GETTING THE DEAL THROUGH

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Cartel Regulation

The application of competition regulation in 48 jurisdictions worldwide

2013

Contributing editor: D Martin Low QC

Published by *Getting the Deal Through* in association with:

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Cartel Regulation 2013
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1473-3420

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Netherlands

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The Dutch Competition Act (the Act) entered into force on 1 January 1998 and is modelled closely on European Union competition law. The cartel prohibition contained in the Act is a copy of article 101 of the Treaty on the Functioning of the European Union (ex article 81 of the EC Treaty), excluding the effect on interstate trade criterion. An English-language version of the Act is available on the Dutch Competition Authority's website.

On the same date, the Dutch Competition Authority (NMa) started its operations. On 1 January 2013 the NMa merged with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) into a single regulator, the Autoriteit Consument en Markt (ACM), headed by chairman Chris Fonteijn. This organisation has the task of applying and enforcing the Act. The ACM also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in the Netherlands. The ACM has approximately 400 employees, up from 70 in 1998.

The ACM has independent status from the Ministry of Economic Affairs, Agriculture and Innovation. The minister for economic affairs, agriculture and innovation (the minister) is empowered to set out general policy rules, and can instruct the ACM to undertake activities in relation to EU and international competition issues. However, the minister is prohibited from giving instructions to the ACM with respect to any specific case.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

On 3 December 2011, legislation entered into force lowering the bar for agreements to fall under the de minimis exemption of article 7 of the Act. As a result, the national de minimis clause is no longer in line with the thresholds of the European Commission's guidelines on the effect on trade concept. One of the main hold-ups of the bill was whether this would constitute an infringement of European law, since it would mean that certain hard-core cartels caught by article 101 TFEU, due to an appreciable effect on interstate trade, would be exempted under national law. In a letter of 9 September 2010, the European Commission's director-general for competition indicated that the revised de minimis clause would lead to the exemption of hard-core restrictions, which could affect interstate trade and could thus be prohibited under EU law. The bill was subsequently amended to introduce an additional condition reading that the restrictive agreement at hand may not have an appreciable effect on interstate trade.

In addition, on 1 July 2012 legislation entered into force introducing rules against unfair competition by public authorities.

On 1 January 2013 the NMa merged with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) into a single regulator, the ACM, headed by chairman Chris Fonteijn. A bill is in preparation containing provisions concerning the powers of the ACM, which are intended to take effect on 1 January 2014. To the extent the proposed changes are significant these will be addressed at the relevant subsections below.

A bill introducing the possibility of imposing prison sentences on individuals infringing the cartel rules, as well as disqualification possibilities, has been in preparation for some years. However, it is believed that these plans have been shelved.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article 6 of the Act, which, as noted above, mirrors article 101 TFEU, agreements, decisions and concerted practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market. The prohibition covers all types of behaviour, horizontal or vertical, irrespective of whether they are based on formal, oral or tacit agreements or concerted practices.

Article 6 does not provide specific examples of restrictive clauses. In practice any agreement that fixes prices, limits output or divides markets, customers or sources of supply will almost inevitably be considered to infringe article 6. Horizontal price-fixing agreements, collective vertical price fixing, collective boycotts and horizontal agreements aimed at partitioning markets or quota schemes (including limitation of sales and prohibited tendering agreements – 'bid rigging') are regarded by the ACM as very serious infringements of the competition rules.

As in EU competition law, agreements restricting competition are only prohibited if they affect competition to an appreciable extent.

Article 7 provides for an exemption for restrictive agreements, including hard-core cartels, where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies involved in the supply of goods) or €1.1 million (for other companies) are involved. As per 3 December 2011, an additional exemption is available for any restrictive agreement between (any number of) undertakings whose combined market share on any relevant market does not exceed 10 per cent and which agreement does not appreciably affect interstate trade.

As noted above, article 101 TFEU also forms part of the substantive law on cartels in the jurisdiction, having direct effect in relation to agreements and concerted practices affecting competition in the Netherlands where there is also an effect on interstate trade.

4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

There are no industry-specific offences under the Act. The competition rules apply across the board, including in regulated sectors such as telecommunications. The Act provides for non-application of the cartel prohibition to collective labour agreements, sector agreements on pensions between employers' organisations and employees' organisations and (under certain conditions) agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession.

At present, there are various non-industry-specific exemptions from the cartel prohibition, such as agreements benefiting from an EU exemption (falling under a block exemption), which are exempt from the cartel prohibition. However, under the Act as amended in line with article 29(2) of Regulation No. 1/2003, the ACM has the express power to declare an EU block exemption non-applicable in the Netherlands.

In addition, various categories of agreement can be exempted from the cartel prohibition by general administrative order. Such 'national block exemptions' have been issued for:

- agreements offering temporary protection from competition to undertakings in new shopping centres; and
- certain cooperation agreements in the retail trade.

Restrictive practices necessary for the operation of services of general economic interest may also fall outside the scope of the cartel prohibition.

As of 1 August 2004, individual exemptions can no longer be granted by the ACM. Today, companies must self-assess agreements in light of the same criteria, but these are now contained in a new clause (3) in article 6 of the Act, which mirrors article 101(3) TFEU. The Dutch rules have therefore been aligned with the EU rules under Regulation No. 1/2003, providing for self-assessment in the place of applications for the grant of individual exemptions. To assist in the self-assessment, the ACM has issued guidelines on, inter alia, the application of article 6(3), on the cooperation between companies and on competition in the health-care sector. In addition, policy guidelines on consortia arrangements entered into force on 1 October 2009, which are largely based on the Commission guidelines on horizontal agreements and on the application of article 101(3) TFEU.

In general, the ACM will not provide written advice (comfort letters) as to whether an agreement fulfils the criteria of article 6(3). However, similar to the Commission, it will provide advice in 'novel' cases. Informal advice has been given in, for example, the collective sale of football match broadcast rights, on joint preferential policies proposed by a group of health insurers for medicine suppliers and on a chip-card payment system for public transport tickets. More and more parties prefer an informal discussion with the ACM over informal advice. On its website the ACM has published 4 informal advices in 2011, mainly on concentration control issues. Its most recent informal advice relating to the cartel prohibition was in 2011, relating to a plan by the Dutch shrimp-fishing industry to make shrimp fishing sustainable. The ACM took a favourable view towards most of the plans, drawn up by the Dutch producer organisation and the Dutch Fishing Association, but did not approve of the proposed catch limitations aimed to protect the brown shrimp population. According to the ACM, 'there is no need for such limits, as studies have revealed that the proposed catch limits would go beyond what is necessary'.

5 Application of the law

Does the law apply to individuals or corporations or both?

The cartel prohibition applies to undertakings and associations of undertakings. The term 'undertaking' is construed broadly and – in accordance with the case law of the Court of Justice of the European Union – is generally defined by the ACM as 'every entity engaged in economic activity, regardless of its legal status and the way in which it is financed'. Therefore, the Act may also apply to individuals running an unincorporated undertaking. Publicly owned entities may also qualify as undertakings. Intention to make profit is not required.

Agreements concluded between undertakings belonging to the same group of companies are, for the purposes of the Act, considered as agreements within one single economic entity and are in principle not subject to the cartel prohibition.

Pursuant to the Act, principals and de facto managers can be made subject to fines of up to €450,000 for involvement in a cartel. Under amendments already in effect from 1 August 2004, maximum fines of €450,000 can be imposed on individuals for non-cooperation with ACM investigations. Similarly, maximum fines of €450,000 or 1 per cent of turnover can be imposed on companies for non-cooperation (this 1 per cent figure is in line with the increased maximum fines for procedural breaches under EU Regulation No. 1/2003). In November 2010 the ACM for the first time used its power to impose personal fines on individuals for a cartel infringement. Personal fines varying between €10,000 and €250,000 were imposed on three executives of two construction companies for their involvement in a cover-pricing cartel. The ACM announced that as a matter of policy it will investigate the possibility of imposing fines on individuals in every cartel case.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

The Act applies to all conduct that affects competition on part or the whole of the Dutch market. The place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.

