy developments.

**ACM's year 2022 at a glance**

In its Agenda 2022, the ACM announced that it would focus on energy transition & sustainability, the digital economy, and the real estate/housing market.

*Sustainability*

While 2021 was the year in which the ACM published its Draft Guidelines on Sustainability Agreements ("**Sustainability Guidelines**"), 2022 was the year in which the ACM applied the Draft Guidelines in five cases. The Sustainability Guidelines provide clarification on the competition law assessment of sustainability initiatives between undertakings.

On 28 February 2022, the ACM published its informal approval of two initiatives of undertakings promoting sustainability in the energy sector. The first initiative concerned the joint purchase by an association of undertakings for energy users and water users (*VEMW*) and electricity from the offshore wind farm *Hollandse Kust West* for a fixed price.

The ACM concluded that the initiative allowed members of *VEMW* to buy green energy directly from the producer. As a result, they would contribute to climate goals and the promotion of wind

farms. The ACM also established that businesses and wind-farm developers will continue to have options to buy and sell sustainable energy elsewhere. The second initiative concerned setting a joint price for CO2 when taking decisions regarding purchase and investment by network operators of gas and electricity cables and pipelines. The goal of this initiative would be to make it more appealing to make investments that result in fewer CO2 emissions. Therefore, the sustainability gains outweighed the disadvantages while allowing a sufficient level of competition to remain.

On 27 June 2022, the ACM published its informal guidance about the approval of the collaboration between *Shell* and *TotalEnergies* regarding the storage of CO2 in empty gas fields in the North Sea, so-called CCS services (carbon capture and storage). For storage, trunklines needed to be constructed. The Dutch government, Gasunie and Energie Beheer Nederland worked together with Shell and TotalEnergies to build the trunkline that connects to empty gas fields. This is part of project 'Aramis'.

To initiate project Aramis, Shell and TotalEnergies need to offer CO2 storage together. Therefore, they need to determine the price together for CO2 storage for the use of the first 20% of the trunkline's capacity. Based on the Sustainability Guidelines, the ACM allowed Shell and TotalEnergies to set a price for the use of the first 20% of the trunkline's capacity. The ACM looked at the benefits for consumers and at the contribution that this project makes to the reduction of CO2 emissions and the fact that competition is not restricted to the remaining 80% of transport and storage capacity. The ACM concluded that the benefits for consumers and society as a whole exceed the costs of the negative effects on competition.

On 26 July 2022, the ACM announced that it allows cooperation between various soft drink suppliers, including *Coca-Cola*, to abolish the plastic handle on multipacks of soft drinks. This assessment is not published as an informal opinion, but only as a press release on ACM's website. These suppliers launched a joint initiative to abolish the plastic handle that comes on multipacks of soft drinks and water bottles. The ACM concluded that competition is not restricted by the agreement because the handles are not part of the competitive process. The cooperation would therefore not lead to higher prices or reduced quality. The ACM concluded that the collaboration falls within the scope of Chapter 4 of its Sustainability Guidelines (sustainability agreements without restrictions of competition).

On 2 September 2022, the ACM approved a collaboration between members of the Dutch Garden Retail Sector about reducing the use of illegal crop protection products. This collaboration entailed that garden centres would inform each other if illegal pesticides were found in the residues on a plant, after conducting tests on these plants. Suppliers of these plants were then banned from new deliveries to the centres until they proved that action is taken against the use of illegal pesticides. This will be verified- by taking another test. The ACM observed that illegal pesticides are still used despite regulatory supervision. The Garden retail sector, therefore, needed to take action to stop the use of such pesticides. The ACM concluded that it did not have any objections against the arrangements, provided that the arrangement needs to be open and transparent, and due process needs to be in place and followed before any supplier is excluded.

We discussed the informal guidance of the ACM regarding sustainability initiatives previously here and raised the question of whether it would have really needed a specific policy for assessing these initiatives. While the ACM uses the Sustainability Guidelines for its assessment it seems that these cases could probably also have been decided by using the 'classical' competition law framework. One may even question if these initiatives – regardless of the justified exemption under

Article 101 TFEU – can truly make a difference in terms of reaching sustainability goals and thus justify applying the Guidelines' framework.

*Market studies*

***Market for cloud services***

The ACM conducted a market study into the functioning of the market for cloud services. It found that companies don't switch easily between cloud service providers, nor that they combine cloud services from different providers. There are some reasons for this:

- Users do not have to invest in hardware themselves, they use whatever they need on the infrastructure of the cloud service provider;
- The infrastructure of the provider of cloud services; and
- The cloud services from different IT providers are not interoperable.

