Abuse of Dominance in the Netherlands

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A Practice Note discussing the laws and regulations governing abuse of dominance and monopolisation in the Netherlands. The Note discusses the antitrust and competition laws that govern abuse of dominance, how these laws are enforced, how to determine if a company is dominant or has monopoly power, types of conduct by dominant companies that may face competition scrutiny, and the key enforcement priorities regarding dominant companies in the Netherlands.

The competition laws against abuse of dominance and monopolisation can have a significant impact on how companies conduct business in jurisdictions where they have an important market position. Certain activities that are legitimate for non-dominant companies to engage in can infringe these laws when they involve a dominant company. However, jurisdictions can differ in how their competition laws determine dominance and in the types of conduct that are prohibited.

Companies (and their counsel) should therefore understand the risk of being considered dominant and of infringing these competition laws in any jurisdiction in which they do business. This Note explains the competition laws addressing dominance in the Netherlands.

Laws and Regulations Governing Abuse of Dominance

The competition laws regulating dominant companies in the Netherlands are primarily modelled on *EU* competition law. The *Competition Act 1997* (*Mededingingswet*) (Competition Act) is the national framework for enforcing competition rules.

Article 24 of the Competition Act, which is a near copy of *Article 102* of the *Treaty on the Functioning of the European Union* (TFEU), prohibits abuse of dominance. Article 25 of the Competition Act, which resembles Article 106(2) of the TFEU, provides an exemption from Article 24 for undertakings entrusted with the operation of services of general economic interest.

The *Explanatory Memorandum on the Competition Act* (Competition Act Explanatory Memorandum) that originally accompanied the bill is the primary source of information issued by the Dutch legislator to that provides official clarification on the Competition Act. While the Competition Act Explanatory Memorandum does not have the force of law, it outlines considerations that led to the development of the bill, the rationale behind the original legislative proposal, and key provisions of the law. The Competition Act Explanatory Memorandum is often relied on by courts and competition authorities in interpretating the law and understanding the Dutch legislature's intent.

The *Authority for Consumers and Markets* (*Autoriteit Consument & Markt*) (ACM) enforces the Competition Act, including laws regarding abuses of dominance. Previously, the ACM's predecessor, the Netherlands Competition Authority (NMA), enforced these laws. The *European Commission* shares its authority to apply Article 102 of the TFEU with the competition authorities of the EU *member states*, which includes the ACM (*Council Regulation (EC) No 1/2003*).

Decisions from the European Commission and *Court of Justice of the European Union* (CJEU) may be used in abuse of dominance cases in the Netherlands.

For more information on:

- The ACM, see *Practice Note, Authority for Consumers and Markets (Netherlands): Overview*.
- Abuse of dominance under Article 102 of the TFEU, see *Practice Note, Article 102 of the TFEU (Abuse of Dominance)*.
- The exemption under Article 106(2) of the TFEU, see *Practice Note, State Measures and Public Bodies Under EU Law*.

Methods of Enforcement

The ACM can investigate potential abuses of dominance. The ACM's enforcement powers and procedures are defined in:

- The *Authority for Consumers and Markets Establishment Act 2013* (*Instellingswet Autoriteit Consument en Markt*) (ACM Establishment Act).
- The *General Administrative Law Act* (*Algemene wet bestuursrecht*) (AWB).

Most investigations are launched in response to tips and enforcement requests, which can be received from:

- The ACM's consumer rights *website* (*ACM ConsuWijzer*).
- The business community.
- Informants, which can be anonymous.

The ACM can also conduct an *ex officio* investigation without receiving a tip or an enforcement request if it suspects an abuse of dominance.

Investigative choices are based on the ACM's prioritisation policy, the *Policy Rule on the Prioritisation of Monitoring Compliance* (*Beleidsregel prioritering van handhavingsonderzoeken*) (Prioritisation Policy). Generally, the ACM examines the harm to the proper functioning of markets. The ACM can also consider whether the potential violation falls within one of its strategic objectives (see *Prioritisation Policy*).