In 2004 (Shrimps, nr. 2269) the ACM decided it had jurisdiction to impose fines on Dutch, Danish and German undertakings that participated in a cartel that concerned a relevant market constituting of Denmark, Germany and the Netherlands. The Danish and German undertakings did not achieve relevant turnover in the Netherlands. The ACM held that undertakings do not need to have activities in the Netherlands for their restrictive agreements to produce effects on the Dutch market and therefore to be caught by the cartel prohibition. The ACM's decision was upheld by the District Court of Rotterdam. It follows that the ACM does not necessarily require an undertaking to have direct sales in the Netherlands for its agreements to be subject to the cartel prohibition. There have been no decisions (yet) in which the ACM based its jurisdiction on the basis of indirect sales in the sense of cartelised intermediate products that were sold outside the Netherlands and were incorporated into (final) products sold to customers in the Netherlands.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

Akin to investigations under EU law, investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or ex officio – on the initiative of the

ACM. Investigations start with fact finding, by making requests for information to parties possibly involved in a suspected infringement or carrying out on-the-spot inspections (either announced in advance or in the form of dawn raids).

If on the basis of the information gathered, the ACM has a reasonable suspicion that an infringement has occurred, it will normally pursue a case. Having said this, the ACM has repeatedly emphasised its discretion to prioritise and is encouraging the use of civil law tools by third parties.

It will then send a report (comparable to a statement of objections under EU competition law) to the undertakings concerned. The addressees of the report have access to the (non-confidential) documents contained in the ACM's files and may submit a written reply concerning the contents of the report to the ACM. In practice, addressees of the report are also invited to present their views in an oral hearing before the ACM. The (legal service of the) ACM subsequently reassesses the case and the ACM issues a decision.

In February 2012 the ACM has renewed its guidelines for dealing with complaints and signals from third parties about possible competition infringements, which is available in English on the NMa's website.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The ACM has two types of powers available for fulfilling its statutory task of monitoring compliance with the Act: surveillance and investigation. The character of and the limits to these respective powers are defined in the Dutch General Administrative Law Act. The distinction between surveillance and investigation is relevant in practice in that from the moment an investigation starts there is a right to remain silent (a right not to answer questions if the answers could be incriminating). In April 2009, for instance, the ACM exercised its surveillance task by issuing a press release in which it stated to have verified Dutch telecommunications company KPN's compliance with earlier-made commitments. Generally, however, the powers given to investigating officers are the same as those entrusted to officers with surveillance duties. Broadly speaking, the powers of the ACM are the same as the powers provided to the Commission under EU Regulation No. 1/2003. The powers given to the ACM may only be used in so far as they are reasonably required.

ACM surveillance officials are authorised to enter all premises, with no prior judicial authorisation being required. Private homes are an exception in that the ACM is not allowed to enter without prior authorisation by the Rotterdam District Court. It is not clear if the ACM has the right only to perform a superficial search or an extensive inspection. In the case of a Commission inspection, prior authorisation is required from the Rotterdam District Court if a company withholds permission for an extensive inspection of business premises or if a private home or vehicle is to be inspected.

Surveillance officers are also authorised to request information, to examine books and other business records, and to make copies, although attorney-client privilege exists. It should be noted that – as opposed to recent EU case law – in ACM dawn raids based only on Dutch competition law, attorney-client privilege also exists in relation to in-house lawyers who are admitted to the bar. The ACM is of the view that without attorney-client privilege, an in-house lawyer would no longer qualify as a viable competitor for external lawyers and therefore has retained attorney-client privilege for in-house lawyers. As a result, conflicting regimes remain depending on the capacity in which the ACM conducts an investigation. If ACM officials conduct investigations on the basis of Dutch competition law, Dutch national rules apply and the correspondence with both in-house and external counsel is covered by attorney-client privilege. The same applies to investigations by the ACM at the request of the Commission or a competition authority of another member state. However, if ACM inspectors only assist the Commission officials, EU rules apply and correspondence with in-house counsel has no legal privilege coverage.

The ACM is focusing increasingly on searches of computer records, and the extraction of 'forensic images' of entire hard disks of desktop computers is now a common feature of a dawn raid. The standard procedure for (digital and analogue) investigations is laid down in the ACM's Procedure in relation to the Inspection and Copying of Analog and Digital Data Documents of August 2010. It is the first time the ACM has published integral guidelines including its procedure in digital as well analogue investigations. This recent Procedure is (partly) the result of a ruling in interim relief proceedings, in which the District Court of The Hague ruled that the procedure of the digital logbook laid down in the previous ACM guidelines, Digital Procedure 2007, was an insufficient safeguard against 'fishing expeditions', since it only provided insight into which files had been opened during the investigation without specifying how long and how thoroughly the files were examined. As a remedy, the Court ordered the ACM to invite an authorised representative of the parties to be present during its investigation of the digital copies to make sure that no copied data beyond the purpose and subject matter of the investigation would be examined. The new Procedure takes account of this ruling by providing the relevant company the opportunity to be present during the examination of the digital copies it claims are outside the scope of the ACM's investigation. In addition, the ACM has introduced a 'sealed envelope' procedure similar to that known from EU case law to further safeguard legally privileged documents during ACM dawn raids. If a company refuses to allow the ACM officials to take a cursory look at a document because it considers it to be covered by legal privilege, the ACM inspector will place the document in a sealed envelope without having examined it and hand it to an independent ACM official, the 'legal professional privilege officer'. The company subsequently has 10 business days to substantiate its legal privilege claim in writing to the legal professional privilege officer. This procedure – although an improvement – still remains controversial, as the legal professional privilege officer is not independent, as prescribed by the General Court in the Akzo case.

The ACM contends that a company's employees are obliged to answer questions, although they have the right not to answer questions that could incriminate their employer. In June 2011, the Rotterdam District Court upheld the fines imposed by the ACM on two former employees for failure to cooperate with an investigation by invoking their alleged right to remain silent. The District Court of Rotterdam ruled that former employees cannot invoke the right to remain silent when questioned in relation to their former employer. To date, the highest court in competition cases between the ACM and undertakings in the Netherlands, the Trade and Industry Appeals Tribunal, has not ruled on this issue. It should be noted that the facts considered by the ACM in this case concerned the period prior to the introduction of the ACM's authority to impose fines on individuals who 'have instructed on or have exercised de facto leadership' in regard of anti-competitive practices, introduced in October 2007. Consequently, former employees currently need to carefully consider in which capacity the ACM is questioning them. If they are questioned as former employees who have instructed or exercised de facto leadership in regard of an anti-competitive practice, they will have an individual right to remain silent. In all other cases, they will have a legal obligation to cooperate and cannot invoke the right to remain silent.

In October 2008, the ACM imposed a fine of €269,000 on a company for breaching a seal affixed by the ACM during a dawn raid. It was the first time the ACM used its (since October 2007) expanded authority to impose a fine up to €450,000 or 1 per cent of a company's turnover for breaching such seal. In September 2010, the ACM used this authority for the second time and imposed a fine of €51,000 for breaching a seal. The ACM was not convinced by the

company's argument that the fine should have been imposed on the security guard who opened the sealed door. According to the ACM, the company could be held responsible for breaking the seal, as it should have informed security of the affixed seal. The ACM further considered that it is generally not necessary to show that the break of the seal is attributable to the company in question, unless the company proves that there are exceptional circumstances.

The ACM has issued a brochure describing its powers in relation to investigations. There are of course limits to the ACM's powers, in particular, limits placed on administrative authorities by the General Administrative Law Act.

