



LOYENS & LOEFF

EU COMPETITION TEAM

Competition law in the Netherlands in 2020

An annual overview by the EU Competition Team of Loyens & Loeff N.V.

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EU COMPETITION TEAM



Despite the challenges of the Coronavirus crisis, it has been an intense and successful year for our Competition Team, in which we accelerated our growth of the last years.

- **High-profile mergers** - We were involved in several high-profile strategic merger cases (including three phase II merger proceedings and complex phase I proceedings in **DPG-Sanoma** – see p. 7).
- **New important assignments** - We received important new assignments from high-profile clients.
- **Cartels, abuse of dominance and competition litigation** - We continued to act in important cartel cases. Our Competition Litigation Team worked on various cartel damages claims procedures and is currently involved in a procedure relating to the alleged manipulation of the JPY LIBOR interest rate.
- **Technology focus pays off** – We are on track in our aim to become a market and thought leader in the technology sector.
- **Our Healthcare** (Band 1 Chambers), **Food**, and **Life Sciences Teams** (the latter two Teams both rank Tier 1 in Legal 500) are fueling the competition practice with new clients and assignments.
- **We moved offices!** We look forward to welcoming you in our brand new office building **Hourglass**. Look right for a **sneak preview** of the interior!

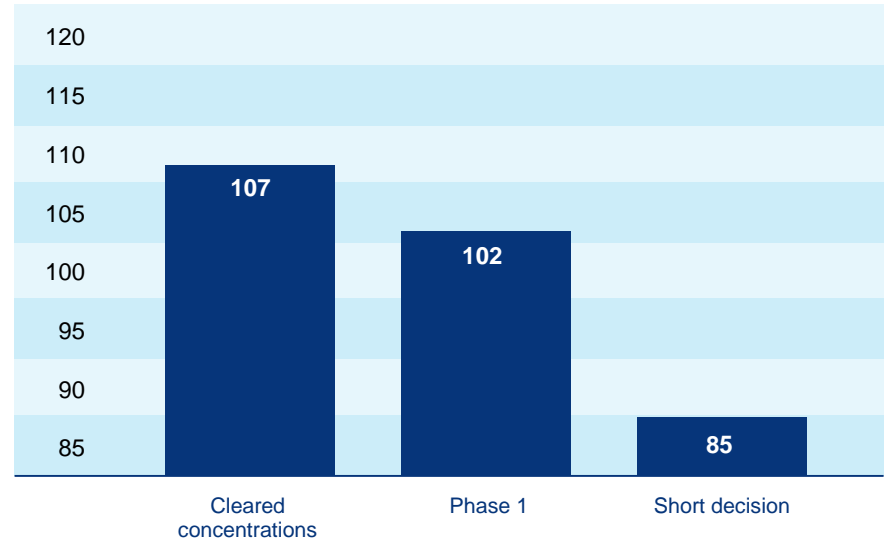
For Dutch competition law in general, 2020 has also been a very interesting year. A landmark case was the Rotterdam district court's **annulment of the first ministerial approval** of a merger that was prohibited by the Authority for Consumers & Markets (**ACM**) (**PostNL/Sandd** – see p. 6). No less than five phase II merger decisions were taken (with a sixth case being withdrawn very late into the process). In addition, the ACM published its first cartel fines decisions in nearly five years (including a total of **EUR 82 million** of fines being imposed on the major tobacco producers in the ACM's first decision relating to **an indirect exchange of information** between competitors – see p. 11). The ACM also investigated alleged abuses of a dominant position by pharmaceutical companies (see p. 15). Finally, the ACM issued three important statements regarding the application of competition law during the **COVID-19 pandemic**. One of these **landmark cases** was handled by **our Competition Team** – see p. 14.



Numbers:

In so far published per 1 January 2021, the ACM has taken the following decisions in merger cases:

1 st phase decisions	
Short form decisions	85
Full decisions	17
Permit required	3
Exemption from standstill obligation	0
Remedies required	3
2 nd phase clearance decisions (2 with remedies)	
	5
Referral to the European Commission	
	0
Prohibition decisions	
	0



Highlights:

Page 6: The Rotterdam District Court has annulled the ministerial approval of a merger between the two remaining postal operators (*PostNL/Sandd*).

Page 7: The ACM has cleared the acquisition by DPG Media of Sanoma's Dutch media activities.

Page 8: The ACM allowed a merger between travel organisations and remains strict where healthcare mergers are at stake.