When an investigation is launched, the ACM can:

- Enter premises, including business premises and the homes of the undertaking's management and staff.
- Request and demand information, which can be copied or seized.

(Articles 5:15-5:17, AWB and Article 50, Competition Act.)

Employees and other staff of an undertaking under investigation are, in principle, required to cooperate with the ACM's investigations (Article 5:20, AWB). However, they are not required to incriminate themselves or their company in cases in where a possible punitive sanction may be imposed (Article 5:10a, AWB). In practice, this means that, before an interrogation, the ACM must inform an individual that they are not required to respond to questions that may incriminate themselves or the company in question.

The ACM can also collect data from websites for its research. It gathers information from public sources on the internet, for instance, based on opensource intelligence.

Under the *Method of Digital Research* (*Werkwijze digitaal onderzoek*), the ACM can examine and copy digital data carriers, such as computers and mobile phones. Algorithms are used when investigating digital data. Impactful algorithms are included in the *Dutch Algorithm Register*, a public register where Dutch government organisations publish information about the algorithms they use. The register focuses on impactful algorithms (including high-risk AI systems) and provides users with insights into how these algorithms work.

For more information on the ACM's investigative process and enforcement procedures, see *Practice Note, Authority for Consumers and Markets (Netherlands): Overview*.

Private Enforcement

In theory, instead of filing a complaint with the ACM or European Commission, an individual or undertaking can initiate civil proceedings in the Dutch courts alleging a market player's abuse of dominance. An undertaking may prefer this option if it:

- Thinks a civil action will be quicker and more efficient than waiting for a competition authority's decision and potential administrative enforcement.
- Is aiming for financial benefits or compensation for damages that are expected to be greater than the litigation costs.

In practice, there are limitations on private enforcement actions. The individual or undertaking must be able to show that it has the right to initiate these proceedings, for example, a contractual or economic relationship with the dominant company. Additionally, private abuse of dominance actions can be complex and require a high degree of evidence, which can make these cases difficult and ineffective. Between 2000 and 2022, there were only approximately six to seven private enforcement actions for an abuse of dominance annually.

Prioritisation Policy

The Prioritisation Policy sets out the ACM's enforcement priorities. Generally, the ACM assesses requests for enforcement or signals about possible Competition Act violations based on:

- The harm the conduct presents to the proper functioning of markets and confidence of people and businesses in the markets.
- The public interest in ACM action.
- How effective and efficient the ACM can act.

Under the Prioritisation Policy, the ACM's initial investigation looks at harm in a broad sense, including harm to people's and companies' confidence in the proper functioning of markets in both the short and long terms and the extent of that harm. The ACM examines whether harm can be prevented or mitigated by an enforcement action.

Notably, harm is not limited to:

- Purely financial harm to people and businesses. The conduct's effect on prices, quality and variety of supply, and innovation are important considerations.
- The direct harm a possible violation poses to certain parties in or out of the market. Indirect harm, such as the impact the potential violation continues to have on other parties or markets or the damage to the general confidence of people and businesses are considered.
- Average or representative participants in markets. Priority for investigating harmful conduct can be given where the conduct has a relatively large impact on a limited size group, such as people and companies in vulnerable or dependent positions. These groups particularly need confidence that the markets are functioning well for them.

The ACM examines various public interests to gain insight into an enforcement investigation's relevance to society. Public interests stipulated by the legislator include:

- Well-functioning markets.

- Optimal regulation of legal or natural monopolies.
- Consumer protection.

The ACM can also consider other public interests when deciding whether to start an enforcement investigation, including:

- Sustainability interests.
- Economic resilience.
- Quality of care, privacy, or safety.

The ACM can choose to not prioritise a possible violation due to certain public interests. When the ACM weighs its options, it also considers whether the potential violation falls within one of the strategic objectives from the ACM Agenda, which is an annual publication that sets out how the ACM fulfils its mission (see *Enforcement Priorities in the Netherlands Regarding Dominance*).