The extent of these limits has been considered by the courts. In March 2005 The Hague Appeal Court ordered the ACM to pay damages (in the *Accel* case, the first time such an award has been made against the ACM) for having acted negligently in respect of the wording and timing of a press release. The Court stated that, as the ACM's powers are broad in relation to investigating, considering evidence and imposing sanctions, it has a duty to act with 'great care in respect of the interests of the other party'. The ACM should have made it clear that at that stage of the proceedings the press release only concerned alleged behaviour, and a copy of the press release could have been sent to the company concerned under embargo to allow it to prepare a reaction. In 2004, the ACM produced guidelines on communication procedures following the judgment of a lower court in this case. These guidelines were updated in September 2009. Faux pas by companies in their press releases also occur: Oranjewoud's leniency percentage was, for instance, reduced by 10 per cent due to its issuing a press release in which it stated it had applied for leniency (and including certain non-public information about its leniency application).

In September 2005, in a case concerning market data collection, The Hague District Court held that the ACM had breached its duty to take reasonable care when making competition law infringement allegations. The Court stated that the ACM has the power to make statements outside the normal statutory procedures for formal 'statements of objections' in cartel investigations. However, when the normal procedures provided for by the legislator are not followed, the standard of care required of the ACM in preparing and communicating such statements is even higher.

It should be noted that the Act provides companies with more time to prevent – or limit – reputational damage by introducing a five-day waiting period after the fining decision's announcement before the ACM can make the decision available for public inspection. The bill concerning the powers of the ACM (see question 2) obliges the ACM to publish any decision in which fines are imposed, save exceptional circumstances. The bill maintains the five-day waiting period before the decision can be published. If a company requests an interim injunction from the court against publication of the decision, the bill provides that publication will be suspended until the court has ruled on the request; this is in conformity with the ACM's current practice as laid down in its guidelines on public communications.

The Hague Court of Appeal decision in *Commissariaat voor de Media/Ernst & Young* also has implications for competition investigations and for the general duties to cooperate with regulators on professionals acting for clients under investigation. The Court held that the accountants must provide the Dutch media regulator with audit materials concerning a client. This is subject to two requirements. First, the information should be necessary for enforcing a satisfactory level of regulation. Second, the request should be reasonable, and the information should no longer be available from the person subject to regulation.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The ACM is an active member of various fora for international cooperation:

- the European Competition Network (ECN) provides for formal cooperation between the Commission and EU member state competition authorities;
- the European Competition Authorities Association (ECA), which facilitates (informal) cooperation between the European Economic Area (EEA) national competition authorities, the Commission and the European Fair Trade Area (EFTA) Surveillance Authority; and
- the ACM is also part of the International Competition Network (ICN) and is involved in competition work undertaken by the Organisation for Economic Co-operation and Development (OECD).

The ACM can supply information obtained in the course of the application of the Act to foreign competition authorities. This is an exception to the general rule that information collected about companies under the Act should remain confidential and should be used only for the purposes of the Act. However, such information may only be transferred by the ACM if the confidentiality of the information (where relevant) is sufficiently protected, adequate assurances are given that the information will not be used for purposes other than the enforcement of (foreign) competition law and the provision of such data is in the interests of the Dutch economy. In addition, any information collected in relation to the ACM's own initiative enforcement of EU Regulation No. 1/2003 can also only be exchanged with foreign competition authorities on the basis of the above guarantees. An exception is made for information collected in relation to EU Regulation No. 1/2003 that is covered by the professional secrecy rules under that Regulation (as set out in article 28(1)).

Similar provisions allow the exchange of information collected under the Act with national administrative agencies authorised to enforce competition rules under different statutes. The ACM chose 'cooperation' as a theme for its 2010 Annual Report, which states 'the ACM more than ever reaped the benefits of cooperation, not just cooperation within the organisation between the general competition oversight and industry-specific oversight departments, but also with other authorities and regulators, both domestic and abroad'. Even recently the ACM is 'reaping benefits', as the Fiscal Intelligence and Investigation Service provided the ACM with cartel-related information found during an investigation, which led to the ACM investigating a potential real estate trading cartel. However, the ACM finds there is still room for improvement: it has indicated to favour increased information exchange among regulators at national and international levels by removing the statutory restrictions preventing it from passing on information about activities falling under the supervision of other authorities.

Furthermore, there are specific forms of domestic inter-agency cooperation, including the following:

- A cooperation protocol between the ACM and the Health Authority (amended in October 2006), which provides for information exchange between these authorities and for a degree of 'soft' coordination of enforcement action (to determine who takes the lead in which type of cases).
- A less structured form of interagency cooperation is currently in place between the ACM and the public prosecutor. In 2002, a covenant was entered into for the exchange of information and coordination of investigative measures concerning alleged infringements of competition and criminal law in the construction sector. This covenant was renewed in 2003.

Specific cooperation between the ACM and the Dutch Inland Revenue is described in question 10.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

Aside from the allocation of cases within the ECN, international interagency cooperation does not (formally) affect the investigation, prosecution and sanctioning of cartel activity in the jurisdiction. Of note is, however, a recent investigation of a public bid-rigging cartel in the painting business, in which the ACM requested that the Belgian competition authority search the home of a manager who resided in Belgium. The evidence was used by the ACM, even though the case was solely based on an infringement of Dutch competition law and not on article 81 EC Treaty (article 101 TFEU). In addition, in late 2010 the ACM imposed fines on Dutch, Belgian and German flour producers for their participation in a cartel. The ACM closely cooperated with other European competition authorities in this investigation.

The result of domestic interagency cooperation is that the ACM may refrain from initiating proceedings under the Act (or put proceedings that have already commenced on hold) if the relevant cooperation scheme stipulates that another authority is better placed to deal with the case. For example, the covenant between the public prosecutor and the ACM (see question 9) has formed the basis of cooperation in ongoing investigations in the construction sector. Interestingly, in July 2009 the District Court of The Hague ruled that the public prosecutor can lawfully provide the ACM with transcripts of telephone taps installed for criminal investigation purposes.

As for information exchange with the Dutch Inland Revenue and the ACM, the Council of State concluded that the provisions of the Tax Act take precedence over the confidentiality article in the Competition Act, although exemptions may be granted. In the construction sector cases, the government had taken a different stance: it had stated that, as confidential information had been given to the ACM in reliance on the confidentiality provisions in the Act, the information should not be divulged by the ACM, unless companies agree to information being exchanged with the Inland Revenue. However, the government's position concerning future cases is that the Tax Act will be treated as taking precedence, although exemptions may be granted on a case-by-case basis. In July 2007, the ACM and Inland Revenue produced a covenant regarding such situations. The covenant also includes rules on information exchange in regard of leniency applications. In such event, a voluntary disclosure scheme will apply on the basis of which the Inland Revenue will not impose punitive fines. Conversely, the Inland Revenue Service may voluntarily inform the ACM if it finds documents indicating that the companies it visits are part of a cartel, as it did in the tree growers case of November 2007 and the real estate trading cases in 2010.

11 Adjudication

How is a cartel matter adjudicated?

The ACM both investigates and adjudicates on cartel matters in the public interest on the basis of administrative law procedures. There is, however, a separation (Chinese walls) between ACM staff who carry out investigations and prepare the statement of objections, and those who decide on a possible sanction. In 2011, the Trade and Industry Appeals Tribunal confirmed that high standards apply to the interdepartmental Chinese walls within the ACM. The Tribunal upheld the Rotterdam District Court's earlier ruling that the ACM legal department's meddling in the investigation of an alleged competition law infringement was contrary to the Chinese walls set up between the legal department, responsible for levying sanctions, and the competition department, responsible for conducting investigations. The ACM's statutory Chinese walls go one step further than the 'traditional' all-in-one system according to which the European Commission and many other antitrust regulators seem to be organised. The European Court of Human Rights recently confirmed that such all-in-one systems of investigation and fining comply with the fundamental right to a fair trail, provided they are safeguarded by sufficiently extensive review of the sanctioning decision by an independent court.