These circumstances all increase the risk of vendor lock-in, i.e., after companies have chosen a provider, they are locked in with this provider because of switching barriers, such as insufficient suitable alternatives for the cloud services they are using. Even where there is a suitable alternative, data cannot always be transferred properly and /or uncertainties exist around the financial consequences of switching.

Due to vendor lock-in, the initial choice for a cloud service provider is important and hence, that is where the competition mainly takes place. The competitive pressure reduces when users have made their choice for a service provider, as customers appear unlikely to leave due to the lock-in. Given this lack of competition, after the initial choice has been made, the risk exists that cloud service providers unilaterally change conditions and rates.

In its final remarks on the market study, the ACM considers the proposed Data Act of the European Commission as a possible solution for the market failure due to the lack of interoperability. However, the Draft Data Act needs some amendments. The ACM proposes to *(inter alia*) develop European standards that enable different cloud service types to be able to communicate with each other (i.e., not only services of the same service type), and require exporting cloud service providers to ensure that third-party service providers enjoy functional equivalence when interconnecting their services.

***Market study into antenna sites***

The ACM conducted a study into the market for antenna sites. The ACM concludes that it does not see any major problems in the market but it does foresee that some obstacles might occur as a result of the amendment to the Dutch Telecommunications Act.

In March 2022, the Telecommunications Act was amended as a result of the implementation of the European Electronic Communications Code. Mobile Network Operators ("**MNO**"), *inter alia*, now need to agree to requests for network sharing. This is particularly important to enable the rollout of 5G applications. Some MNOs expressed competitive concerns. The increasing demand for 5G

applications may outrun the supply of antenna sites. This potential shortage of antenna sites is problematic: it may hinder the rollout of 5G applications since it is very expensive to deploy such a network. In addition, the shortage of antenna sites is partially the result of concerns of citizens interfering with the permitting procedures by municipalities as they fear health risks or other technical or legal hick-ups.

The ACM, however, concludes in its market study that there are currently no large issues. The current issues can be solved under the existing legal framework. Market participants are able to decide amongst themselves about the planning and the level of the co-use fee. If problems would occur, then the ACM is able to solve them with its power of dispute settlement.

***Market study into medical supplies***

The ACM also finalised its market study regarding the market of medical supplies. 'Medical devices' is a general term for more than 500,000 products, such as pacemakers, face masks, blood test devices for diabetes etc. In its study, the ACM established 63 submarkets for medical devices. It concluded that few competitive issues arise in 31 of the 63 submarkets, due to the homogeneous or the low complexity of the products. In addition, many manufacturers are active in these markets, and the barriers to entry are relatively low for new entrants because of the type of products.

For the remaining 32 submarkets, the ACM found anti-competitive risks. These have different reasons:

- The number of manufacturers is low, thereby making it easier to coordinate or making it more difficult to enter that submarket;
- Strong manufacturers are sometimes also active in multiple submarkets, which can lead to the illegal tying of products; and
- Lack of transparency in the procurement process, especially if a specialist not only has an advisory role but also an executive role in the decision-making process regarding which devices will be purchased.

The markets for radiotherapy equipment, prosthetics and implants, and heart, dialyse- and plasmapheresis materials were analysed in more depth as specific anti-competitive risks were present. These risks included the high costs of changing suppliers given the small number of suppliers, product differentiation to fall within specific demand from certain patients and tying and bundling.

**Enforcement activity by the ACM**

In 2022, the ACM seemed exceedingly reluctant to conduct competition law investigations. The ACM only conducted one investigation, which is still ongoing. The ACM also took one decision for a violation of the cartel prohibition. The ACM handed out two fines for *gun jumping* in 2022 and rejected several requests for investigations.

*Antitrust enforcement*

In 2022, the ACM upheld its decision (in administrative appeal) to fine Samsung for over €39.875.500 million for exercising undue influence over the online selling prices of television sets of its seven retailers from January 2013 to December 2018. Samsung argued that the ACM had failed to establish vertical price restraints in its decision and had therefore not proven any restriction by object. According to Samsung, vertical conduct can only constitute a hardcore restriction when it involves either price fixing or market sharing.