The ACM is committed to effective and efficient actions. Efficiency involves a cost-benefit analysis on whether carrying out an enforcement investigation is possible with the available resources and in view of the ACM's current or other planned activities. Synergy advantages may prioritise an investigation, such as when there is an ongoing project under a strategic ACM objective. Moreover, given the large number of laws whose compliance is subject to the ACM's supervision, the ACM seeks to distribute full enforcement investigations evenly across the territories.

Remedies

After finding an abuse of dominance, the ACM can:

- Issue a decision establishing the abuse of dominance.
- Impose a fine of up to the higher of:
    - EUR900,000; or
    - 10% of an undertaking's annual turnover for the financial year preceding the decision.
- Impose an order subject to periodic penalty payments (*last onder dwangsom*).

(Articles 56-57, Competition Act.)

The ACM determines fine amounts under the *Fining Policy* (*Boetebeleidsregel*). An undertaking's responsible executives can also be individually fined.

Periodic penalty payments can be imposed as corrective structural measures as referred to in Article 10(1) of the ECN+ Directive (*(EU) 2019/1*). The measures must be proportional to the offense and necessary to end the offense. (Article 58a, Competition Act.)

Commitments

An undertaking under investigation for an abuse of dominance can avoid penalties and fines by offering commitments to the ACM. The ACM can declare these commitments binding if they are more effective than imposing a penalty or fine in terminating the abuse of dominance. (Article 12h, ACM Establishment Act.)

Compliance Monitoring

The ACM can also informally monitor an undertaking to ensure it complies with the Competition Act's prohibition on abuse of dominance. Monitoring occurs when the party under investigation ends its abuse of dominance without the ACM formally using its enforcement powers.

Private Enforcement Remedies

The Competition Act does not expressly include remedies for private civil actions filed in the Dutch courts by individuals or undertakings asserting an abuse of dominance. Instead, the remedies in those actions are exclusively governed by the general provisions of the Dutch Civil Code (*Burgerlijk Wetboek*) (DCC), including the DCC's provisions on:

- Nullity (*nietigheid*) for an act that violates a mandatory provision of law (Article 3.40, DCC).
- Undue payment (Article 6:203, DCC).
- Unjust enrichment (Article 6:212, DCC).
- Abuse of circumstances or threats (Article 3:44, DCC).
- Torts (Book 6, Title 3, DCC).
- Damages (Book 6, Title 1, section 10, DCC).

The most likely civil remedy is to nullify an undertaking's abuse of dominance that violates a mandatory provision of law under Article 3:40 of the DCC. That is, because Article 24 of the Competition Act expressly prohibits an abuse of dominance, that abuse should be nullified under the DCC in a civil action. Where nullity is an appropriate remedy for an agreement that contains a provision creating an abuse of dominance, the remedy starts with removing the offending provision from the agreement, leaving the rest intact (Article 3:41, DCC).

Claims for undue payment, unjust enrichment, and the provisions regarding torts and damages are, in theory, available to a potentially injured party due to an abuse of dominance.

Determining Dominance in the Netherlands

Methodology

Dominance refers to both:

- A dominant economic position (*economische machtspositie*) as defined in the Competition Act.
- A dominant position under Article 102 of the TFEU.

Under the Competition Act, an undertaking (or collection of undertakings) is dominant if it can hinder effective competition in the Dutch market (or part of it) by behaving to an appreciable extent independently of its competitors, suppliers, customers, or

end-users (Article 1(i), Competition Act). This language is similar to the *European Court of Justice's* definition in *Hoffman-La Roche & Co. AG v Commission (Case C-85/76) EU:C:1979:36* (*Hoffman-La Roche*).

The difference between the definition provided in the Competition Act versus that of *Hoffman-La Roche* is that the ACM and Dutch courts emphasise the power to damage the competitive process, whereas the European Commission focuses on how a dominant entity exploits its dominance by defining dominance as the ability to profitably increase prices above the competitive level for a significant period of time without facing sufficiently effective competitive constraints (Article 102 Guidance (*2009/C 45/02*)).