In addition, private parties may initiate civil procedures, for example for interim relief (under article 3:296 of the Civil Code) and damages. Actions for damages are based on article 6:162 of the Civil Code (unlawful act) or article 6:212 of the Civil Code (concerning unjust enrichment). Actions can be brought by parties to a contract seeking rescission or suspension of terms and conditions. Such civil procedures are now being used more frequently in relation to cartel cases (see question 17). Furthermore, civil procedures can be initiated with respect to breaches of article 101 TFEU.

12 Appeal process

What is the appeal process?

Decisions of the ACM in cartel cases are subject to a three-stage appeal process. The first stage is carried out by the ACM, with advice from an independent committee. The second and third stages are before specialist administrative law courts.

First, an addressee of a decision (and other interested parties) can file for administrative review with the ACM. Such an appeal must be lodged within six weeks of the notification of the decision. In this first stage of the appeal process, the ACM reviews its decision on the basis of the appeal. The review is not handled by the initial case handlers. In cases where a sanction has been imposed, a committee of independent experts advises the ACM. The ACM is not obliged to follow this advice, but must give its reasons where it is not followed.

The administrative review decision may itself be appealed against to the Rotterdam District Court (administrative law chamber), again within six weeks of the notification of that decision.

Further appeal is possible against this judgment to the Trade and Industry Appeals Tribunal.

Since 1 September 2004, it is possible to dispense with the administrative review stage on the basis of the Direct Appeal Act 2004. When filing an administrative review application with the ACM, an applicant can request that the ACM allow a direct judicial appeal to the Rotterdam District Court. It is for the ACM to decide, depending on whether the case is suitable for direct appeal and subject to certain other rules, whether to grant the request.

The bill concerning the powers of the ACM (see question 2) envisages the abolition of the administrative review stage for decisions in which fines are imposed, which will change the appeals process into a two-stage appeal process (appeal to the District Court of Rotterdam and further appeal to the Trade and Industry Appeals Tribunal).

13 Burden of proof

With which party is the burden of proof?

The burden of proof for showing that the cartel rules have been infringed lies with the ACM. The District Court has full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

The Act includes a provision expressly stating that the company claiming the benefit of article 6(3) of the Act – which is similar to

article 101(3) TFEU – shall bear the burden of proving that the conditions of that paragraph are fulfilled.

In October 2009, the District Court of Rotterdam ruled that two general statements of leniency applicants, supported solely by written evidence provided by the same applicants, proved insufficient evidence of a construction company's participation in public bid rigging. The ACM had imposed a fine on the company on the basis of two statements of leniency applicants that the company had participated in a system of public bid rigging. These statements were supported by written evidence on four projects that derived from the same leniency applicants. The evidence of three projects originated from one applicant. The Court held that, in view of the company's denial of having participated in the public bid rigging, the statements constituted insufficient proof of the infringement. The ACM was consequently not authorised to impose a fine. This judgment was confirmed by the Trade and Industry Appeals Tribunal in April 2012.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

There are no criminal sanctions under the Act.

In criminal law cases published in June 2005, the Rotterdam District Court discussed the relationship between Dutch criminal and competition law. These cases related to criminal charges brought concerning alleged widespread fraud in the Dutch construction sector (see question 18). (Reference was also made in these cases to the European Commission's 1992 'SPO decision' concerning a Dutch association of joint price-setting organisations.) However, these criminal cases are separate from (administrative law) competition cases before the ACM. The Court held that parliament intended sanctions under the Act to be administrative, not criminal. It held that in practice, the ACM can better deal with most infringements of the Act than the public prosecutor, as competition law is a complicated field of law and distinct from typical criminal cases. Furthermore, it noted that the involvement of just one agency removes possible 'double jeopardy' problems. A distinction was made, however, for criminal sanctions relating to facts prior to 1998. The ACM had no power to impose fines for this period prior to the entry into force of the Act. The previous Act (the WEM) provided for criminal sanctions, including imprisonment for economic delicts, with the public prosecutor responsible for prosecution. In May 2008, the District Court of The Hague confirmed that competition law is an exclusive matter for the ACM; moreover, it noted that criminal prosecution is barred for facts that are an infringement of both criminal law and competition law, because it considers the Act a lex specialis of the general Criminal Law Act.

As stated earlier (see question 2) a bill has been under preparation introducing (inter alia) prison sentences for individuals infringing the cartel rules. However, it is believed that these plans have been shelved.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Agreements prohibited by the cartel prohibition laid down in article 6 of the Act are null and void. The consequences of this are governed by civil law. In accordance with article 3:41 of the Dutch Civil Code, an agreement can be partially null and void. In addition, the Supreme Court ruled in December 2009 that it was not possible to convert a contractual anti-competitive clause into a legal clause on the basis of article 3:42 of the Dutch Civil Code. As noted earlier, article 101 TFEU has a direct effect in relation to agreements and concerted practices affecting competition in the Netherlands, where there is also an effect on interstate trade.

Under its powers of enforcement under the Act and under EU Regulation No. 1/2003, the ACM can impose administrative fines for infringements of the cartel prohibition in the Act and of article 101 TFEU (see question 18). Such fines are imposed on the natural or legal person to whom the infringement can be attributed. If this person can show that he or she cannot be held responsible for the infringement, no fine will be imposed. In February 2010, the District Court of Rotterdam found that the ACM was right to declare two former parent companies inadmissible in their appeal against a cartel fine imposed on their former subsidiary, despite the agreement to pay the fine at the sale of their subsidiary. Pending the ACM's investigation into potential bid rigging by Lavaredo, a subsidiary jointly held by Lavason and Voilier, Lavaredo was sold by its parent companies. At the sale of Lavaredo, Lavason and Voilier agreed to pay the potential fine imposed on Lavaredo. The ACM eventually imposed a fine on Lavaredo. Contrary to the European Commission's recent (and controversial) approach, the ACM attributed the infringement solely to Lavaredo since its (former) parent companies had joint control and there was no reason to assume that Lavaredo did not decide on its own conduct independently. Consistent with settled case law of the Dutch administrative courts, the District Court ruled that the agreement by the former parent companies to pay the fine did not constitute a direct interest in the ACM's decision to impose a fine on Lavaredo. Neither the agreement to payment of the fine, nor the fact that Lavaredo could withdraw its appeal without the former parent companies being able to prevent that, could alter this.

The Act enables the ACM to fine directors of legal persons personally for breach of the cartel rules (fines can also be imposed for non-cooperation with an ACM investigation). Pursuant to the Act, fines of up to €450,000 can be imposed on principals and de facto managers for breach of the cartel prohibition. In Wegener (September 2012), the District Court of Rotterdam held that a member of the supervisory board of an undertaking can qualify as a principal or de facto manager only in exceptional circumstances, because the powers and influence that a supervisory board member is generally able to exercise are limited to supervising the company. According to the court, a supervisory board member's role in a company must have been atypical in order for him to be held personally liable as principal or de facto manager.

In determining the fine, the ACM must take the statutory limits and policy guidelines on the setting of fines into account (see question 19).

In addition to the imposition of administrative fines, the ACM can impose an order under threat of periodic penalty payments. Such an order is designed to lead to the quick termination of an infringement, and therefore serves a different purpose from a fine. Both a fine and an order under threat of periodic penalty payments can be imposed for the same offence. The order cannot apply for more than two years.

It is also possible to impose a provisional order under threat of a periodic penalty payment. This type of order can only be imposed if immediate action is required, in the interest of the undertakings affected by the infringement or with the aim of preserving actual competition.

