



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2014

7th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
December 2013

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ISBN 978-1-908070-81-4

ISSN 1756-1027

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Netherlands



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The Dutch Competition Act ('DCA') is based on the EU competition rules. It is primarily oriented towards public enforcement and grants the Dutch competition authority, the Authority for Consumers and Markets ('ACM'), the power to investigate and prosecute offences. Apart from this administrative route, the competition rules can also be enforced in private actions before the civil courts. Some proposals were made in the past to introduce criminal enforcement, but the Dutch legislator has announced that criminalisation of competition law is no longer on the agenda.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 6 DCA prohibits agreements between undertakings, decisions of associations of undertakings and concerted practices, which may appreciably affect competition on the Dutch market or a part thereof, in the sense that competition is prevented, restricted or distorted. The prohibition applies not only to agreements that actually have an appreciable restrictive effect, but also to agreements that have such object, regardless of whether this object is in fact realised. For the latter group of agreements (also called 'hard-core' restrictions such as price fixing and market sharing), it is not necessary to establish whether they have a restrictive effect on competition.

For the definition of the concepts "agreement" and "concerted practice", articles 1(e) and 1(f) DCA refer to the meaning of those concepts under article 101 TFEU. Thus, in keeping with European case-law, an "agreement" between undertakings within the meaning of the DCA covers both horizontal agreements (i.e. between companies that are active at the same level of production or trade) and vertical agreements (i.e. between companies that are active at different levels in the production and distribution column).

An "agreement" under the DCA is any consensus between undertakings to regulate their commercial behaviour. It is sufficient that undertakings have somehow expressed a joint intention to that effect. A written agreement is not required. Any consensus reached (directly or indirectly) between undertakings may constitute an agreement within the meaning of the DCA.

Secondly, the cartel prohibition applies to "concerted practices", to the extent that such practices discourage undertakings from independently determining their commercial behaviour.

The term "decisions of associations of undertakings" firstly includes any formal resolution of a constituent body of an association. In addition, it includes any measure that is intended to be binding on an association's members, as well as all recommendations and advice that are intended to be followed by the members.

For the cartel prohibition to apply, agreements or concerted practices should "appreciably" affect (or be capable of appreciably affecting) competition on the Dutch internal market or a part thereof. If an agreement is only capable of restricting competition to a negligible extent due to the weak market position of the participants, or due to an inherent incapacity to have anticompetitive effect (for non-hard core agreements), it fails to satisfy the appreciability criterion.

Apart from the appreciability criterion, article 7 DCA contains a purely quantitative exception to the cartel prohibition that covers:

- Agreements, decisions or concerted practices involving eight or less undertakings, provided that their combined turnover in the preceding calendar year did not exceed € 5,500,000 if their activities are mainly the supply of goods, or € 1,100,000 in all other cases (article 7(1) DCA).
- Agreements, decisions or concerted practices involving undertakings that are actual or potential competitors, provided that their combined market share does not exceed 10% on any of the relevant markets and trade between EU Member States is not appreciably affected (article 7(2) DCA).

1.3 Who enforces the cartel prohibition?

The Authority for Consumers & Markets ('ACM') enforces the cartel prohibition. The ACM has several instruments at its disposal that can be used for the detection of cartels. These instruments are laid down in the DCA as well as the General Administrative Law Act ('Awb').

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The ACM can start a supervisory inquiry or an investigation on its own initiative. Matters may be brought to its attention by virtually any means: reports in the press and professional journals; information provided by foreign competition authorities; and the European Commission and other government authorities (such as the Tax Authority). Furthermore, the ACM may receive complaints from undertakings and consumers. Information may also be provided by whistleblowers or by undertakings applying for leniency or by the carrying out of announced inspections or dawn-raids.

The ACM may always start a supervisory inquiry on the basis of the powers provided in the Awb. In order for the ACM to make use of its more extensive powers under the DCA, however, it must start a formal investigation, which is only possible if the ACM has a reasonable suspicion that an infringement has occurred. In such cases, the undertaking concerned must be informed of the subject-matter and scope of the investigation, though it has been held that a fairly general description is sufficient. Any use by the ACM of its supervisory or investigative powers must be proportionate to the aim to be achieved (article 5:13 Awb and article 6 ECHR).

