

Question A: Abuse of a Dominant Position and Globalization

Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse?

Are there too many restrictions on legal rights and business opportunities?

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1. Introduction

Please provide the full text of the provision prohibiting anticompetitive unilateral conduct in your jurisdiction. Please indicate whether this provision is found in a statute exclusively concerning competition law or whether it is found in a statute with a broader remit than competition law. If there is a list of prohibited practices in the provision, is this list interpreted as an exhaustive or indicative list of prohibited practices? How long has your jurisdiction had a rule prohibiting anticompetitive unilateral conduct? Please provide a brief history concerning the adoption of the rule. Are there any other legal rules found in other areas (for example in unfair competition law, etc) that prohibit practices similar to those prohibited by the competition rule on anticompetitive unilateral conduct?

Abuse of a dominant position is prohibited by Article 24 of the Dutch Competition Act (DCA). This article provides:

"Prohibition of abuse of a dominant position

- 1. Undertakings are prohibited from abusing a dominant position.
- 2. The implementation of a concentration, as described in Article 27 [DCA], shall not be deemed to be an abuse of a dominant position."

Article 24 DCA does not provide any list of prohibited practices. In the explanatory memorandum to the DCA, it is explicitly noted that the legislator chose not to provide a list of examples. However, the explanatory memorandum also notes that abuse of a dominant position in any case includes the practices listed in article 102 TFEU. The list of examples in article 102 TFEU therefore falls within the Dutch prohibition. Such a list is however not exhaustive and the legislator expects there to be many other forms of abuse. Consequently the Dutch legislator opted not to include a list in the article.

Dutch law contains a prohibition of abuse of dominance since the entry into force of the DCA 1 January 1998. The Dutch government then strongly, if not exclusively, based the prohibition on article 86 EC (now article 102 TFEU) and its interpretation in the decisions of the Commission and the case-law of the Court of Justice. The explanatory memorandum to the DCA provides that the Dutch rules should be interpreted consistently with EU competition rules.

Apart from article 24 DCA, article 194 of Book 6 of the Dutch Civil Code also prohibits unfair unilateral behaviour. This article implements Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising. Under this article, undertakings will be held liable for misleading and/or comparative advertisements. This article aims to protect undertakings from unfair practices of other undertakings, without, however, requiring that the undertaking acting unfairly has a dominant position.

2. Definition of ‘Abuse’

Is there a definition of ‘abuse’ in the legislation? If so, please provide the definition. Is there a definition of ‘abuse’ provided by the competition authority? If so, please provide the definition. Is there a definition of ‘abuse’ provided by case law? If so, please provide the definition.

The DCA defines dominance as:

"a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users."¹

The DCA does not however define *abuse*. The Dutch competition authority, the *Autoriteit Consument en Markt* (ACM)², provides the following definition on its website:

¹ Article 1(1) DCA.

² Before 1 April 2014, the ACM (the *Autoriteit Consument en Markt*) was called the *Nederlandse Mededingingsautoriteit* (NMa). For reasons of coherence, in this report reference will be made to the competition authority as "ACM".

"Abuse occurs when an undertaking that holds a dominant position in the market causes damage to the competitive position of its competitors. The dominant undertaking excludes competitors from the market at the expense of consumers. Thereby the consumer has, for example, less choice."³

A conclusive definition of *abuse* is not provided by the ACM. The description above only seems to include *exclusionary abuse*. In its decisional practice, the ACM refers to the case law of the Court of Justice when it defines abuse in the context of article 24 DCA. The application of Article 24 DCA is therefore very casuistic.

It is established case law and practice that Dutch competition law is based to a significant extent on the European competition rules. The decisions of the Court of Justice relating to the meaning of the notion *abuse* are therefore also leading for the interpretation of abuse in the context of 24 DCA.⁴ This follows from the parliamentary explanatory memorandum to the DCA.⁵

3. Exploitative and Exclusionary Abuse

Is there a distinction between exploitative and exclusionary abuse in the legal provision prohibiting anticompetitive unilateral conduct?

The DCA does not distinguish between exploitative and exclusionary abuse. The explanatory memorandum to the DCA does, however, distinguish between exploitative and exclusionary abuse.⁶ For exploitative abuse, on the one hand, the explanatory memorandum describes the situation where the dominant position is exploited to achieve benefits that would not have been realised in a situation with adequate competition. The memorandum refers to the example of charging excessively high prices. Exclusionary abuse, on the other hand, is explained as the situation in which a company strengthens its position in relation to its competitors for example by giving fidelity rebates in order to gain the commitment of certain customers, by refusing to supply its competitors or by selective price dumping. The explanatory memorandum notes, furthermore, that both forms of abuse can occur together.

ACM has published a brochure on abuse of dominance in which it also explains that it is common practice to distinguish between exploitative and exclusionary abuse.⁷ According to the ACM, exploitative abuse, on the one hand, occurs when an undertaking uses its dominant position in order to gain benefits that would not be obtained

³ See the website of the ACM: <https://www.ACM.nl/nl/onderwerpen/concurrentie-en-marktwerking/misbruik-economische-machtspositie/wat-is-een-dominante-positie/>.

⁴ CBB, 15 July 2004, ECLI:NL:CBB:2004:AQ1727 (*NOS/Telegraaf*).

⁵ Explanatory memorandum (*Kamerstukken II, 1995/96, 24 707, nr. 3*) p. 71.