Furthermore, the ACM can impose a binding order to comply with the Act on the undertaking or individual acting in violation of the cartel prohibition or impose a periodic penalty payment in the form of a structural measure (similar to article 7 of EU Regulation No. 1/2003). The bill regarding the powers of the ACM which is currently under preparation (see question 2) introduces the power for the ACM to issue binding instructions on an undertaking to behave in a particular way in order to comply with the cartel prohibition, without the ACM having to establish that the undertaking has

committed an infringement. The ACM can impose fines of up to €450,000 or 1 per cent of turnover for non-compliance with the binding instructions it has issued. According to the explanatory memorandum to the bill, the power of issuing binding instructions is intended to enable the ACM to specify the contents of the cartel prohibition in a specific situation.

Alongside fines or penalties, or both, for infringement of the cartel prohibition in the Act, significant administrative fines can also be imposed for certain other forms of conduct (referred to as non-cooperation). The ACM can now impose fines of up to €450,000 or 1 per cent of turnover (in line with EU No. Regulation 1/2003) for non-compliance with the duty on undertakings to cooperate with an investigation, and a maximum of €450,000 on individuals. The Act also enables the ACM to impose fines for breach of the duty to cooperate if companies do not make their accounts available to the ACM when it is setting fines.

Fines for non-cooperation have been imposed in a number of cases, including on individuals. In the first individual case, regarding an ex-director, the (then) maximum fine of €4,500 was not imposed, rather a fine of €2,250. Similarly, in the second case, an ex-employee of a company received a fine of €10,000 for non-cooperation in 2007, instead of the (current) maximum of €450,000. In 2009, the ACM imposed record fines of €150,000 each on two former general managers. The ACM has continued to impose fines on individuals in subsequent years. As a matter of policy the ACM investigates the possibility of imposing fines on individuals in every cartel case.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Cartel activity cannot lead to both criminal and civil or administrative sanctions. The Act does not provide for criminal sanctions. Behaviour that could lead to criminal sanctions based on the Criminal Law Act is barred from prosecution by the public prosecutor if that behaviour also infringes competition law (District Court of The Hague, as noted under question 14).

17 Private damage claims and class actions

Are private damage claims or class actions possible?

The cartel prohibition has 'direct effect' in the sense that private parties can commence legal proceedings to obtain injunctive relief or to recover actual (but not punitive) damages (see question 11). The same applies in respect of article 101 TFEU.

The use of civil proceedings is being encouraged by the minister and the ACM, in line with similar promotion of the use of civil procedures at EU level.

The rules of the Dutch Civil Procedure Code apply. The burden of proof rests with the claimant unless any special rule or the requirement for reasonableness and fairness prescribes otherwise. (As noted above, the chairman of the ACM Board has advocated ACM decisions being made binding on Dutch courts as evidence of a competition law infringement in civil proceedings. This would ease the burden of proof on claimants.)

In respect of follow-on litigation, the District Court of Amsterdam in Equilib/KLM (March 2012) ruled on the question under what circumstances a civil procedure has to be suspended pending an appeal against the European Commission's decision (Airfreight) before the EU Courts (on the basis of the Masterfoods judgment). The claimant argued among other things that in view of the fact that KLM had been a leniency applicant in the European Commission's proceedings and had already reached settlements with other claimants in other jurisdictions, KLM's appeal against the decision should not result in a suspension of the civil proceedings since in its appeal KLM did not contest the establishment of an infringement, only aspects of the duration and gravity of the infringement, and the calculation of the fine. However, the court held that the judgment of the General Court regarding the nature, duration and scope of the participation of KLM in the infringement may impact on the question whether KLM has acted unlawful in respect of the claimants, since it is not only KLM's participation in the infringement that is relevant in this respect but in particular the periods, locations and manner in which KLM has participated and whether its participation concerned services/shipments delivered to the claimants. The court therefore decided to suspend the proceedings until the Commission's decision is final. In another follow-on case (Gas Insulated Switchgear), Tennet/ABB (May 2012, District Court of Arnhem), cartel participant ABB requested the court to order claimant Tennet to produce documents relating, among other things, to the damage Tennet claimed to have suffered from the cartel. This claim was made on the basis of Article 843a of the Dutch Code of Civil Procedure (DCCP), which provides a basis for discovery requests in respect of specific documents relating to the claim which are in the possession of the other party. In response, Tennet produced a large number of documents – which however did not appear to correspond to the documents requested – and stated that it did not or no longer had any other responsive documents in its possession. This was supported by a statement made by an archive manager of Tennet. The District Court held that Tennet had sufficiently demonstrated that it had no further documents in its possession. According to the District Court this was not surprising; there is a statutory duty to keep documents for seven years only and almost all documents dated from before 2005. The District Court also considered that part of the documents requested did not meet the 'specific documents' requirement, and that article 843a DCCP is not intended to move up the stage of production of evidence in the proceedings.

Article 3:305a of the Dutch Civil Code allows class actions. However, the practical relevance of this provision in the context of claims based on infringements of the Act is fairly restrictive as it is not possible to institute a class lawsuit to obtain damages. Currently, there is a bill pending which is intended to further facilitate class actions. Although there are plans to amend the bill so as to also allow class suits to obtain damages, it is yet unclear if and when such amendment will be made to the bill. Currently, more relevant for cartel cases with mass exposure is probably the possibility of declaring a settlement binding on all injured parties. According to article 7:907 of the Dutch Civil Code, a settlement reached by the defendant and a foundation or association with a statutory goal to represent the injured parties can be declared binding on all injured parties by the Amsterdam Court of Appeal. Pursuant to the Dutch Act on the Collective Settlement of Mass Claims (the WCAM), the parties to a settlement agreement may request the court to declare the settlement agreement binding on all persons to which it applies according to its terms (the 'interested persons'). The settlement agreement must have been entered into between one or more potentially liable persons and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the interested persons. If the court declares the settlement agreement binding, all interested persons are bound by its terms. There is an exception for interested persons that timely submit an 'opt out' notice, which can only be submitted after the binding declaration has been issued. Being bound by the terms of the settlement agreement basically means that the interested persons who do not 'opt out' have a claim for settlement relief and are bound by the release in the settlement agreement. Since the entry into force of the WCAM in 2005, the court has declared a settlement agreement binding in five (not competition-related) cases. On 12 November 2010 and 17 January 2012, the Amsterdam Court of Appeal delivered important decisions regarding an international

collective settlement of mass claims. The court assumed jurisdiction and declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. The decision will have to be recognised in all European member states, Switzerland, Iceland and Norway under the Brussels I Regulation and the Lugano Convention. The Netherlands is the only European country where a collective settlement of mass claims can be declared binding on an entire class on an 'opt-out' basis. This makes the Netherlands an attractive venue for settling international mass claims, irrespective of whether any (class action) litigation has taken place in the Netherlands. In addition, Dutch courts seem to seize jurisdiction quite easily and legal costs are capped, making it a popular country for assigned claims. Damages actions are currently pending against various cartels including paraffin wax, sodium chlorate, elevators, air cargo and switch gear.

Following the NMa's decision in the *Interpay* case (see question 18), a lorry-load – literally – of 12,000 claims were deposited with Interpay, which had been the sole provider of PIN services on the Dutch market. Umbrella groups – including retailers and the hotel, restaurant and catering industry – coordinating these claims have recently agreed to settle, with a covenant being drawn up on lower PIN prices. The NMa stated in informal guidance in November 2005 that the covenant was not problematic in terms of competition.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

Different fines can be imposed for frustrating or failing to cooperate with an investigation, and for cartel infringements. The maximum fines for a failure to cooperate with the ACM or for breaking the seals during a dawn raid are €450,000 or 1 per cent of the company's turnover, whichever is higher. The ACM also has the power to impose periodic penalties for a firm's non-compliance with the duty to cooperate. Fines of up to €450,000 can also be placed on individuals. Furthermore, an order subject to a penalty can in certain cases be imposed, ordering that business information and documents specified in the order be made available for inspection. This order can be imposed together with the fine mentioned above (see questions 15 and 19). Fines for breach of the cartel prohibition may not exceed €450,000 or 10 per cent of the company's turnover, whichever is higher. A fine up to €450,000 can be imposed on individuals. Fines are calculated with the 2009 policy guidelines on the setting of fines, which is dealt with in detail in question 19.