Page 9: The ACM has conditionally cleared two mobility joint ventures, subject to behavioural remedies



Rotterdam District Court annuls ministerial approval of PostNL/Sandd merger

- Following a Phase II investigation, the ACM prohibited the acquisition of Sandd by PostNL, which would create a near-monopolist in the Dutch postal market. Following this prohibition decision, for the first time in history the Dutch government cleared the concentration in the ministerial review procedure (phase III).
- In a judgment dated 11 June 2020, the **Rotterdam District Court annulled** the decision of the Dutch State Secretary of Economic Affairs by which the State Secretary had allowed the acquisition of Sandd by PostNL in the public interest.
- The State Secretary had attached a number of **conditions** to the clearance. For example, the merged entity's pricing should be based on actual costs and access for third parties to the merged entity's network should be guaranteed.
- Two of such third parties which are dependent on PostNL's (enlarged) network disagreed with this decision and appealed against it. In its judgment, the court found that the consultation period of four days that was given to third parties to present their views on the obligations to provide network access was too short.
- Furthermore, the court found that the State Secretary had **demonstrated insufficiently that the concentration would indeed be in the public interest**. In particular, the court found that the State Secretary had rebutted insufficiently the ACM's finding (supported by experts) that the universal postal service entrusted to PostNL could also be maintained without the acquisition of Sandd.
- Finally, the court held that it was foreseeable that a large proportion of Sandd's employees would lose their job, which had also become reality.
- The State Secretary has suggested that she will appeal the judgment. It is unclear whether in the meantime she will take a new decision as to whether or not to grant a permit. The implications of the judgement for the consummation of the acquisition, which had already taken place, are therefore equally unclear.



ACM allows acquisition of Sanoma's Dutch media activities by DPG

- **In brief:** The ACM unconditionally cleared the acquisition of publishing company Sanoma Media Netherlands by rival publisher DPG Media after a prolonged phase I investigation. After the acquisition, there will be sufficient competition, also on the market for free online news and on the online-advertising market.
- The ACM's investigation focused in particular on the effects of the concentration (i) on competition between Sanoma's news portal NU.nl and the free online news offered by DPG Media's national newspapers, and (ii) on competition on the online-advertising market. The ACM has also assessed whether the acquisition would have any significant impact on the position of freelance journalists.
- Sanoma Media Netherlands owned NU.nl, which is a popular source of **free online news** in the Netherlands. All newspapers owned by DPG Media each have their own websites that also offer free news. The ACM concluded that, after the acquisition, sufficient other providers of free online news would remain on the market.
- The ACM's also concluded that, after the acquisition, there will be sufficient competition on the **advertising market**. The online advertising market has grown considerably over the past few years and is expected to continue to grow over the next few years. On the online advertising market, competition is fierce, particularly from international tech firms such as Google and Facebook.
- Finally, **freelance journalists** expressed concerns about their bargaining positions. The ACM however concluded that the acquisition would not have any significant impact on their positions. The DPG Media/Sanoma combination only seeks the services of a modest number of freelance reporters when looking at the total number of freelance reporters in the Netherlands. As a result of the acquisition, DPG Media-Sanoma would not gain a position which is too strong when hiring freelance journalists.
- DPG Media was represented by **Loyens & Loeff**.