⁶ *Ibid.*

⁷ See the brochure of the ACM: "Misbruik van een economische machtspositie", October 2009. In this document the ACM also provides a list with examples of what constitutes "abuse". <https://www.acm.nl/nl/publicaties/publicatie/7103/Misbruik-van-een-economische-machtspositie-/>.

under normal market conditions. Exclusionary abuse, on the other hand, refers to the improper weakening of an (efficient) competitor or the hindering of market access by an undertaking in order to strengthen its position on the market.

Is there a distinction between exploitative and exclusionary abuse in the decisional practice of the competition authority?

An example of a case where the ACM explores which conduct must be regarded as exclusionary abuse is the case *Stichting LPEV*.⁸ In that case, the ACM states that there will only be exclusionary abuse when an undertaking with a dominant position actually obstructs competition by foreclosing the market for his competitor in an anti-competitive manner and therefore influencing the welfare of the consumer in a negative way.⁹ The ACM adds that the market can be considered to be foreclosed in an anti-competitive way where the effective access of actual or potential competitors to the market is hindered or prevented as a result of the behaviour of the undertaking with a dominant position, and as a result the dominant undertaking is in a position to raise prices to the disadvantage of the consumers. There will be no abuse of a dominant position if the behaviour of the dominant undertaking can be objectively justified.¹⁰

Concerning an example of exploitation, the ACM has imposed a fine in 2004 in its decision *Interpay*¹¹ for abuse of a dominant position in the form of excessive fees charged for network services for electronic payment. ACM fined Interpay for the excessive fees charged for electronic payment transactions which individual retailers had to pay. In this decision, ACM establishes that Interpay has a dominant position on the market for network services for electronic payment. Interpay, which was set up by the eight biggest banks of the Netherlands at the time, was at that moment the only undertaking offering this electronic service. Although Interpay had decreased its prices for transactions, these fees were still found to be too high in relation to the costs made for these network services.

Is there a distinction between exploitative and exclusionary abuse in the case law?

Dutch case law also distinguishes between exploitative and exclusionary abuse. This can for example be derived from the decision *VVV*¹² in which the Administrative High Court for Trade and Industry (*College van beroep voor het bedrijfsleven* (CBb)), explicitly discusses the difference between these two forms of abuse. The CBb first considers the extensive definition of abuse provided by the General Court of the European Union in the case

⁸ Decision in case 7475 of 13 June 2013 (40) (*Stichting LPEV v Oranje Kruis*).

⁹ *Ibid.*, para. 39.

¹⁰ *Ibid.*, para. 40-41.

¹¹ Decision in case no. 2910 of 28 April 2004 (700) (*Interpay*).

¹² CBb, 22 March 2007, ECLI:NL:CBB:2007:BA2598, (*Vereniging Vrije Vogel*), para 6.3.1.

See also for example District Court of Rotterdam, 4 July 2007, ECLI:NL:RBROT:2007:BA9164 (*CRV/NMA*); see also Visiedocument Inkoopmacht, <https://www.acm.nl/nl/download/bijlage/?id=7749>, p. 12.

*Selex*¹³, which is tailored to abuse in the sense of the exclusion of competitors. In *Selex*, the General Court defined an *abuse*, in accordance with settled case law,¹⁴ as

"the conduct of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

The CBb subsequently states that abuse can also include the exploitation of a dominant position.¹⁵ For this type of abuse the CBb refers to the definition provided by the Court of Justice in *United Brands*.¹⁶ In this case, the Court of Justice stated that it must be evaluated whether:

"the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."¹⁷

It must be emphasised, however, that in general it is not common practice, neither in the decisional practice of the ACM nor in Dutch case law, to distinguish explicitly between exclusionary or exploitative abuse. It is more common for the decision maker to refer directly to one of the examples provided by Article 102 TFEU.

4. Price-Based and Non-Price-Based Abuse

Is there a distinction between price-based and non-price-based abuse in the legal provision prohibiting anticompetitive unilateral/ in the decisional practice of the competition authority/in case law?

Article 24 DCA does not distinguish between price-based and non-price-based abuse.

Does your jurisdiction have stricter rules than that contained in Article 102 TFEU in the sense of Regulation 1/2003 Article 3(2)?

¹³ Case T-155/04 *Selex* [2006] ECR II-04797, para. 107.

¹⁴ Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para. 69, and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para. 111.

¹⁵ Case CBb, 22 March 2007, ECLI:NL:CBB:2007:BA2598 (*Vereniging Vrije Vogel*), para 6.3.2.

¹⁶ Case 27/76 *United Brands* [1976], ECR 207.

¹⁷ *Ibid.*, para. 249.

The explanatory memorandum to the DCA explicitly states that the provisions on competition law are based on EU competition rules and are not stricter nor less strict than EU competition law. The general principle of the DCA is that its provisions and its application are influenced to a significant extent by the decisional practice of the Commission and the case law of the Court of Justice.¹⁸

In practice, however, the Dutch authorities interpret the definitions of dominance and abuse strictly, as set out in the following chapter.

5. Enforcement

5.1. Decision-Making Practice

How many cases concerning the prohibition on anticompetitive unilateral conduct have been decided in your jurisdiction in the last five years by the competition authority? How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules)?

In the period between 01-01-2009 and 06-05-2015 the ACM has adopted 28 decisions concerning the prohibition of abuse of dominance. This number is very low, compared to the number of cases relating to cartel infringements.

The number is also especially low, considering that of those 28 decisions, many do not contain a detailed investigation into the matter.¹⁹ They simply refer to the ACM's policy on enforcement priorities and state that, after preliminary research and based on policy other cases are more important to investigate than the case at hand.