Fines have been regularly imposed by the ACM for failure to cooperate, for substantive cartel infringements and for the breaking of seals.

In 2010, the ACM imposed fines in 12 cases, amounting to fines totalling €137.1 million . In 2011, the ACM imposed fines in six cases, amounting to fines totalling €35 million. To date, the highest fines imposed by the ACM have been in relation to alleged cartel agreements in the construction sector: at the end of 2003, fines totalling over €100 million were imposed in five cases on 22 companies for bid rigging, market sharing, exchanging of sensitive information and agreeing not to compete. The fines for two companies were reduced by 70 per cent and 25 per cent in the ACM's first application of its Leniency Guidelines. A further set of €100 million fines were imposed on 350 companies involved in a cartel structure coordinating tender applications in the so-called 'GWW' construction sub-sector in April 2005. The gross amounts of fines had been revised down to take account of companies' participation in an 'accelerated' procedure using joint representation; in some cases, leniency applications; reductions for companies that agreed to information given to the ACM in leniency applications being exchanged with the Dutch Inland Revenue; and reductions for small firms. The ACM also imposed (in October 2005) total fines of €40 million for similar infringements on 150 companies in the electrical and mechanical engineering sectors. The accelerated procedures in the construction sector were completed mid-2006, whereas the procedures regarding the companies that opted out of the accelerated procedure were concluded by the end of 2006. A number of appeals have been lodged, most of which have been dismissed. In July 2010, the Trade and Industry Appeals Tribunal ruled that the ACM's approach to the construction fraud was not unreasonable. According to the Tribunal, opting for the accelerated procedure was a well-considered choice of the relevant construction companies, which choice would still stand in appeal. This would only be different if the construction companies convincingly argue that the facts established by the ACM or the ACM's related legal assessment were incorrect.

In 2004, the ACM fined Interpay, a provider of network services for debit card transactions, €30 million and imposed a further €17 million in fines on the eight founding banks of Interpay. The Interpay joint venture was found to have abused a dominant position in the market for network services for debit card transactions through excessive pricing. On administrative review, the ACM reduced the fines on the eight founding banks to €14 million, since the banks have now set up an innovation fund of €10 million aimed at providing a significant contribution to (more) effective payment traffic in the Netherlands. The ACM also withdrew the fine on Interpay. The reason for this fine withdrawal was the otherwise-needed (time-consuming and complex) research into excessive prices and the conclusion of a covenant between the banks and retailer groups on PIN services (see question 17).

In November 2009, the ACM imposed a total fine of more than €3 million on five Dutch swimming pool chemicals distributors for market sharing. The distributors entered into a customer-sharing system in regard of the sale of swimming pool chlorine to disinfect pool water. The cartel had a market share of 90 per cent and had existed long before 1998, when the Dutch Competition Act entered into force. The long duration of the cartel proved the salvation of one undertaking, as it sold its cartel-participating subsidiary in 2001. Similar to the European Commission, the ACM is subject to a limitation period of five years for the imposition of penalties. In June 2009, the ACM for the first time imposed a fine of €17,000 on a cartel facilitator, in line with European case law. In December 2010, the ACM fined a cartel of four manufacturers of insulated glass for having concluded price-fixing agreements for a total of €17,746,000. In December 2011, the ACM imposed total fines of € 18 million on four participants in an industrial-laundry cartel, which undertakings were considered by the ACM to have shared markets through a 'soft-franchise' formula, which was a franchise formula set up by the franchisees without any involvement of an independent franchisor. In June 2012 the ACM imposed total fines of € 23 million on growers of bell peppers and silverskin onions for agreements on price fixing and output restrictions. Significant fines have been placed on foreign companies by the ACM. For example, in the GWW investigations noted above (where alleged government approval of the agreements was noted by the ACM), seven foreign firms were among those sanctioned.

Fines have also been imposed for failure to cooperate in the context of dawn raids in various cases, including in the construction sector. In 2003, a construction company was fined for refusing to allow the ACM to interview certain employees; the then maximum fine for procedural infringements of €4,500 was imposed. This followed the judgment of the Rotterdam District Court in a separate case, *Texaco*, where it was held that a fine could be imposed on a company for refusing to allow the ACM to question certain employees. The Court stated that the required cooperation is not limited to the legal representatives of a firm. In July 2006, the Rotterdam District Court confirmed this ruling in another case and added that a company's refusal to allow the ACM to question three employees does not authorise the ACM to impose three separate

fines. According to the Court, such refusal constitutes only one violation of the duty to cooperate.

Fines for non-cooperation have been placed on individuals, for the first time in 2003 – on an ex-director of a company subject to ACM investigations (see question 15). Note, however, that fines for non-cooperation have subsequently increased significantly (see question 15). In 2009, the ACM imposed fines of €150,000 each on two former general managers; its highest fines up to now on individuals for non-cooperation.

The first fine – of €269,000 – for a breaking of seals during a dawn raid was imposed in November 2008. In September 2010, the ACM imposed a fine of €51,000 on an association of undertakings for breaching a seal. This fine was, however, reduced to €23,000 by the District Court of Rotterdam (June 2012) because the ACM had applied the wrong gravity factor and because it had not taken into account as a mitigating circumstance that the association had swiftly cooperated with the ACM, beyond its obligation to do so, in establishing the cause of the breaching of the seal.

Fines have been reviewed by both the ACM and by the courts. In September 2004, on administrative review the ACM announced substantial reductions in fines imposed on five mobile telephone network operators for agreements to coordinate behaviour relating to reductions in dealer bonuses for sales of prepaid and post-paid mobile telephone subscriptions. The original fines totalling €88 million were cut by 40 per cent to €52 million on the grounds that the relevant turnover forming the basis of the fine calculation was lower than that previously taken into account. The fines imposed on two companies were reduced by over 50 per cent due to the fact that a large number of their sales were made via non-dealership channels. On appeal in 2006, the Rotterdam District Court cancelled the fine imposed on Telfort for insufficient evidence of Telfort's participation in the meeting on reductions in dealer bonuses. Telfort had denied its presence at the meeting and claimed the right to remain silent. The Court stated that the ACM could not draw inferences from Telfort's silence. It further ordered the ACM to reconsider the fines imposed on the remaining operators, given the ACM's inadequately substantiated disregard of the operators' objections, particularly the operators' evidence disproving the causal link between the meeting and the subsequent parallel behaviour. In further appeal, the Tribunal sought guidance from the European Court of Justice (ECJ) on the interpretation of the concept of concerted practice and the presumption of a causal link between the concerted practice and market conduct. Taking account of the ECJ's preliminary ruling, the Tribunal in August 2010 ruled that the ACM correctly qualified the exchange of information as a restriction by object. Subject to proof to the contrary, to be adduced by the undertakings concerned, it must be presumed that the mobile operators in the concerted practice that remain active on that market take account of the information exchanged with their competitors. Surprisingly, the Tribunal ruled that article 6 of the European Convention on Human Rights prevents this to mean that the mobile operators need to conclusively prove the contrary. Instead, it is enough for them to provide sufficient evidence to refute the presumption. The Tribunal therefore ordered the ACM to reassess the evidence adduced by the mobile operators to rebut the presumption of a causal link. In addition, the ACM needed to examine or re-examine the actual effects of the infringement on the market in order to set or reset the level of the fine. In October 2011, the ACM concluded that the evidence adduced by the mobile operators was not sufficient to change its conclusions and re-imposed the fines, which were lower than the original fines due to the fact that the Tribunal considered the infringement of a less grave nature and the passing of an unreasonable period of time.

No criminal sanctions can be imposed on individuals (see questions 14 and 16). As noted under question 2, the ministers for economic affairs and justice are currently preparing a bill to introduce (inter alia) prison sentences for individuals infringing the cartel rules.