When the ACM concludes that an infringement has been committed, it will draw up a formal report, setting out its findings, the main evidence on which these are based and an indication of the intended sanction. Subsequently, the parties concerned are given the opportunity to respond to the ACM's findings. In principle, the report and all documents in the ACM's file must be made available to the parties concerned, although the ACM may withhold certain confidential information.

In multi-party cases, all the parties are, in principle, invited to a hearing and to respond to each other's views, unless confidentiality issues stand in the way of a party's attendance of a portion of the hearing. The ACM will take all expressed views into consideration and will, subsequently, decide whether or not to impose a sanction by formal decision.

1.5 Are there any sector-specific offences or exemptions?

The DCA does not provide for any sector-specific cartel offences. There are a number of specific exemptions to the cartel prohibition. These apply to:

- Services of general economic interest (article 11 DCA).
- Certain kinds of cooperation in the retail trade and designation of shops in new shopping centres (national block exemptions based on article 15 DCA).
- All matters covered by European block exemptions (article 12-13 DCA).
- Collective employment conditions and certain collective pension agreements (article 16 DCA).

1.6 Is cartel conduct outside the Netherlands covered by the prohibition?

The cartel prohibition applies to all agreements or concerted practices that have an appreciable effect on the Dutch market or a part thereof. Where the undertakings are situated and where the agreement or concerted practice is entered into, is irrelevant. There are several examples of foreign cartel conduct with an effect on the Dutch market being sanctioned in the Netherlands.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A

Investigatory power	Civil / administrative	Criminal
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	Yes	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

ACM officials may enter any place. For entry into a natural person's home without his consent, the ACM needs a search warrant approved by a judge. If entry to the premises is refused, ACM officials can request assistance from the police to gain a forced entry.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers. However, subject to some conditions, the ACM is allowed to use information from telephone taps collected by the Public Prosecution Service in a criminal investigation, if such information is made available to the ACM. In two recent judgments, however, the Rotterdam District Court held that when sharing information collected through the use of telephone taps with the ACM, the Public Prosecution Service needs to take a reasoned decision after considering all interests involved. The courts need to be able to assess all considerations. These judgments are under appeal by the ACM at the time of writing.

2.4 Are there any other significant powers of investigation?

There are no other significant powers of investigation. However, it should be noted that with respect to collecting electronic evidence the ACM, unlike the European Commission, does not usually sort out the specific documents it wants to take during the inspection. As a result, the ACM often ends up taking tens of thousands of electronic documents, a large portion of which are irrelevant for the inspection.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

ACM officials will carry out searches of business and/or residential premises. There is no absolute right for undertakings to have a lawyer present during inspections. However, as a matter of courtesy, ACM inspectors are generally prepared to wait a limited amount of time (normally between 30 and 60 minutes) to give the company's lawyers the opportunity to attend the inspection.

Nevertheless, frequently inspections are started before external legal counsel's arrival.

2.6 Is in-house legal advice protected by the rules of privilege?

The legal professional privilege only applies to attorneys who are admitted to the Bar. In the Netherlands, since 1 May 1997, it has been possible for in-house lawyers to become members of the Bar (so-called "Cohen-attorneys"). Such "Cohen-attorneys" have the same status and identical professional obligations as attorneys working with a law firm and, hence, legal advice drawn up by a "Cohen-attorney" is covered by the legal privilege, provided the documents in question were drafted in the capacity of attorney (i.e. providing legal advice to the company).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

As a general rule, the ACM may only make use of its investigative powers in a manner and to the extent as is proportionate in relation to the investigation's purpose.

Undertakings and individuals have a right against self-incrimination (derived from article 6 ECHR as a prosecution of infringements of the DCA is considered a *criminal charge* within the meaning of the Convention). Therefore, if the ACM has a reasonable suspicion that an infringement has been committed, its officials are obliged to inform management and employees of an undertaking under investigation that they have the right not to answer questions if the answer would directly incriminate either themselves or the undertaking (article 53 DCA). Recent case-law confirms that this safe-guard also covers individuals who at the time of the interview are no longer in the employment of the undertaking concerned, for the period when they were employees.