Furthermore, of those cases in which the ACM did carry out an investigation, there are only two cases in which the ACM enforced article 24 DCA. In the first case, *GasTerra*, the ACM imposed a fine.²⁰ It subsequently annulled the fine and its decision after *GasTerra* appealed the decision in an administrative procedure.²¹ In the other case, the national registrar of music copyrights *Buma/Stemra*, made a commitment to the ACM in which it stated that it would offer more choice to its customers in future.²² As a result, the ACM ended its investigation. Another case which received a lot of attention during the last five years is the *AstraZeneca* case. The ACM

¹⁸ Explanatory memorandum (*Kamerstukken II, 1995/96, 24 707, nr. 3*), p. 10.

¹⁹ See for example Decision in case no. 7341 of 15 March 2012 (6) (*TransRAbility/Lloyd's Registrar Nederland*), Decision in case no. 7213 of 27 April 2012 (27) (*Platform Makers/NOP e.a.*), Decision in case no. 7464 of 30 August 2012 (8) (*Van der Zwan/Kluwer*), Decision in case no. 7489 of 29 September 2012 (16) (*Praktijk voor psychologische en pastorale hulpverlening/Zorgverzekeraars Nederland*), Decision in case no. 1404 of 8 May 2014 (3229) (*Stichting Belangenbehartiging Opstalhouders Harlemmermeer/Hoogheemraadschap Rijnland*).

²⁰ Decision in case no. 4296 of 5 January 2011(213) (*GasTerra*).

²¹ Decision in case no. 4296 of 30 June 2011 (214) (*GasTerra*).

²² Decision in case no. 203301 of 6 June 2014 (*Buma/Stemra*).

investigated this case for nearly four years, but in the end concluded in its decision that it could not be established that AstraZeneca did in fact have a dominant position

These three cases are briefly discussed below.

GasTerra

In a decision of 5 January 2011, the ACM found that GasTerra, a Dutch company active in the trade and supply of natural gas, was hindering competition in the wholesale gas market. The ACM concluded in its decision that GasTerra had used supply conditions in its agreements with energy distributors in the Netherlands which discouraged these distributors from offering gas from other wholesale suppliers. This impeded the market access of such wholesale suppliers.

However, on administrative appeal the ACM was more receptive to GasTerra's arguments. GasTerra especially argued that the ACM had not proven that the energy distributors had been hindered by GasTerra from using other sources of energy. The fact that they had not used other sources, GasTerra reasoned, could have been attributable to a number of other factors. GasTerra asserted that after the market had been liberalised, it simply took a while before alternatives to GasTerra's products and services became available. In addition, the ACM began to suspect that there may have been practical and legal obstacles to the introduction of contracts that would offer energy companies more freedom. After reconsideration, the ACM therefore arrived at the conclusion that it could not be established that GasTerra had abused its dominant position.

Interesting in this decision is the liberal stance taken by ACM. In considering the appeal of GasTerra, its intervention as competition authority was not directed at enforcing more advantageous distribution conditions for the distribution of gas by GasTerra, but making it possible for undertakings to have access to other sources that compete with GasTerra's sources. In other words, the ACM emphasised that it did not want to prescribe the results of commercial negotiations, but wanted the market to work. In this light, the behaviour of GasTerra would only result in an abuse of a dominant position in the situation where it would hinder the access to other sources of gas.

Buma/Stemra

Composers and songwriters need Buma/Stemra, the national registrar of music copyrights, to collect the fees which radio and television stations have to pay for playing their music. This is, however, not always the case for music played through internet sources. Nonetheless, Buma/Stemra based its contracts with composers on an "all-in-one" package deal. There was no simple procedure to transfer only a part of the copyrights to Buma/Stemra. As a result, composers and songwriters had in fact no choice and actually no possibility to sell their music themselves on the internet.

After several complaints, ACM took the initiative to negotiate a more flexible, simpler and more accessible system with Buma/Stemra. Composers and songwriters in this way have more choice as concerns selling (part of) their rights. As a result, more ways for streaming and downloading will become available. In the perspective of the ACM these commitments would not only be beneficial for the composers and songwriters, but also for the consumers.

*AstraZeneca*²³

This case concerned the market for gastric acid blockers. At the time of the decision, the market for this type of medicine consisted of the product of AstraZeneca, called Nexium, and generic medicines. AstraZeneca was distributing Nexium to hospitals as well as pharmacies. However, the prices it offered to hospitals were much lower and even beneath the cost price, than those offered to pharmacies. In spite of the low prices it applied to hospitals, AstraZeneca was able to compensate its losses with its high prices for Nexium distributed to pharmacies. In 2011, ACM already published a preliminary report in which it established the presumption that AstraZeneca was abusing its dominant position.

However, in the final decision it *could not be established*, as ACM emphasised, that AstraZeneca had infringed article 24 DCA. ACM therefore, *did not see a basis for intervening* in relation to her competence for applying article 102 TFEU. Concerning the factual research of the case, the report presumed that a reason for why AstraZeneca kept the prices low for hospitals was that there was an *endorsement effect* of Nexium. If specialists prescribed a medicine in a hospital, later on it would be prescribed again outside the hospital since patients have a tendency to stay with one medicine and doctors continue to prescribe a brand which a patient has already used. Therefore, it would be advantageous for AstraZeneca to have higher sales through hospitals so that patients would be bound by Nexium afterwards. Also, in the ACM report a distinction was made concerning the market for gastric acid blockers between the extramural and intramural market.