In the Netherlands, a dominance assessment requires:

- Defining the relevant market, which considers the relevant product and geographic markets.
- Examining whether the undertaking in question is dominant in that market.

The relevant product market is defined based on either demand-side or supply-side substitution. Demand-side substitution is the main consideration, as it is the most effective and immediate disciplinary force on a given product's suppliers. Supply-side substitution can be relevant in specific cases, namely when it:

- Is as effective and immediate as demand-side substitution.
- Leads to similar competitive conditions across the products concerned.

The relevant geographic market is defined by assessing the conditions of competition. Geographic markets can range from local to global, depending on the facts of the case. A common starting point is to identify the areas where the relevant conduct is likely to have effects by identifying the location of the undertakings involved and their customers. Further analysis then focuses on whether both:

- The competition conditions in a certain area are sufficiently homogeneous.
- The area can be distinguished from other areas because the conditions of competition are appreciably different in those areas.

The hypothetical monopolist test is the most common method of assessing the relevant market in abuse of dominance cases. This test identifies the narrowest field of competition (that is, a product or geographic market) that a monopolistic can profitably institute a small but significant price increase (for example, a 5% price increase) without consumers switching to other products or turning to other areas. If such a price increase:

- Leads to profitability and almost no decrease in demand, the relevant market is established.
- Is not profitable, the test continues by widening the market definition to include the products, producers, or geographic zones that exert the tightest competitive constraint on the hypothetical monopolist's pricing. The market definition is widened until the hypothetical monopolist's price increase leads to profitability and almost no decrease in demand, which then establishes the relevant market.

Once the relevant market is determined, dominance is assessed. Like many national competition authorities, the ACM examines market share as the first indicator of an undertaking's dominance (see *Market Share Benchmarks*). Other criteria the ACM considers include:

- The quantity an undertaking sells compared to its competitors.
- The economic power of the undertaking's competitors.
- The undertaking's ability to produce and sell more.
- The ability of new companies to produce the same product and compete.
- The ability of customers and suppliers to oppose the undertaking.
- The ability of customers to pressure for better prices, quality, and innovation.

(See *Monitoring of Fair Competition and Market Forces*, ACM.)

Additional factors found in EU case law include:

- The ability of competitors to apply pressure on a firm with a high market share, as dominance is more likely if rivals are small and lack competitive strength.
- The potential for new competitors to enter the market.
- The presence of countervailing buyer power.
- The content of internal documents, such as documents demonstrating certain market intents of the undertaking under investigation.

These additional factors were exemplified in a case where an undertaking:

- Had rivals that were all small firms.
- Aggressively acquired its rivals.
- Held patents that limited its competitors' ability to offer innovative features.
- Claimed it sold to large retail chains, but buyers had little power since they had no credible alternative supplier to turn to for bargaining leverage.

(Paragraphs 84-96, *Commission Case COMP/E.1/38-113* and see *Legal Update, Commission fines Tomra for abuse of dominant position*.)

Market Share Benchmarks

The Competition Act itself does not provide specific market share benchmarks for:

- A presumption of dominance.
- A safe harbour from dominance.

Dutch competition law follows the European competition law doctrine on the topic of market share benchmarks for dominance. Under EU precedent, a 50% market share creates a presumption of dominance (paragraph 60, *AKZO Chemie BV v Commission (Case C-62/86) EU:C:1991:286*). Dutch courts have applied the *Akzo* presumption (see *Court of Rotterdam, 16 June 20245 (ACM/Apple) ECLI:NL:RBROT:2025:6961*).

In certain circumstances, dominance can be found at lower market shares. For example, the European Commission found an undertaking with a 40% market share to be dominant (*British Airways Plc v Commission of the European Communities (Case T-219/99) EU:T:2003:343* and see Article 102 Guidance).

Joint or Collective Dominance

Article 24 of the Competition Act applies to joint or collective dominance (*gezamenlijke machtspositie*).