The ACM stated that Samsung's conduct was clearly intended to restrict retailers' freedom to set prices and thus qualified as a by-object restriction. The fact that the decision did not label the conduct as resale price maintenance does not alter this conclusion, according to the ACM. The terminology used in the fining decision distinguishes Samsung's conduct from conduct where a supplier uses more unilateral coercion, penalties, or direct financial incentives to restrict customers' ability to set resale prices. According to the ACM, Samsung was well aware that its conduct was prohibited as its subtle approach was effective enough to influence the buyers' pricing. Samsung even expected its customers to follow the price recommendations. The ACM concluded that regardless of the definition of 'vertical price fixing', the practices of Samsung fell within the 'general' framework of a restriction by object and within the prohibition of Article 4(a) of the Vertical Block Exemption Regulations ("VBER"): restricting the buyer's ability to freely determine its resale price. We wrote an article about the fining decision of Samsung and the latest administrative appeal decision of the ACM.

On the back of the Samsung case, the ACM kicked off a campaign to raise awareness amongst buyers about anti-competitive price influencing. The ACM publicly warned suppliers who influence the prices of buyers, launched a platform for buyers about deciding prices and provided buyers with a template letter to use against their suppliers if they suspect anti-competitive price-influencing. In late December, the ACM announced that it started investigations into associations of suppliers of healthcare services. These associations allegedly 'advised' their members to increase their prices in their negotiations with health insurers. We wrote an article about ACM's investigations into '*price influencing*'.

In early 2022, the ACM continued the discussion with Apple about compliance with a penalty order that the ACM had imposed in August 2021. The ACM found that Apple was abusing its dominant position in relation to payment requirements for dating apps offered in its App Store. Under Apple's terms & conditions, in-app payments from apps that are downloaded from Apple's App Store need to be processed exclusively through Apple Pay. The ACM decided that this is an abuse of dominance by Apple as dating-app providers have little choice but to accept Apple's conditions. The ACM imposed a penalty order decision requiring Apple to amend its terms & conditions for these dating-app providers before the 15th of January 2022 or forfeit a periodic penalty of EUR 5 million per week, with a maximum of EUR 50 million.

Apple made a futile attempt to obtain preliminary relief against the penalty order decision before the District Court of Rotterdam. In January 2022, the periodic penalty payments started to kick in and went up to the maximum penalty of 50 million euros. On 27th March 2022, Apple submitted its amended terms & conditions, which the ACM approved. Finally, on July 2022, Apple changed its unfair conditions and allows different methods of payment in Dutch dating apps. See here for more information about the penalty order decision against Apple.

*Refusal to investigate – prioritisation decisions*

The ACM was in 2022 particularly active in rejecting enforcement requests based on its own prioritisation policy. Most of the complaints related to alleged abuse of dominance. We highlight 3 of these 8 prioritisation decisions.

To start with, the ACM refused (in Dutch) to investigate whether Philips engaged in anti-competitive agreements with suppliers regarding selling sleep-apnoea appliances to patients. Philips currently recalls these products and replaces them after a safety warning in 2021. In this context, the requesting party claims that this resulted in a restriction of competition as Philips allegedly obliged suppliers not to deliver sleep-apnoea-appliances of competing brands to these customers as replacements for the defective Philips appliances. The ACM did not find any competitive issues here, as patients, caretakers, health insurers and regulatory authorities are involved in setting up the replacement process.

The ACM also rejected (in Dutch) the request to investigate the rental of shopping spaces for liquor stores behind the security line at Schiphol. The ACM notes that Schiphol is not obliged to rent out shopping areas and that this area does not qualify as an essential or unique facility. The shopping area behind the security line at Schiphol is not the only place where retailers can offer products to travellers. The ACM also established that it is not likely that Schiphol's rental behaviour may restrict competition.

Thirdly, the ACM refused to investigate a complaint of PACE Rights Management LLP ("PACE") about collecting societies Buma/Stemra allegedly abusing their dominant position by discouraging affiliated music authors from transferring their copyrights elsewhere or managing them themselves. Buma/Stemra would do this by (i) making it unattractive in its policy to cancel or withdraw certain rights, (ii) ignoring notifications to withdraw and (iii) its fee structure for live events. The ACM conducted exploratory research. In its research, it did not assess whether Buma/Stemra has a dominant position because it already found in 2014 that Buma/Stemra has a dominant position in the market of online and offline exploitation of music copyrights.

Despite the dominant position, the ACM concluded in the case of PACE that Buma/Stemra did not *prima facie* abuse its position because it mainly acted in accordance with the Directive regarding collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use (Directive 2014/26/EU). The ACM upheld its decision in administrative appeal.