AstraZeneca offered extensive argumentation against the conclusions of the preliminary report. AstraZeneca first of all contested the conclusion that Nexium and generic blockers were substitutable, which was successful. AstraZeneca was second of all able to undermine the presumption of the ACM's preliminary report that the low prices in the intramural market had an effect on the extramural market. As AstraZeneca had argued, a number of factors could have been responsible for the fact that the sales volumes of generic blockers did not grow as they would have been expected to.

Therefore, when ACM evaluated the market position of AstraZeneca, it concluded that AstraZeneca did not have a dominant position on the intramural market, where it had a market share below 30%. In the separate, extramural market, looking at the arguments of AstraZeneca, ACM had doubts whether it could conclude that the users of Nexium were bound to Nexium by its endorsement effect to such an extent that AstraZeneca could

²³ Decision in case no. 7069 of 2 December 2014 (1832) (*AstraZeneca*).

behave independently on the market in the sense of Article 24 DCA and 102 TFEU. As a consequence, the ACM could not establish that AstraZeneca had a dominant position in either of the relevant market.

This was a case in which complaints were brought by market participants on the basis of which ACM started their investigation. This investigation and the concluding decision focus on the question whether other products or producers were hindered by the pricing of AstraZeneca. When this turned out not to be the case, what is interesting is that, after more than four years of investigation, ACM did not investigate whether the prices on the extramural market might have been excessive and therefore an exploitation of consumers and health insurers.

How many cases concerning the prohibition on anticompetitive unilateral conduct have been decided in your jurisdiction in the last five years by the courts? How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules)?

In the period between 01-01-2009 and 11-05-2015 the Dutch courts have decided on 54 abuse of dominance cases. This is very few cases compared with the number of cases concerning the cartel infringements. This is also due to the fact that there are a growing number of follow on claims for damages against former cartel members.

With regard to the decisions from the Dutch courts, the only case in the Netherlands where the court actually found proof of an abuse of dominance was the case *EMS/Equens*.²⁴

EMS/Equens

The only case in the Netherlands where a court found that an abuse of dominance was proven was in *EMS/Equens*.²⁵ Equens administrated a data network for credit card payment transactions. Undertakings who accept payments by credit cards are called 'merchants'. EMS is a processor of payments by credit cards, and acts as a so-called 'acquirer'. Payments can be accepted through point of sale-terminals (basically any device for credit card payment) which are connected through the network which is operated by EMS. Paysquare is also an acquirer, in which Equens indirectly held shares, and a competitor of EMS. Equens had a contract with EMS on the basis of which EMS was able to use the data network. At a given moment Equens introduced a waiting procedure for when a merchant wanted to transfer to a different acquirer. This waiting procedure meant that the transfer to a new acquirer would be effected after 42 days, a period in which the former acquirer would be able to contact and possibly bind the nearly lost customer again.

In this case, the facts were investigated in the light of article 102 TFEU and article 24 DCA. It was assumed that the relevant product market was the total Dutch market, and could therefore form a threshold for possible foreign competitors. In this case, an abuse of a dominant position was found, and the court stated that *abuse*, within the

²⁴ District court of Midden-Nederland, 10 July 2013, ECLI:NL:RBMNE:2013:3245 (*EMS/Equens*).

²⁵ *Ibid.*

meaning of article 102 TFEU and article 24 DCA, requires an *objectively proven infringement* of competition. The abuse could in certain circumstances also be noticeable on an adjacent market. This could be the case when an undertaking with a dominant position on an upstream market abuses this dominant position through its actions on a downstream market. In this case, the waiting procedure of 42 days which Equens introduced for de-connecting a merchant and connecting him to a different acquirer, was found to introduce a factual obstacle to competition between acquirers. In this way, Equens significantly influenced the competition on the downstream market for acquirers in a negative way, the court concluded. The waiting procedure gave Equens and Paysquare the possibility to prevent or in any case delay the de-connection of merchants from acquirers, a possibility which was also used in fact. This was found to be an abuse of a dominant position.²⁶

Of the cases decided by the competition authority and/or courts, are you able to identify the proportion of exploitative and exclusionary abuses?

This is difficult to identify since there is not always a distinction made between exploitative and exclusionary abuse. Often it can be seen that the qualification of the abuse is limited to a referral to examples provided by article 102 TFEU.

5.2 Competent Courts and Authorities

Are there specialist courts in your jurisdiction dealing with competition infringements?

Please provide a brief explanation of the judiciary background regarding the competition cases.

The Dutch General Administrative Act (DAA) applies in respect of judicial review with regard to the decisions taken by the ACM. In the second annex to the DAA, entitled 'The regulation of Administrative Jurisdictions', article 7 states that the District Court of Rotterdam has jurisdiction to rule on individual decisions taken on the basis of the DCA. The District court of Rotterdam therefore has, as the only court where decisions of the ACM can be appealed in first instance, specialised expertise in competition law. In the same annex, article 11 states that appeal of a judgment of the District Court can be lodged at the *College van beroep voor het bedrijfsleven* (CBb) (Administrative High Court for Trade and Industry), which is located in The Hague. The CBb is the highest authorised Dutch court in competition cases and has a special working group for competition law.

Besides the specialised judicial appeal in administrative cases, it is also possible for a private party to invoke the DCA in civil court cases. This is done, for example, in order to challenge the validity of a contract. A judgment finding that an undertaking has a dominant position on the market and has violated article 24 DCA, can lead to the contract being declared null and void on the basis that it is in conflict with Dutch public order. Such a claim can be brought before every civil court in the Netherlands.

²⁶ District court of Midden-Nederland, 10 July 2013, ECLI:NL:RBMNE:2013:3245 (*EMS/Equens*), para. 4.4.21.