Third parties can become involved in the investigation at any stage and, just like the undertaking that is being investigated, they are obliged to provide any assistance or information demanded by the ACM. The aforementioned supervisory and investigative powers equally apply to third parties, though any demands on third parties must be reasonable in view of the principle of proportionality. The right against self-incrimination does not extend to third parties.

ACM case files may contain sensitive and confidential information. To the extent that they are or should be aware of the confidential nature of information, ACM officials and all other persons involved with the exercise of its tasks have a legal obligation to maintain the secrecy of such information (articles 90-91 DCA).

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

All legal and natural persons have the duty to cooperate with supervisory and investigative inspections (article 5:20 Awb). This duty also applies to natural persons who are not or are no longer employed by the undertaking in question. A refusal to cooperate may be punished by fines up to € 450,000 or, for undertakings and associations of undertakings, 1% of the annual turnover if that amount is larger (article 69 DCA). Additionally, the ACM may order undertakings to supply information and impose periodic penalty payments if the order is not complied with (article 70 DCA). In several cases, sanctions have been imposed for a refusal to cooperate. There are no indications that the ACM has become stricter recently.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The DCA only prescribes an upper limit for fines: as regards fines for cartel infringements, article 57 DCA provides for a fine of up to € 450,000 or 10% of the undertaking's global turnover in the preceding accounting year, whichever is higher. In addition, article 56 DCA allows the ACM to impose an order to maintain or restore effective competition, subject to periodic penalty payment (for which no maximum is set) if the order is not complied with (see article 83 DCA for a provisional order when there is an immediate urgency to stop the infringing behaviour if its consequences would be irreversible).

Failing to cooperate with an ACM investigation may lead to an order to cooperate subject to periodic penalty payment. In addition, as mentioned above, a fine may be imposed up to € 450,000 or 1% of the turnover in the preceding accounting year, whichever is higher (articles 69 and 70 DCA).

Breaking a seal which was placed on a business premise or object (for example, a filing cabinet) by ACM investigators during the course of an inspection may lead to a fine up to € 450,000, or in case of undertakings, 1% of the turnover in the preceding accounting year, whichever is higher (article 70b DCA).

3.2 What are the sanctions for individuals?

Cartel infringements, failing to cooperate with an ACM investigation and breaking a seal which was placed by the ACM investigators during the course of an inspection may lead to a fine up to € 450,000. Individuals and undertakings can be fined simultaneously.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Fines can be reduced on the basis of such grounds. The amount of the reduction is decided on a case-by-case basis, taking all relevant circumstances into account.

3.4 What are the applicable limitation periods?

The ACM may not impose sanctions in cases in which five years have lapsed since the termination of the infringement. This limitation period is interrupted if an "act of investigation" comes to the attention of the undertaking in question, at which point a new five-year period commences (article 64 DCA). An "act of investigation" includes carrying out a dawn-raid and the issuing of a report. In any event, no fine may be imposed after ten years have lapsed from when the infringement was terminated by the undertakings in question.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. However, a commitment of an undertaking to pay fines of officials may lead to an increase of the basic fine of the undertaking. The reasoning behind this is that such commitments go against the ratio of the legislation designed to make it possible to fine officials. Such commitments are considered to erode the effects of the legislation, but they are not illegal in themselves.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In theory this is possible, but there are no examples of such claims being awarded. In order for an employee to be held liable, it must be established that the employee acted completely on his own and managed to conceal the cartel for all others within the undertaking. It is hardly conceivable that such circumstances would, in practice, exist.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Fining Policy Rules of the Minister of Economic Affairs provide for a leniency programme. In cases involving a successful leniency application, the ACM will either refrain from fining undertakings or individuals that are, or have been, members of a cartel, or it will reduce the level of the fine from that which would have been imposed but for the leniency application. An important condition of the leniency programme is that the leniency applicant must cooperate fully, continuously and sincerely with the ACM, until all sanction decisions with regard to all undertakings involved in the cartel have become irrevocable. This means that the leniency applicant must refrain from behaviour that obstructs or may obstruct the investigation, such as the destruction of evidence, as well as behaviour that might disclose the leniency application, or the intent thereof, to other parties. The applicant also has the obligations to provide the ACM with relevant information as early as possible, to discontinue its involvement with the cartel and to cease all infringing activities, as well as the obligation to keep (ex-) employees available for the deposition of statements. The aforementioned conditions apply to all leniency applications.