Sentencing

19 Sentencing guidelines

Do sentencing guidelines exist?

The Act provides for administrative but no criminal penalties. In December 2001 the ACM published Guidelines for the Setting of Fines. These Guidelines were replaced in 2009 by the policy guidelines on the setting of fines.

The policy guidelines state that the fine is based on the relevant turnover of the undertaking. This is understood to be the value of all the transactions realised by the undertaking during the duration of the infringement from the sale of goods or the provision of services to which the infringement relates. (See question 18 in relation to turnover calculations employed in the construction sector in relation to bid rigging.)

The fine for offenders other than individuals is set according to the following formula (as stated in the guidelines):

Starting point × seriousness factor
+ increase/decrease for additional circumstances.

The ACM will set a starting point equal to 10 per cent of the offender's relevant turnover. The seriousness factor has a maximum of five and is determined by the gravity of the infringement, considered in combination with the economic context in which the infringement occurred. The ACM distinguishes between three types of infringements: very grave, grave and less grave infringements. The basic amount of the fine consists of 10 per cent of the relevant turnover multiplied by the seriousness factor. In the case of very grave infringements, the ACM may increase the basic amount of the fine with an amount of up to 25 per cent of the basic amount (entry fee). In addition, in the case of a repeat infringement, the basic amount will be increased by 100 per cent.

The starting point for individuals is determined within the range of €10,000 to €200,000 for giving instructions or exercising de facto leadership with regard to inter alia 'procedural' infringements such as breaking of seals affixed by the ACM during dawn raids. A range of €50,000 to €400,000 applies in regard of infringement of the cartel prohibition.

There is a statutory limit of five years, which must in any event be observed. On 1 July 2010, the Rotterdam District Court remarkably ruled that in the event of a single continuous infringement, the ACM cannot take account of the undertaking's turnover related to the statute-barred part of the infringement when calculating the fine. This surprising ruling is currently under appeal. The maximum fine for infringement of the cartel prohibition is €450,000 or, if this is greater, 10 per cent of the total annual turnover of the undertaking, or, if the infringement is committed by an association of undertakings, the joint turnover of the undertakings that have participated in the infringement.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Yes, the policy guidelines on the setting of fines, which set out the ACM's calculation method for fines, are adopted by the minister and are binding on the ACM. However, the principles of sound administration and the statutory maximum limit also apply.

If strict application of the policy guidelines would result in inequitable treatment, the ACM will have to deviate from it. This issue has been discussed, for example, in construction sector cases, such as *Noord-Holland Acht*, and in the *Interpay* decision; other cases include *Nederlands Tandtechnisch Genootschap* and *NIP*, *LVE*, *NVP* and *NVVP*. In Wegener (September 2012), the District Court of Rotterdam confirmed that if strict application of the

sentencing guidelines would have an inequitable result, the ACM is obliged to deviate from the sentencing guidelines.

If the special circumstances of the case give cause, the ACM may also impose a symbolic fine of for example €1,000.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

Yes; companies – and as of 1 October 2007 also individuals – may contact the ACM's Leniency Office to obtain immunity or a reduction in their fine for a cartel offence. The Leniency Guidelines of October 2009 set out the leniency policy to be applied by the ACM. Furthermore, the ACM has published supplementary notices to the Guidelines, specifically concerning certain investigations in the construction sector. These have been produced to help deal with investigations into a massive number of leniency applications from construction companies. The supplementary notices set out special rules relating to an 'accelerated sanctions procedure' (strictly speaking, this is not a form of leniency, rather it applies where a company foregoes individual representation and uses a joint representative, receiving a 15 per cent reduction in fines) and specially tailored scales of leniency-based fine reductions.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

The Leniency Guidelines provide for complete immunity from fines for the first company to present information to the ACM about a cartel prior to the start of an investigation. However, this only applies if certain criteria are fulfilled. First, the company will need to continue to comply with its cooperation duty until the ACM has issued a sanction decision. This duty to cooperate includes the following steps.

From the moment a company is considering applying for leniency, it should refrain from any practice that may obstruct the ACM's investigation (such as destroying evidence or any action that would result in the (future) leniency application becoming public knowledge).

From the moment a company submits its leniency application, it should:

- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the Leniency Office; and
- keep its employees and – insofar as is possible – former employees available for statements.

Full immunity may be granted to a company provided that the following cumulative conditions are also met:

- the company is the first to present information to the ACM about a cartel prior to the start of an investigation;
- the company provides the ACM with information that constitutes a sufficient basis for initiating an investigation into the cartel;
- the company has not compelled another company to take part in the cartel agreement; and
- the company continues to comply with its cooperation duty (as stated above).

Companies providing information about a cartel after the ACM has started an investigation, but prior to its issuing a report, may qualify for a reduction in fines of between 60 to 100 per cent if:

- the company is the first to provide the ACM with information on the cartel;
- the company provides the ACM with information that has significant added value;
- the company has not compelled another company to take part in the cartel agreement; and
- the company continues to comply with its cooperation duty (as stated above).

The ACM will grant a 100 per cent reduction if the leniency applicant is the first to provide information which the ACM did not yet have in its possession and which enables the ACM to prove the cartel infringement.

Companies providing information about a cartel after the ACM has started an investigation, but prior to its issuing a report, may qualify for a reduction in fines of between 10 to 40 per cent if:

- the company is the second (or next) to provide the ACM with information on the cartel or is the first to provide information but has compelled another company to take part in the cartel agreement;
- the company provides the ACM with information that has significant added value; and
- the company continues to comply with its cooperation duty (as stated above).

Individuals can also apply for leniency according to the Guidelines. If a company applies for leniency, current employees can benefit from the same leniency if they declare to the ACM that they want to be considered as leniency 'co-applicants' of the company and they individually comply with the leniency requirements. Former employees can also benefit from a company's leniency if the ACM determines that there is no conflict with the interest of the investigation. Individuals can also apply for leniency by themselves. They can also apply for leniency jointly with other individuals on the condition that these individuals at the time the leniency application is made are all employees of the same company involved in the cartel.

Following the June 2008 decision of the Court of First Instance in Treuhand, the ACM explicitly noted that leniency can also be applied for by companies that facilitate and contribute to the functioning of a cartel, even where they are not direct producers or distributors of the cartelised product or service. In July 2009, the ACM fined a cartel facilitator for the first time.

23 First in

What is the importance of being 'first in' to cooperate?

According to the Guidelines, the company that is first to notify the ACM of the existence of a cartel can qualify for a 60 to 100 per cent reduction in fines if it has not compelled another undertaking to take part in the cartel. This compares to a maximum reduction of 40 per cent for a company that is not the first to notify.

Normally, a 100 per cent reduction or complete immunity will only be granted to the first company to notify the ACM prior to the initiation of an investigation. However, if the investigation has started, but the information provided by the first company enables the ACM to prove the cartel infringement and the information was not yet in the ACM's possession, the ACM may still grant full immunity.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

There is no formal difference between the leniency provided to companies going second, third or later. The percentage reduction for companies other than the first to provide information on a cartel depends on the moment that the information is provided and the additional value that this information has for the ACM in its investigation. (The ACM also considers the extent to which a company has cooperated beyond the legal requirements.) In practice,

therefore, the later in time and the greater the number of companies who have already applied for leniency, the less likely it is that the information presented by another company to the ACM will have substantial additional value.

The Dutch rules do not provide for 'amnesty plus'.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

Whether it is advisable for a company to apply for leniency depends on the specific circumstances of the situation, but although there are no deadlines for applying for leniency it follows from the above that, once the decision to apply for leniency has been taken, it is advisable to present the information as soon as possible.