Are there regulators with concurrent powers that can enforce the same competition rules as the competition authority? If so, do they follow the approach of the competition authority in their interpretation of the prohibition or do they have a distinct approach?

The ACM is the only regulator that can enforce article 24 DCA, since the ACM is the only authority in the Netherlands with the competence to take decisions on infringements of the DCA and EU competition law. This is set out in article 2 DCA and the Institutional Act of the ACM. The ACM is a merger of three former entities, the former Independent Authority on Post and Telecommunications, the Authority on Consumers and the Dutch Competition law Authority. Therefore, the competences of these three authorities have already been merged.

The only other authority next to the ACM is the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit*, NZA). This authority investigates the mergers of undertakings in the healthcare sector and monitors the market position of undertakings with a significant market power. Therefore, the NZA is exercising an *ex ante* supervision of the healthcare market. The Market Regulation Healthcare Act (MRHA) is applicable to the NZA.

According to article 47 MRHA, a significant market power is the position of one or more healthcare providers or healthcare insurers to, alone or together, hinder the actual competition on the Dutch market or a part of it through the possibility to behave independently to important extent of:

- their competitors;
- other healthcare providers or insurers;
- consumers.

Article 49 MRHA confers the competence on the NZA to take a number of decisions by which it can impose measures on undertakings with a significant market power. The NZA can, amongst other things, oblige an undertaking in the healthcare sector to give access to information, treat consumers in a non-discriminatory way, offer services independently of other services, how to manage their accounts, to use certain calculation measures or not to create overcapacity. Furthermore, the NZA can adopt rules which might be necessary for the execution of these obligations.

With these competences, the NZA exercises an *ex ante* supervision in the healthcare market in order to prevent any abuse of dominance.

Are there guidelines of any form or shape adopted by the competition authority in your jurisdiction concerning the enforcement of or the substantive interpretation of the prohibition?

The ACM has published a brochure on "abuse of a dominant position".²⁷ However, this brochure only gives a superficial introduction to the common concept of articles 102 TFEU and 24 DCA. From the brochure it is

²⁷ See the brochure of the ACM: "Misbruik van een economische machtspositie", October 2009. In this document the ACM also provides a list with examples of what constitutes "abuse". Available at [https://www.acm.nl/nl/publicaties/publicatie/7103/Misbruik-van-een-economische-machtspositie/-/](https://www.acm.nl/nl/publicaties/publicatie/7103/Misbruik-van-een-economische-machtspositie/).

apparent that the ACM fully shares the goal of the European Commission as laid out in the guidelines on priorities of enforcement.²⁸ This goal, the ACM states, is the protection of the competition process in order to prevent damage to the consumer, as well as striving for a more effect oriented approach in the application of the provision.

5.3 Approach Followed by Competent Courts and Authorities

Is there a **particular approach** and/or standard of harm that can be identified in the decisional practice of the competition authority or the case law of the courts regarding their interpretation of ‘abuse’?

Decisional practice ACM in general

In the decisional practice of the ACM, it appears that ACM applies a high threshold as concerns the standard of harm required before it will find a breach of article 24 DCA and article 102 TFEU. Following the implementation of the DCA in 1998, a number of decisions of the ACM were annulled by the Dutch courts due to their lack of sufficient proof and economic research. In recent years, however, the approach of the ACM seems to be the other extreme: economic assessment is the key²⁹ and the ACM is very reserved in concluding that there is a dominant position or an abuse without extensive (economic) proof.

Predatory pricing

The approach of the ACM concerning unfair purchase or selling prices is very reserved, as illustrated in a number of decisions. In *Sandd v. TNT*,³⁰ Sandd, an undertaking active in the post and package sector, had made several complaints against postal service TNT (subsequently PostNL), the former national postal service which held an exclusive concession until April 2009 after the liberalisation of the postal sector in 2001.

The ACM stated that since the reduction of prices is in principle a natural expression of a healthy competition process from which the consumer directly profits, its approach is in principle very reserved.³¹ The ACM investigated the factual development of competition in the market, next to testing the long run average incremental costs (LRAIC). This is one of two models of an as-efficient-competitor-test which the Commission employs.³² Both are cost-benchmark-tests and the choice of the appropriate cost benchmark is crucial for the analysis. Failure to cover the LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market. The ACM concluded in its investigation that not only was the pricing

²⁸ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C 45 p.2.

²⁹ Official reaction of the management board of the ACM to the SEO report addressed to the Minister of Economic Affairs, Agriculture and Innovation, reference number 12328452, 23 November 2012.

³⁰ Decision in case no. 6207 of 15 December 2009 (233), (*Sandd v TNT*).

³¹ *Ibid.*, para. 38.

³² Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C 45, p.2, para. 26.

slightly above the LRAIC, but ACM also remarked that the competitor Sandd had been able to enter the market and increase its profit each year. This led the ACM to the conclusion that there had been no abusive pricing.³³

The ACM later confirmed this first decision, rejecting another complaint of Sandd.³⁴ Sandd had additionally claimed that free use of the network of PostNL by Netwerk VSP - the subsidiary of PostNL (the legal successor of TNT) - was a form of predatory pricing and therefore an infringement of article 24 DCA. Sandd argued in particular that an assessment of the prices would have to take into account the remuneration which Netwerk VSP paid for the use of the network of its mother. This argument was rejected by the ACM because PostNL formed an economic unit with its subsidiary. The ACM concluded that abusive pricing could not be proven. In this case, the ACM therefore emphasised that it would only take action against predatory pricing if competition was being harmed and consumers would suffer damage. Pricing would possibly be abusive if the price for a product or service is lower than the relevant costs made. However, according to ACM, offering products or services for a price which is lower than the costs made does not necessarily have to have an exclusionary effect on competition. It can also, in the long run, offer effects of economies of scale or learning effects.³⁵