Several characteristics of the market in question must be analysed to make a position of collective dominance more probable. Examples of these characteristics include:

- Markets with low dynamism.
- Low demand growth.
- Low demand price elasticity.
- The presence of homogeneous products.
- Similar cost structures.
- Similar market shares.
- High entry barriers (*belemmering markttoegang*).
- A lack of countervailing power on the demand side.

In the Netherlands, collective dominance is difficult to prove and is therefore relatively rare. In 1998, the NMA found collective dominance between the Netherlands Broadcasting Foundation and broadcasting associations (NMA, *Decision of 10 September 1998* (De Telegraaf/NOS HMG)).

Monopsonies

The Competition Act does not specifically address monopsonies, but the Netherlands recognises the concept of monopsonistic dominance (that is, buyer dominance) (Article 7.1, Competition Act Explanatory Memorandum). Buyers have market power when they can depress purchase prices paid to sellers below a competitive price.

In the Netherlands, monopsonies mainly occur in the labour market, where there is growing evidence that employers have market power that enables them to pay below-market wages without losing a substantial number of employees.

In a 2022 speech on labour markets, the ACM's chair noted that while monopsonies in labour markets are rare, they create stable market power that the ACM should be vigilant about (see *Labor markets, competition law's long neglected corner*, ACM, 27 June 2022).

Types of Conduct That May Be Deemed Abuses of Dominance

Once the ACM finds an undertaking dominant, it assesses whether the undertaking abused its dominance. The tests used to determine an abuse of dominance are:

- Whether the conduct, by itself, is sufficient to indicate an abuse of dominance.
- Whether the conduct is presumed to be an abuse of dominance.
- A structured test where a set of conditions must be met before conduct is an abuse of dominance.
- An assessment of relevant circumstances before an abuse of dominance is identified.

The structured test is mostly used, although in some instances the assessment-based test is required. For example, in a case involving Google in which its conduct fell outside traditional types of abuse, an overall assessment of Google's conduct led to a finding that Google abused its dominance (*Google LLC v European Commission (Case C-48/22 P) EU:C:2024:726* and see *Article, Google Shopping: abuse of a dominant position*).

The Competition Act does not provide a list of the types of conduct that can be an abuse of dominance. However, the Competition Act Explanatory Memorandum lists several forms of abuse:

- Directly or indirectly imposing unfair purchase or sales prices or other unfair contractual terms.
- Limiting production, marketing, or technical development to the prejudice of consumers.
- Applying dissimilar conditions for equivalent services to trading partners, which restricts competition.
- Conditioning the conclusion of a contract on requiring other parties to accept supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

In practice, the main categories of abuse of a dominant position are:

- Exclusionary abuse (see *Exclusionary Abuse*).
- Exploitative abuse (see *Exploitative Abuse*).

Exclusionary Abuse

Exclusionary abuse is conduct that forecloses rivals. The primary forms of exclusionary abuse are predatory pricing and exclusive dealing.

Predatory pricing occurs when a dominant undertaking charges lower short-term prices to force out long-term competition. A claim of predatory pricing requires proof that prices are below a certain cost level and that the pricing could harm equally efficient rivals. A dominant undertaking's prices that are:

- Below average variable cost are presumed abusive.
- Above average variable cost but below average total cost are abusive if the pricing is part of a plan to eliminate competitors.

Exclusive dealing occurs when a dominant undertaking requires or gives incentives, such as exclusivity discounts or loyalty rebates, to customers that only deal with the dominant undertaking. This excludes competitors from the relevant market and distorts fair competition.

Exploitative Abuse

Exploitative abuse occurs when an undertaking directly or indirectly imposes unfair prices or other trading conditions on its customers (Article 102(a), TFEU). Excessive pricing (*onbillijk hoge prijzen*) and unfair terms are classic examples of exploitative abuse.

There are no clear rules for when a price is excessive. The CJEU has analysed whether prices are excessive by considering whether both:

- There is an excess between the price the dominant undertaking:
    - charged in the relevant market; and
    - would have hypothetically charged if there was effective competition in the market.
- The price difference is due to:
    - the dominant undertaking abusing its market power; or
    - other legitimate reasons.