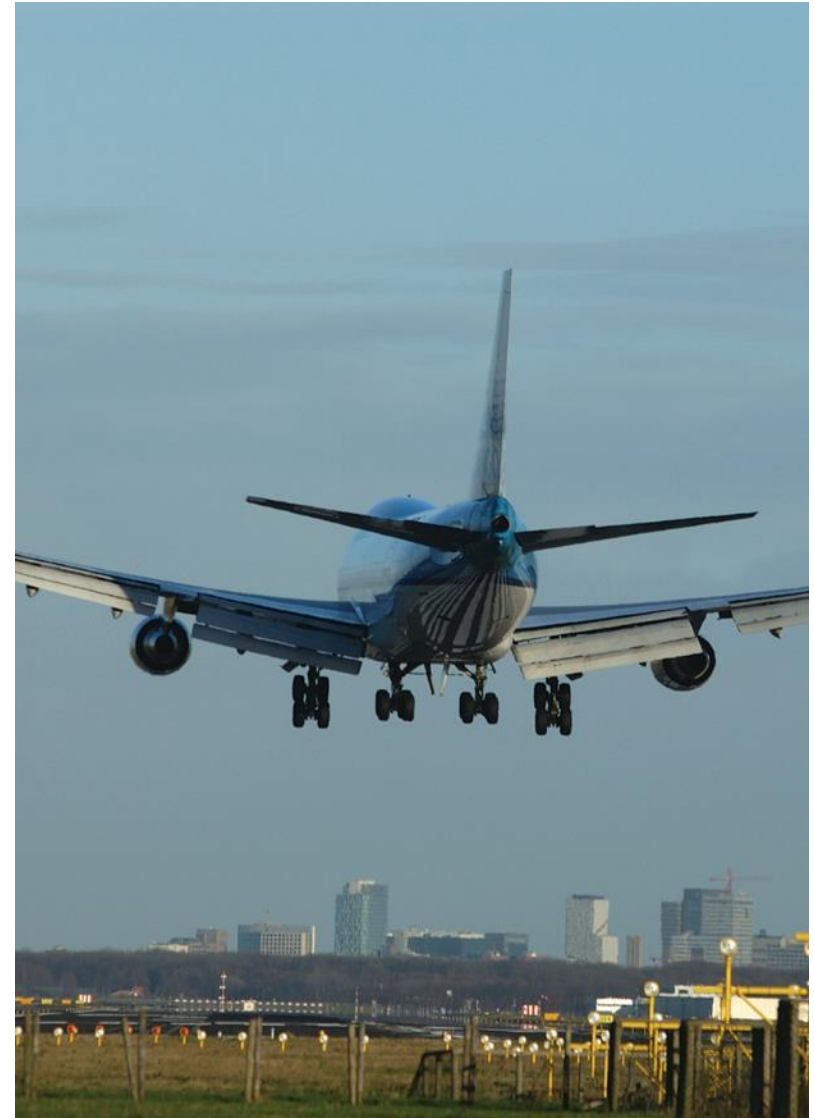


ACM allows merger between travel organisations

- **After a lengthy phase II investigation**, the ACM cleared the acquisition of Dutch tour operator Corendon by its rival Sunweb on 26 October 2020. The ACM concluded that, after the acquisition, sufficient competition will remain on the market, although the number of large tour operators would be reduced from three to two. Apart from Sunweb and Corendon, TUI would remain on the market as a major competitor, and several smaller tour operators also offer package tours.
- The ACM's investigation indicated that consumers looking for beach holidays consider several countries, and that price is often the deciding factor. Sunweb and Corendon proved not to be each other's main competitors. Smaller competitors and new entrants remain able to exert competitive pressure alongside TUI. In addition, a large group of consumers consider purchasing individual components (plane tickets and hotel reservations) separately as an alternative for package holidays.
- The **coronavirus (COVID-19) crisis** erupted during the assessment of this acquisition. The ACM held that it is difficult to predict what the effects of the crisis will be. This is why the ACM only looked at the market situation as it was immediately prior to the outbreak of the pandemic.
- On 12 November 2020, Sunweb decided to **abandon the transaction**. Attempts by Corendon to enforce the transaction in court have thus far been without any success.

ACM remains strict in healthcare mergers

- In 2020, the ACM remained very strict in its assessment of mergers in the **healthcare sector**.
- No less than three of the five phase II cases related to this sector.
- In two of these cases, **remedies** were required in order to obtain approval.



ACM clears mobility-as-a-service (MaaS) joint ventures subject to behavioural remedies