Unfair litigation as a dominant undertaking

In August 2012, the ACM issued a decision concerning a complaint of the land development company Chipshol against Schiphol Airport.³⁶ Chipshol claimed that Schiphol had abused its dominant position by unduly influencing several governmental decisions and procedures to the disadvantage of Chipshol. Chipshol alleged that it was prevented from developing a working site in the area of the airport as a result of the abuse. The ACM assessed Chipshol's complaint against the criteria which the General Court had laid down in its judgment in *ITT/Promedia*.³⁷ In this judgment the General Court considered that starting legal proceedings could qualify as an abuse of a dominant position. This consideration was based on two criteria established by the Commission in its decision which was the basis for the dispute before the General Court. The cumulative criteria were that, firstly, if such action cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party, and secondly, is conceived in the framework of a plan whose goal is to eliminate competition.³⁸ Although according to the ACM Schiphol had influenced the governmental decisions, it found no evidence that Schiphol had done this in order to merely to frustrate Chipshol, and not, as Schiphol claimed, in order to pursue and defend its interests. Therefore, according to the ACM, Schiphol's conduct did not fulfil the conditions of *ITT/Promedia*. Since Schiphol's conduct could not qualify as abuse, the question of whether Schiphol had a dominant position in the relevant market was left unanswered.

Case law of Dutch courts on abuse of a dominant position

³³ Decision in case no. 6207 of 15 December 2009 (233), (*Sandd v TNT*), para. 44-56.

³⁴ Decision in case no. 6207 of 21 May 2012 (476), (*Sandd v PostNL*).

³⁵ *Ibid.*, para. 39-43.

³⁶ Decision in case no. 7194 of 20 August 2012 (75) (*Chipshol/Schiphol*).

³⁷ Case T-111/96 *ITT Promedia/Commission* [1998] ECR II-02937.

³⁸ *Ibid.*, para. 55.

High standard of proof in courts

Several decisions of the Dutch courts reflect that there is a high standard of proof when applying article 24 DCA and article 102 TFEU. For example, as concerns the approach of the Dutch courts, in the case *CR Delta*,³⁹ the CBb annulled a decision of the ACM and emphasised that the competition authority had to substantiate its decision with, next to the legal motivation, a solid economic motivation.⁴⁰ As the ACM recognises itself,⁴¹ the standard of harm applied by the courts is high, amongst other things because of the requirement of a solid economic analysis.

That the courts apply a high standard of proof is also recently confirmed in the case *UPC/T-Mobile Netherlands*.⁴² This case concerned the tariffs for telecom interconnection services between fixed telephone lines (from UPC) and mobile telephone providers (T-Mobile). UPC stated that the tariffs charged by T-Mobile were too high and exceeded the maximum tolerable levels. UPC complained that through these tariffs T-Mobile was making abuse of their dominant economic position. According to the District court of Rotterdam it had become apparent from the competition law practice of the ACM, the European Commission and the courts, that the test for assessing whether prices were excessive is very strict. Therefore, this provision demands a thorough analysis. In the case *UPC/T-Mobile Netherlands*, ACM had, in her opinion, no reason to carry out a thorough analysis, since UPC had not directly delivered an economic report on the matter. Therefore, there was *prima facie* no reason to believe that the prices handled by T-Mobile Netherlands were excessive. As a result, the District court of Rotterdam did not allow UPC to further substantiate its claim through additional evidence.⁴³

HPC/NVM

This case opposed the Dutch Association of real-estate agencies (NVM) and a software company (HPC).⁴⁴ HPC supplied an office management application to real estate agencies which made it possible to exchange information about supply and demand of real estate. The relevant issue was the fact that NVM delayed the supply of information which was needed for linking using the management application, while they did supply it without delay to a competing company. In this case the Amsterdam Court of Appeal ordered an economic report for definition of the relevant market, the assessment of the substitutability of products and their costs and prices. Following the delivery of this report, the Amsterdam court set out its reasoning in a follow-up judgment for its legal evaluation.⁴⁵ The Court of Appeal considered in the first place that the case law of the EU courts should be guiding in the application of article 24 DCA. In order to determine whether the claimed refusal to deal should be held abusive, attention should be paid especially to the criteria established by the Court of Justice in the

³⁹ CBb, 7 October 2010, ECLI:NL:CBB:2010:BN9947 (*CRV/NMA*).

⁴⁰ *Ibid.*, para. 4.1.2.

⁴¹ Official reaction of the management board of the ACM to the SEO report addressed to the Minister of Economic Affairs, Agriculture and Innovation, reference number 12328452, 23 November 2012.

⁴² District court of Rotterdam, 3 July 2013, ECLI:NL:RBROT:2013:5992, (*UPC/T-Mobile*) para. 5.11.

⁴³ *Ibid.*, para. 5.12.

⁴⁴ Amsterdam Court of Appeals, 30 March 2010, ECLI:NL:GHAMS:2010:BM1240 (*NVM/HPC*).