It is also possible to obtain a marker for an incomplete leniency application, if the information provided by the leniency application offers a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel. In most cases, it may prove time-consuming and burdensome to gather all the evidence on the cartel agreement. The marker secures the leniency applicant's position in relation to other possible applicants during a time period which is determined by the Leniency Office on a case by case basis.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The candidate leniency applicant can contact the ACM's Leniency Office anonymously or through an authorised representative to discuss the applicability of the Guidelines to a 'hypothetical' case. Prior to applying for leniency, the candidate applicant can also – through an attorney – (anonymously) contact the Leniency Office by telephone to determine whether it can still qualify for full immunity (see question 22). If the Leniency Office confirms the availability of full immunity, the candidate applicant is obliged to immediately apply for leniency.

Corporate statements containing incriminating information do not have to be provided in writing but can be provided orally. Further, any information presented to the ACM by a company in the context of an application for leniency should not be made public to the extent that the information qualifies as confidential information (eg, business secrets) in the sense of the relevant article of the Dutch Act on transparency in public administration. The identity of the applicant for leniency is not made public before the ACM has issued its report (comparable to the Commission's statement of objections).

However, confidentiality of information contained in leniency applications in respect of exchange of information between agencies remains a controversial issue (see question 10).

Moreover, as noted in question 21, the ACM's Leniency Guidelines also cover (very serious) breaches of article 101 TFEU with effect in the Netherlands. Rules for exchange of leniency application information and cooperation with the Commission and other EU member state competition authorities are included. The explanatory statement to the Guidelines refers to the Commission's Notice on cooperation within the ECN and states that the ACM will follow the Notice with regard to the position of applicants claiming the benefit of a leniency programme and exchange of information (in relation to article 101 TFEU).

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

A precondition for immunity or a reduction of over 60 per cent is that a company has not compelled another undertaking to take part in the cartel.

A successful leniency applicant has to cooperate with the ACM during the investigation and comply with the conditions as mentioned in question 22.

Note also the specific rules for leniency and accelerated sanction procedures developed by the ACM to date in relation to construction subsector investigations (see question 21). In the second tranche of construction sub-sector cases (the electrical and mechanical engineering sectors), a 70 per cent leniency reduction was given to one firm for producing useful information at an early stage in the investigations. Other companies received reductions of between 24 and 40 per cent. The ACM announced that in the civil and utility building sector cases, 230 firms (of the 700 being investigated) will receive leniency reductions of between 30 and 50 per cent, stating that the investigation is for the most part based on their information. Twenty-five firms had their leniency applications rejected on the basis that the information provided was too limited. Similarly, in the GWW cases, leniency was not granted in all cases where applications had been made.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The only settlements resembling a 'plea bargain' currently are the specific procedures that were available in the construction fraud cases. See questions 18 and 21.

It is worth noting that the ACM is willing to consider settlement of competition infringements by alternative means (to refrain from imposing substantial fines to competition law infringements). However, in order for the ACM to employ alternative enforcement instruments, five strict criteria should be met:

- there is an immediate termination of the infringement;
- alternative enforcement yields a consumer profit;
- alternative enforcement does not harm third-party interests;
- a structural solution is preferable to a change of behaviour; and
- the infringement does not concern a hard-core cartel.

According to the ACM, compliance programmes are particularly relevant to sectors in which ACM enforcement policy has been successful (for example, the construction industry and insurance sector). Following ACM intervention, companies are willing to impose self-regulation. In doing so, they hope to ensure an enduring compliance with the Competition Act. It is up to the ACM to convince the companies involved that a system of checks and balances is most conducive to maintaining compliance.

The ACM may further decide to refrain from sanctions if companies pledge in writing to refrain from certain behaviour, which enables the ACM to adopt a commitments decision (comparable to a commitments decision under article 9 of Regulation No. 1/2003). If the commitments are broken, the ACM can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or €450,000. The ACM cannot accept a pledge if it intends to impose a fine, which will be the case with hard-core cartels.

Update and trends

In respect of the type of behaviour under scrutiny, the ACM currently seems to devote its enforcement resources to a significant extent to information exchange systems and practices, whether through industry associations or otherwise. In respect of enforcement methods, the ACM indicated in May 2012 that it has adopted a more pragmatic enforcement approach: instead of imposing fines in each case where an infringement is established, the ACM intends to utilise its alternative enforcement measures more frequently where possible. In practice, it appears that the ACM has more frequently accepted commitments from undertakings in respect of practices which did not constitute hardcore cartels.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

As stated in question 5, the Act enables the imposition of fines of up to €450,000 on principals or de facto managers. The leniency programme was amended in 2007 to include individuals (see question 22). If a company applies for leniency, individuals can benefit from the same leniency if they declare to the ACM that they want to be considered as a leniency co-applicant of the company and they individually comply with the leniency requirements. Individuals can also apply for leniency by themselves, expressly stating that they do not act on behalf of the company of which they are (former) employees. Individuals can also apply for leniency jointly on the condition that at the time the leniency application is made they are all employees of the same company involved in the cartel.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

The Leniency Guidelines stipulate that immunity will be granted to those companies that fulfil the various criteria for leniency set out in the Guidelines (see question 22).

In the case of applications for leniency by companies being the first to notify the ACM of the existence of a cartel (either before or after the ACM has started an investigation), the ACM will notify the company in writing that it will be granted a reduction in the fine or complete immunity where applicable.

Note also the ACM's developed accelerated sanctions procedures and tailored Leniency Guidelines for parts of the construction sector described in question 21, and reductions for further cooperation in making leniency application information available to the Dutch Inland Revenue, as described in question 10.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

Applications for leniency must be lodged with the Leniency Office. Officers of the Leniency Office are officials of the ACM who are not entrusted with surveillance or investigative duties. The Leniency Office has its own telephone and fax numbers and e-mail address. It will notify a company of the date and time that its application for leniency was received by the Leniency Office.

The order of applications is determined by the date and time of the initial telephone call or other oral or written contact between the undertaking and the Leniency Office when a company has unequivocally requested leniency on the basis of the Guidelines.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

As of 1 October 2009, the current policy guidelines with regard to leniency are in force. There are currently no changes or amendments foreseen to these guidelines.

Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

According to the Rules of Conduct of Members of the Bar, members may not represent the interests of two or more parties if the interests of those parties conflict or if subsequent developments are likely to bring them into conflict. If counsel represents employees as well as the corporation, and a conflict of interests arises, it should withdraw as counsel for one of the parties. It is subsequently barred from acting in that case against the party it no longer represents. Subject to these

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Rules of Conduct, counsel may represent both a corporation and its (former) employees.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

See question 33. There is no absolute prohibition on defending multiple corporate defendants. However, since a company's leniency application covers its employees but hurts its competitors, conflicts of interests are more likely to arise when defending multiple corporate defendants.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Yes, although the chairman of the ACM Board has stated that the ACM will take account of the corporation's payment of the employees' fine when calculating the fine to be imposed on the corporation.

36 Getting the fine down

What is the optimal way in which to get the fine down?

In the policy guidelines on the setting of fines, the ACM notes it will take relevant factors into account for reducing the basic fine. Such factors include a company cooperating with the ACM's investigation beyond that which is required by statute, terminating the infringement of its own accord (with the degree of reduction depending on whether the ACM has already commenced an investigation) and compensating (again of its own accord) damage caused. An example of the former can be seen in the *Emmtec* case of June 2004.

Note also the importance of turnover calculations for forming the basis of the fine calculation. This has been shown in the ACM's administrative review decision concerning mobile telephone network operators and dealer bonuses (see question 18) where reductions in fines of more than 50 per cent were accorded by the ACM on review, and similarly in the shrimp cartel case.

Aside from the leniency programme, there is no standard separate procedure for reducing the amount of a fine prior to its imposition in a decision. Generally, the ACM will not be open to negotiations as to the level of the fine. Subject to the above, therefore, normally the only way to achieve a reduction in the fine is to appeal the decision once it has been issued.

CARTEL REGULATION 2013 ISSN 1473-3420