*Merger control*

***Gun-jumping fines***

On 17 March 2022, the ACM fined the Dutch trade association for pharmacies (*Verenigde Nederlandse Apotheken* ("VNA")), for failing to report the acquisition of four pharmacies. The combined turnover of the pharmacies exceeded the turnover threshold in the healthcare sector. VNA, however, intended to purchase the pharmacies and to divest within a year after this acquisition of a significant part of one of the pharmacies. This is allowed under competition law if

the transaction for acquiring and consequently divesting a part of the undertaking is already set in stone. VNA did not eventually manage to sell that part within a year after acquiring it. VNA acknowledged its mistakes and notified the acquisition.

On 11 May 2022, the ACM also imposed a fine on Modulaire of over € 1.8 million for failing to report the acquisition of BUKO. Modulaire sells and rents out ready-made, temporary and permanent modular buildings. Its subsidiary Algeco acquired BUKO, which is active in the same sector as Modulaire. Modulaire did not notify of this acquisition to the ACM, despite being obliged to notify as the turnover of the group to which Modulaire belongs exceeded the turnover threshold. What separates this case from the VNA merger, and justifies the substantially higher fine, is that it took a while for Modulaire to realize its mistake and Modulaire contacted the ACM after the acquisition was already long completed.

***Acquisition of Talpa Network by RTL Group – 2nd phase investigation***

The ACM decided in January 2022 that a licence was required for the acquisition of Talpa Network by RTL Group. The ACM was concerned that the acquisition would create or strengthen a dominant position of Talpa and RTL on the markets for (i) the sale of television advertising space, (ii) the production and procurement of audio-visual content, and (iii) the wholesale supply of television channels to distributors such as KPN and VodafoneZiggo.

The ACM also suspected that RTL and Talpa may have the incentive to increase their prices for advertisers since they already have a strong position on the market for the sale of television advertising space. The ACM also noted the possibility that RTL and Talpa would strengthen and combine their positions in the television advertising market and transfer this combined strength to the radio advertising market. With regard to the market for wholesale supply of television channels, the ACM also considered certain anti-competitive risks between Talpa and RTL. Distributors of television channels, such as VodafoneZiggo and KPN, would have to deal with one single major provider in negotiations, instead of two.

In addition to these horizontal issues, the acquisition could also lead to several vertical restraints. RTL and Talpa are major buying and producing parties of audiovisual content. RTL and Talpa may decide, after the acquisition, not to acquire productions from external producers and to produce more themselves. This may lead to less diverse offered programmes.

The ACM decided on all these grounds that a licence, and thus a second phase investigation, was required. RTL and Talpa subsequently submitted a formal request for a licence and submitted a remedies proposal which was market tested in December 2022.

However, recently the ACM announced its conclusion to reject this remedies proposal on the basis of feedback in the market test and is now preparing its decision to refuse a licence which will block the transaction.

*Acquisition of Stegeman by Ter Beke – 2nd phase investigation*

The ACM also required a licence investigation for the notified acquisition of Stegeman by Ter Beke. Beke and Stegeman are both active in the market for producing, cutting, packaging, and selling processed cold meat to supermarkets and butchers' shops.

In its first-phase investigation, the ACM concluded that Stegeman and Ter Beke will have a strong position in the market for the production and sale of poultry to supermarkets in the Netherlands. Both parties would also have a strong position on the market for dry sausage, cooked ham, and cooked sausages. The ACM considered that there are indications that these constitute separate product markets.

In addition, it followed from the market research of the ACM that buyers may have few alternatives other than Stegeman and Ter Beke for over-the-counter meat products, and having such products cut and packaged. Ter Beke and Stegeman also possess a strong position in the market of producing and selling poultry and dry meats to '*over the counter*'-channels in the Netherlands. The concentration could significantly impede competition in the Dutch market which seems geographically demarcated on the basis of taste preferences of Dutch consumers. The strong market position of Stegeman and Ter Beke after the acquisition may lead to higher prices, reduced quality, and less innovation. The ACM is still investigating this concentration.

**Changes in legislation and policymaking by the ACM**

Some major changes happened in the legislation concerning competition matters in the Netherlands. In short, the rules for approval of concentrations in the healthcare sector changed, the ACM adopted a new Guidance on Agreements between Suppliers and Buyers following the entry into force of the new VBER and the ACM adopted a new Guidance on Well-functioning Markets for Healthcare IT.

*Different rules for obtaining approval concentrations in the healthcare sector*

The rules for obtaining approval from the ACM and the Dutch Healthcare Authority ("**NZa**") for mergers and acquisitions ("**concentrations**") in healthcare have changed in 2022.