The leniency programme divides leniency applications into three categories:

- **Category A:** A fine reduction of 100% will be given to an undertaking that applies for leniency if it is the first to contact the ACM, conditional on: the ACM not having started an investigation at that time; the applicant not having compelled other parties to join the cartel; the information provided not being previously available to the ACM and enabling the ACM to start an investigation; and the applicant's full on-going cooperation.
- **Category B:** If the conditions of Category A are met, except for the fact that the ACM already started an investigation, but no report on the findings of that investigation has yet been sent to the applicant, the fine can be reduced by at least 60%. To secure this category leniency, the applicant must provide the ACM with information which the ACM did not already have and which is of 'significant added value' to the investigation.
- **Category C:** Finally a fine reduction of between 10% and 40% will be given to applicants that are not the first to contact the ACM, or that apply first, but have compelled others to join the cartel. In these circumstances, the applicant must provide the ACM with information the ACM did not already have and which is of 'significant added value' to the investigation.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. From the moment a cartel is first reported to the ACM's leniency department, the A-status can be "reserved" for a certain period. This allows the undertaking to prepare a formal and comprehensive leniency application. The ACM often uses a period of six weeks and sometimes longer. The period is set on a case-by-case basis.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, according to article 2.3.1 of the Fining Policy Rules the ACM can allow applications to be made orally on the condition that the applicant has a legitimate interest thereto.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The ACM will treat the identity of the leniency applicant as confidential until it has issued its report. All information in the context of a leniency application that qualifies as confidential information will not be made public.

The current policy of the ACM is to not disclose any documents provided by leniency applicants to private litigants. However, legislation currently in the making suggests adjustments to this policy. Should the ACM consider that disclosure would compromise the aim of monitoring compliance with the competition rules by the ACM, it is expected that the current policy will remain.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The leniency applicant must cooperate fully, continuously and sincerely with the ACM, until all sanction decisions with regard to all undertakings involved in the cartel have become irrevocable. The obligation to cooperate may therefore extend until the end of all appeals instituted against an ACM decision.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No. However, repeat offenders do face increased penalties.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Individuals may lodge a leniency application independently from their employer. However, this is only possible for those individuals who may be fined by the ACM, i.e. persons who have instigated a cartel or played a leading role with regard to it. Practice to date suggests that if an individual is first to report an infringement, the ACM may grant the undertaking the possibility to also file for leniency and be awarded the same leniency status as the individual. However, this is decided on a case-by-case basis, taking all circumstances into account.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The ACM has the power to declare commitments binding on parties *in lieu* of imposing a sanction. Parties may request the ACM for an opportunity to enter commitments, but it is up to the ACM's discretion to grant such request. The ACM may in particular be willing to accept commitments if a final solution to the identified competition problem in the short term is to be preferred from the consumer point of view.

7 Appeal Process

7.1 What is the appeal process?

Lodging a notice of objection (a so-called 'administrative review' procedure) is the first stage of the appeal procedure in Dutch administrative law. This provides the authority whose decision is being challenged an opportunity to revise its initial decision and adopt a revised decision.

The administrative review phase can be dispensed with if, upon application by the appellant, the ACM permits the applicant to lodge a direct appeal against the initial decision before the administrative law chamber of the District Court of Rotterdam.

A notice of objection or an appeal must be lodged within six weeks from disclosure of the decision to the applicant. To give the appealing party additional time to formulate the grounds for the appeal, the Awb provides for the possibility of lodging a preliminary 'formal appeal' (containing the main elements of the appeal) within the six-week term, coupled with a request to the ACM or the court to grant permission to further substantiate the grounds of appeal at a later stage.

A further appeal on points of law only can be brought before the Trades and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*; CBb) in The Hague in the final instance.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes. However, during the suspension statutory interest will accrue over the fine amount that ultimately is upheld.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, although in practice this option is not often used.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Victims of a cartel may claim damages for a wrongful action on the basis of the general tort provision (article 6:162 DCC). The

conditions that have to be fulfilled under Dutch law for awarding damages are:

- an unlawful act (e.g. an infringement of the DCA);
- the act can be attributed to the defendant;
- damage;
- causal relationship between the unlawful act and the damage; and
- relativity (i.e. the plaintiff's damaged interests are within the scope of protection of the infringed provision).