⁴⁵ Amsterdam Court of Appeals, 12 June 2012, ECLI:NL:GHAMS:2012:BX0460 (*HPC/NVM*).

judgment *Bronner*.⁴⁶ In applying these criteria, the court of appeal ruled that in the case at hand HPC had not been able to demonstrate in a substantiated manner that (i) the alleged refusal of NVM had led to the complete elimination of competition and (ii) having access to the specifications was the only way of building a market presence. In the light of the latter aspect, the court of appeals also took into account that HPC had been active on the market with a market share of about 20 per cent. All in all, the court of appeals therefore rejected the abuse of dominance claim,⁴⁷ which was later on confirmed by the Dutch Supreme Court.⁴⁸

EasyJet/Schiphol

In this case, low cost carrier EasyJet complained that Schiphol airport discriminated EasyJet because it made a distinction between the tariffs for boarding passengers and the tariffs for transfer passengers. Next to that, EasyJet complained that the rates for transfer passengers were unreasonable and not cost-orientated and formed an abuse of an economic dominant position. Upon a complaint by EasyJet, the ACM investigated whether Schiphol abused its dominant position by discriminating in prices between transfer customers and passengers which board for the first time at Schiphol. The ACM concluded that this price differentiation did not amount to discrimination as it did not consider two services at hand as equivalent services. This decision was upheld by the District court of Rotterdam in November 2010.⁴⁹ The court indicated furthermore that price discrimination will only constitute abuse if it can be established that there was competitive harm. The court found that EasyJet, having the burden of proof, failed to prove this competitive harm.

Is there a **claimed objective** of the prohibition of anticompetitive unilateral conduct adopted by the competition authority and/or the courts?

Starting point: Application of the European Commission guidelines

In the brochure of the ACM on "Abuse of a dominant position",⁵⁰ the ACM states, as referred to already, that its goal is the same as that of the European Commission. This is the protection of the competition process in order to prevent damage to the consumer, as well as striving for a more effect oriented approach than a form based approach concerning the application of the provision.

Alternative resolution and solution-oriented approach

In the so-called "SEO-report",⁵¹ titled "An international comparison of the abuse-of-dominance provision", which compared the number of cases in the Netherlands with ten other jurisdictions for the period of 2005 to

⁴⁶ Case C-7/97 *Bronner* [1998] ECR I-07791.

⁴⁷ Amsterdam Court of Appeals, 12 June 2012, ECLI:NL:GHAMS:2012:BX0460 (*HPC/NVM*), para. 2.27.

⁴⁸ Supreme Court of the Netherlands, 21 January 2014, ECLI:NL:HR:2014:149 (*HPC/NVM*).

⁴⁹ District court of Rotterdam, 25 November 2010, ECLI:NL:RBROT:2010:BO5063 (*EasyJet/Schiphol*).

⁵⁰ Brochure of the ACM: 'Misbruik van een economische machtspositie', October 2009. In this document the ACM also provides a list with examples of what constitutes 'abuse'. See <https://www.ACM.nl/nl/publicaties/publicatie/7103/Misbruik-van-een-economische-machtspositie/>.

⁵¹ R. van der Noll, B. Baarsma, N. Rosenboom and J. van der Voort, SEO-report nr. 2001-63, "An international comparison of the abuse of dominance provision", Amsterdam, 31 October 2011. Available at <http://www.seo.nl/pagina/article/an-international-comparison-of-the-abuse-of-dominance-provision/>.

2009, the economists and lawyers concerned concluded that the Netherlands ranked amongst the countries with the lowest number of abuse-of-dominance interventions. It was concluded that this low number was not the result of tools or resources used by the ACM or their deterrent effect. The report was unable to identify though what exactly the reason for this low number of cases was, although several possible explanations were explored. For example, it was considered possible that the ACM might have chosen expressly to intervene in only in a small number of cases or might have resolved cases informally.⁵²

This SEO-report had been commissioned by the Ministry of Economic Affairs, Agriculture and Innovation and was published on 31 October 2011. In reaction to this report, which did not reflect positively on the enforcement practice of the ACM, an official statement by the ACM was delivered to the Minister.⁵³ In this statement the ACM explained that, indeed, the ACM handles a very pragmatic approach towards enforcement of abuse of dominance. The ACM evaluates on a case-by-case basis which strategy should be followed. To the ACM, enforcement is not only about imposing fines. The finding of an adequate solution for the competition problem is also a possibility.

For a substantiation of this argument, the ACM refers to its cases *Interpay* from 2004⁵⁴ and the *GasTerra*⁵⁵ from 2011, which were good examples of its pragmatic approach. Although in both cases the fine for an infringement of article 24 DCA was annulled, the problem for the complainant was solved. In *Interpay*, the problem for the shopkeepers was solved since the market for electronic payment transactions was opened and at the same time an incentive for more efficient regulation of payment transactions was given. In *GasTerra*, the ACM ensured through her actions that the wholesale market for gas was opened without the imposition of a fine under article 24 DCA.

Furthermore, the ACM states that it is of importance that undertakings are open to changes of behaviour through other ways than sanctions. It considers the possibility of commitments very appropriate for an effective approach to abuse of dominance cases. In this light, the ACM would like to promote that undertakings will get the chance to offer commitments on time. The ACM also wants to raise the awareness of undertakings that can assume they have a dominant position in a market through trainings. Whilst this objective of the ACM seems a legitimate approach in itself, the number of commitments published by the ACM in the Netherlands does not reflect this approach. In the period which the SEO-report examined (2005-2009), relatively more commitments were given in other countries than in the Netherlands. In the period examined in this report (2009-2015), the only case is *Buma/Stemra*.⁵⁶

⁵² R. van der Noll, B. Baarsma, N. Rosenboom and J. van der Voort, SEO-report nr. 2001-63, "An international comparison of the abuse of dominance provision", Amsterdam, 31 October 2011. Available at <http://www.seo.nl/pagina/article/an-international-comparison-of-the-abuse-of-dominance-provision/>, p. i-iii.