(See *United Brands Co. v Commission (Case C-27/76) EU:C:1978:22* and *Autortiesibu un Komunicesanas Konsultaciju Agentura/Latvijas Autoru Apvieniba v Konkurences Padome (Case C-177/16) EU:C:2017:689*.)

Unfair terms focus on whether contractual terms give the dominant undertaking an unfair advantage. Cases involving unfair terms are uncommon in the Netherlands.

Discrimination is often considered a secondary-line injury. Article 102(c) of the TFEU notes discrimination as an abuse where a dominant undertaking applies dissimilar conditions to equivalent transactions with other trading parties, which places them at a competitive disadvantage.

Enforcement Priorities in the Netherlands Regarding Dominance

Currently, the ACM is focusing on:

- Stimulating an open and fair digital economy.
- Accelerating the energy transition.
- Developing a sustainable economy.

(*Agenda*, ACM.)

The ACM wants to ensure safety in digital environments by taking action against deception, abuse, and manipulation in online sales and gaming. For example, the ACM is:

- Addressing companies that abuse their customers' dependency on their software or platforms.

- Willing to work with other supervisors in the Netherlands and Europe to enforce the rules against spreading disinformation and hate on social media. Companies will be briefed about their rights and obligations under new digital legislation, including:
    - the Digital Services Act (*(EU) 2022/2065*);
    - the Digital Markets Act (*(EU) 2022/1925*); and
    - the Data Act, which takes effect in September 2025.

In accelerating the energy transition, under which the Netherlands aims to use energy from only sustainable sources by 2050, the ACM wants to protect consumers against unreasonable prices, misleading recruitment, and unreliable suppliers by reducing grid congestion by implementing measures for flexible grid use. The ACM is also focused on providing information about new possibilities under the Dutch Energy Act, such as energy sharing and energy communities.

To help develop a sustainable economy, the ACM wants to:

- Stimulate companies to make sustainability claims that are fair and clear.
- Advise companies on how to cooperate within competition rules to promote a sustainable economy and innovation.
- Prepare for the supervision of new European rules for international corporate responsibility by large companies.

Other Considerations

Frequency of Abuse of Dominance Cases

The ACM handles a relatively low number of abuse of dominance cases, likely due to expense and the agency's strong focus on cartels. The ACM has also acknowledged that, since the leniency program does not apply to unilateral conduct, cartel cases are generally easier to prove than abuse of dominance.

Since 1998, the ACM has handled approximately two abuse of dominance cases each year and has denied 108 requests for enforcement. Approximately 70% of the cases undertaken ended with the ACM concluding that there was no abuse or that abuse could not be established.

The ACM has also suggested that the sector-specific regulations relating to former state monopolies have reduced the relevance of the general abuse of dominance framework in the Netherlands.

Nevertheless, in 2021, the ACM found an abuse of dominance in two cases (see ACM, *Case ACM/19/035630 (24 August 2021)* (Apple) and *Case ACM/20/041239 (1 July 2021)*). Both cases concerned exploitative abuses, while the case against Apple also included an underlying exclusionary element.

Potential Changes to Competition Act

There is current discussion on removing Article 24(2) of the Competition Act, which exempts mergers from being an abuse of dominance, due to the CJEU's judgment in *Towercast v Autorite de la concurrence (Case C-449/21) EU:C:2022:777* (Towercast)). In a letter to Parliament after the *Towercast* judgment, the Minister of Economic Affairs touched on the

undesirability of Article 24(2) of the Competition Act, stating that national competition law should be aligned as closely as possible to EU competition law.

Abuse of Economic Dependence

The Netherlands has no specific regulation prohibiting the abuse of economic dependency. However, in Dutch civil law court cases, especially those concerning a refusal to supply or the abrupt termination of a supply relationship, parties have invoked the existence of an abuse of economic dependence or a similar argument.

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