When the ACM (or the Commission) renders a decision that certain conduct is unlawful and once such a decision has become final (after appeal, as the case may be), it is binding on the civil courts. Therefore, in follow-on actions based on the same facts, plaintiffs do not need to prove there was an unlawful act. The position of claimants in follow-on actions is therefore easier as opposed to stand alone actions, where all elements need to be proven.

In addition or instead of damages, the plaintiffs may, on the basis of a tort action, also request the court to order the defendants to refrain from certain conduct. This is also possible where the unlawful act has not yet taken place, or where an unlawful act has not yet resulted in damages to the plaintiff. The (sufficiently serious) threat of unlawful conduct detrimental to the plaintiff's interests provides sufficient basis for obtaining such an order.

8.2 Do your procedural rules allow for class-action or representative claims?

Collective actions are available under the Dutch Civil Code (articles 3:305a *et seq.* DCC), but no compensation for monetary damages can be claimed. Claims that are possible include the performance or dissolution of an agreement, annulment of a legal act or restitution of undue payments including, at least in theory, inflated prices due to a cartel arrangement. Collective proceedings can only be instituted by an association or a foundation which has the statutory object to represent the interests of a certain group. Aggrieved parties can be represented by the ACM, the Dutch Consumers' Association or other specific associations or foundations.

While it is not possible to enter a collective claim for damages, Dutch law does provide for collective settlements. A settlement agreement can be reached between associations or foundations that have the statutory objective to represent the interests of the group of aggrieved persons and the parties responsible for the damage. Once a settlement is reached, articles 7:709 *et seq.* DCC provide for the possibility to request the Amsterdam Court of Appeal to declare the settlement agreement binding for an entire group of aggrieved parties (whether they took part in the settlement negotiations or not). Parties that do not wish to be bound by the settlement agreement must file a timely opt-out declaration, after which they are free to pursue their own legal action against the defendant.

8.3 What are the applicable limitation periods?

Damages must be claimed within five years after both the damage as well as the liable party have become known to the injured party. In any event, the time limit for an action based on tort expires 20 years after the event that caused harm.

8.4 Does the law recognise a “passing on” defence in civil damages claims?

A passing on defence in civil damages claims is not explicitly provided for under Dutch law. It is up to the courts’ discretion to take this defence into account. In a recent case, an appeals court put a lower court’s calculation of the damages on hold, saying that the “passing on” defence that had been raised, first has to be fully argued before the lower court could start assessing the damage.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Generally, the party that the court rules against has to pay the other party’s legal costs. However, cost awards normally only cover a small percentage of the actual legal costs, due to the system used by the courts to calculate such costs.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Dutch courts are increasingly becoming the preferred choice of forum for follow-on actions. Several claim funding societies have commenced proceedings in the Netherlands against cartels such as the air cargo cartel, the elevator cartel and the bitumen cartel. Lower courts have given judgments, but mostly on procedural matters. Appeals on these matters are pending but many procedural questions remain unanswered.

In January 2013, a Dutch lower court ruled in favour of a customer claiming to be a victim of a cartel. The calculation of the pay-out was left for separate proceedings. However, on appeal, the higher court ruled that the passing-on defence which had been dismissed

by the lower court, first has to be fully argued before pay-out proceedings can start.

Not many cases have been decided in court and in those that have been, appeals are pending. Most cases end up in a settlement before a final decision is rendered.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In June 2013, the European Commission published a proposal for a Directive that will facilitate damage claims for infringements of EU antitrust rules. The Dutch government is opposing several elements of the draft, amongst which a provision suggesting that cartel members cannot use the passing-on defence if it is legally impossible for those further down the chain to claim compensation (due to national rules on causality, including rules on foreseeability and remoteness).

9.2 Please mention any other issues of particular interest in the Netherlands not covered by the above.

This is not applicable to the Netherlands at this time.

Acknowledgment

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