⁵³ Official reaction of the management board of the ACM to the SEO-report addressed to the Minister of Economic Affairs, Agriculture and Innovation, reference number 12328452, 23 November 2012.

⁵⁴ See description of the case above in answer to question 3.

⁵⁵ Decision in case no.5968 of 26 June 2009 (11), (*GasTerra*).

⁵⁶ Decision in case no. 203301 of 6 June 2014 (*Buma/Stemra*).

(For EU/EEA Member States only) Can you please identify what, if any, **effect the Commission's Guidance** on enforcement priorities might have had on the approach of the competition authority and/courts in your jurisdiction?

It is clear from the explanatory memorandum, ACM's own statements and many cases, such as *Sandd v TNT*⁵⁷ and *Stichting LPEV*⁵⁸, that the ACM uses the guidelines of the Commission as its starting point for all interpretation of abuse of a dominant position.

Concerning its enforcement prioritisation policy, the ACM states in its reaction to the SEO-report, as stated above that, while its policy does not much differ objectively from that of other countries, it has recently sharpened its policy in that it shares the economic approach the Commission presents in its guidelines on priorities on enforcement in order to prevent *overenforcement* as well as *underenforcement*. Just as the Commission, the ACM believes that an economic analysis can mean the difference between procompetitive and anticompetitive exclusionary effects.⁵⁹

Are there any criticisms directed towards the decisional practice of the competition authority or the case law of the courts regarding their approach, particularly alleging that their approach leads to too many restrictions on legal rights and business opportunities? The criticisms may involve those from academics, businesses, media, etc.

Doubts of the European Commission concerning cable market regulation

Furthermore, the European Commission has recently opened an investigation over the ACM's proposed analysis of the wholesale market for local internet access.⁶⁰ The Commission has concerns about the analysis of competition on the retail market for consumer internet access, and about the related question whether KPN can continue to benefit from its strong position on the relevant wholesale market when confronted by the cable operator UPC/Ziggo, whose network also serves such consumers throughout almost the entire country.

On the basis of its market analysis, ACM proposes to regulate local access to KPN's (the Netherlands' incumbent operator) copper and fibre networks in order to tackle the competition problems identified. The Commission, however, has expressed serious doubts as to whether this market has been defined and analysed in accordance with the EU telecom rules and with competition law principles. This investigation by the Commission in a case

⁵⁷ Decision in case no. 6207 of 15 December 2009 (233) (*Sandd/TNT*).

⁵⁸ Decision in case no. 7475 of 13 June 2013 (13) (*Stichting LPEV/ Oranje Kruis*).

⁵⁹ Official reaction of the management board of the ACM to the SEO report addressed to the Minister of Economic Affairs, Agriculture and Innovation, reference number 12328452, 23 November 2012.

⁶⁰ See press release of the European Commission, available at <http://ec.europa.eu/digital-agenda/en/news/european-commission-questions-dutch-regulators-analysis-wholesale-market-local-access-telecom>.

where the ACM was actually planning to take measures of regulation on the basis of a market analysis that counts more than 700 pages can certainly be seen as a criticism.

Criticism on priorities

Another criticism is that the ACM just "prioritises cases away" ("*wegprioriteren*"). The enforcement priorities of the ACM are being questioned since the ACM often⁶¹ states in its decisions that it will not investigate a matter further as other cases are deemed more important and its capacity should be invested there. In the case *Vereniging voor Reizigers*,⁶² the CBB therefore already had to critically analyse the legitimacy of the ACM's habit to simply refer to its prioritisation policy and not start an investigation. The CBB stated that, in general, taking into consideration the general interest which is being served with the enforcement of competition law by the ACM, the ACM would, in the case of an established infringement, have to make use of its competences for enforcing the rules of the DCA. Therefore, the court concluded, the ACM would have to motivate why a complaint does not justify an investigation into the matter, taking into account the alleged infringement and the prioritisation criteria.⁶³

General criticism

In the Netherlands, there is widespread criticism on the decisional practice of the ACM. This is because of the extremely low number of decisions finding abuse of a dominant position. Lawyers and academics are recently criticising the ACM more and more often with provoking statements that the Netherlands is increasingly becoming a paradise for abuse of a dominant position in which undertakings can dictate the conditions of their behaviour towards suppliers, undertakings and, finally, consumers. Dutch courts also have already criticised the ACM for its decisions. In the judgment *Vereniging van Reizigers*,⁶⁴ the appeal by the complainant was unsuccessful, but the CBB stated that: "The decision of the ACM has a high level of speculation."⁶⁵

⁶¹ As was mentioned before, see for example Decision in case no. 7341 of 15 March 2012 (6) (*TransRAbility/Lloyd's Registrar Nederland*), Decision in case no. 7213 of 27 April 2012 (27) (*Platform Makers/NOP e.a.*), Decision in case no. 7464 of 30 August 2012 (8) (*Van der Zwan/Kluwer*), Decision in case no. 7489 of 29 September 2012 (16) (*Praktijk voor psychologische en pastorale hulpverlening/Zorgverzekeraars Nederland*), Decision in case no. 1404 of 8 May 2014 (3229) (*Stichting Belangenbehartiging Opstalhouders Harlemmermeer/Hoogheemraadschap Rijnland*).

⁶² CBB, 20 August 2010, ECLI:NL:CBB:2010:BN4700 (*Vereniging voor Reizigers/KLM*).

⁶³ *Ibid.*, para. 7.2.1 and 7.5.2.1.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para. 4.