Under the former regime of Article 49a(3) of the Healthcare Market Regulation Act (*Wet marktordening gezondheidszorg*), a concentration needed prior approval from the NZa when a healthcare provider is involved that provides care with 50 people or more. In this old situation, it did not matter if the healthcare provided was only indirectly involved in the concentration. As of 1 July 2022, NZa adjusted its notification procedure in three areas: 1) scope of the care-specific merger test, 2) description of the financial consequences of the concentration and 3) hearing of clients and staff in the proposed concentration.

One of the changes is that concentrations directly involving a healthcare provider must be reported to the NZa. This means that the undertaking involved in the concentration (i) provides healthcare or (ii) indirectly controls an entity that provides healthcare. Another change is that NZa can request more information in some situations to properly establish the financial impact of the merger. Involving clients and staff in a concentration will be a requirement of the NZa. Healthcare providers directly involved in the concentration must involve their clients and staff in the decision-

making process.

As of 1 January 2023, the rules for notifying concentrations in the healthcare sector to the ACM also change. The Minister of Health, Welfare and Sport decided in 2022 to drop the so-called 'lowered healthcare thresholds' for healthcare concentrations despite a public statement by the ACM that this change was not in the public interest. We discussed these amendments in more detail here (in Dutch). Concentrations in the healthcare sector now only need to be approved by the ACM when they meet the general merger notification thresholds in Chapter 5 of the Dutch Competition Act: at least two undertakings concerned jointly had a worldwide turnover of €150 million or more; and at least two undertakings concerned each had a turnover in the Netherlands of more than €30 million, all in the preceding calendar year.

*ACM Guidance on Vertical Agreements*

The new VBER and Vertical Guidelines of the European Commission entered into force on 1 June 2022, see our analysis of the main changes in this blog post.

Following this new EU regime for vertical agreements, the ACM amended its Guidance (in Dutch) on agreements between suppliers and buyers shortly thereafter. The ACM's Vertical Guidance, which makes the revised EU regime more accessible for SMEs and contains some more concrete examples of the application of 101(3) TFEU and its Dutch equivalent Article 6(3) Competition Act to vertical agreements, was published in July 2022.

*Guidance on Well-functioning Markets for Healthcare IT*

The ACM also adopted a Guidance paper (in Dutch) regarding "Well-functioning markets for healthcare IT" ("**Guidance IT-Healthcare**"). Before the adoption of the Guidance, the ACM started in 2021 a market survey in the market for IT-Healthcare. This was followed by several meetings with companies active in this market and received signals of potentially anti-competitive behaviour from suppliers. All of this indicated that healthcare providers are often too dependent on their IT suppliers since most IT systems solely interact with other systems from the same provider. This leads to a situation where data cannot be exchanged between different healthcare providers unless they use exactly the same IT systems.

A similar issue is the difficulty of exchanging data when a healthcare provider replaces its current IT system with a new system from a different supplier. This dependence on IT-providers creates a high risk of vendor lock-in as switching between IT suppliers would impose significant costs on the healthcare provider. With the Guidance IT-Healthcare, the ACM aims to provide clarity on competition rules and offer certainty to both IT suppliers and healthcare providers to create a well-functioning market for IT healthcare. We discussed the Draft Guidance in more detail in this blog.

**Court rulings in 2022**

The Dutch Courts have been significantly more active in the area of competition law than the ACM

and handed down 22 rulings, of which 12 related to follow-on damages claims and 10 concerned stand-alone cases.

We will not discuss these cases in this blog as we restrict ourselves to public enforcement developments. But one noteworthy case we should mention relates to the admissibility of the parity clauses of hotel platform Booking. The Amsterdam District Court referred preliminary questions to the European Court of Justice about whether parity clauses imposed by Booking are unlawful vertical restraints or justified ancillary restraints under Article 101 TFEU and how to define the relevant market in this case. We expect the ruling of the Court of Justice next year.

**Outlook 2023**

While the ACM kept a low profile in relation to competition law enforcement in 2022, we hope that we can report exciting competition law developments in 2023. Of course, it is difficult to predict if the ACM will more actively fulfil its role as a competition authority. But we certainly expect interesting litigation in relation to ACM's fine on Samsung its periodic penalty decision against Apple and perhaps also in relation to the merger cases discussed. Although we do not really cover private enforcement in this blog, we look forward to the outcome of the ECJ referral in the Booking case.

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