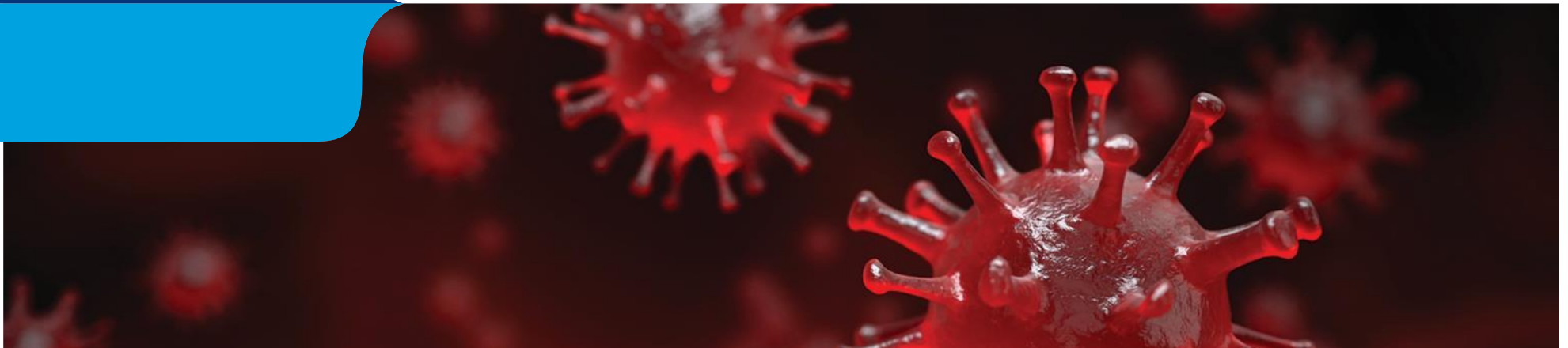
- The ACM has cleared a joint venture between NS (the Dutch railways) and Pon, which will operate an app that allows consumers to plan, book and pay for their trips, combining different modes of transportation. The ACM has granted clearance on the condition that NS offers its train services and bicycles in its bike-rental system (*OV-fiets*) to the new company's competitors under the same terms and conditions. The ACM believes that this will allow other companies to remain able to create competitive travel apps, and that it will ensure that sufficient competition between travel apps will continue to exist.
- A second joint venture was set up between NS and the municipal public-transportation companies in the three largest Dutch cities, Amsterdam (GVB), Rotterdam (RET) and The Hague (HTM). Again, the ACM attached strict conditions to its approval of the proposed platform. For example, NS, GVB, HTM and RET must offer other mobility providers and MaaS-providers access to the platform under equal conditions. In that context, they cannot demand exclusivity. In addition, the four companies committed to make their transit services (bus, tram, subway and train services) available to MaaS-providers, regardless of whether these MaaS-providers are connected to the platform. In addition, the participants promised to ensure that mobility providers and MaaS-providers (including the participants themselves) will not obtain any access to commercially sensitive information.



2. Cartels & Antitrust

A. Main Developments

B. Court Appeals Regarding ACM Decisions



Facts 2020

- Two investigations into a potential cartel were launched
- One ongoing investigation was closed without the imposition of sanctions.
- Two enforcement requests to the ACM were made public, both of which were denied .
- In three instances, fines were imposed.

Tobacco Manufacturers

- On 29 September 2020, the ACM announced that it had imposed fines totalling more than EUR 82 million on four major cigarette manufacturers. The ACM believes that between July 2008 and July 2011, they distorted competition. According to the ACM, they exchanged information via wholesalers and retailers, about future cigarette prices of cigarette packs.
- Each cigarette manufacturer determines its own retail resale. This price is always printed on the package. By law, retailers may not determine resale prices. All manufacturers send their new price lists to wholesalers and retailers several weeks before the new prices take effect. Often upon request of the manufacturers, the price lists were passed on to competing manufacturers before the new retail prices came into effect. The ACM concluded that the manufacturers did in practice also use the information about their competitors when determining their own retail prices for cigarettes..
- ACM chairman Snoop: *“It was common practice for cigarette manufacturers to receive information from wholesalers about the retail prices of their competitors’ cigarette packs before those prices came into effect. With that information, the manufacturers were able to adjust their prices to their competitors’ prices in advance. That distorts competition. The manufacturers knew that exchanging this type of information was at odds with competition rules. However, that did not lead to changes in their behaviour.”*
- The decision marks the first occasion on which the ACM has imposed fines for an **an indirect exchange of information**.
- **Loyens & Loeff** represented a wholesaler in the context of the investigation. It did not receive a fine as the ACM established that it did not take part in the cartel infringement.

Bid-rigging cartels

Roofing contractors

On 20 July 2020, the ACM announced that it had imposed fines (totalling a mere EUR 24,000) on two roofing contractors for distorting competition in a tender process. The customer had started a tender process in order to get the best price for a roof renovation project, inviting four contractors to submit bids. The ACM concluded that two roofing contractors had secretly coordinated their bids prior to the tender process. These were the first cartel fines of the ACM made public since December 2015.

Civil engineering

On 3 December 2020, the ACM announced that it had imposed fines totaling EUR 330,000, on four construction companies for concluding illegal arrangements in three tender processes in the civil-engineering sector in the municipality of Amsterdam. In one or more tender processes, these companies had coordinated the bids they would submit.



New Draft Sustainability Guidelines

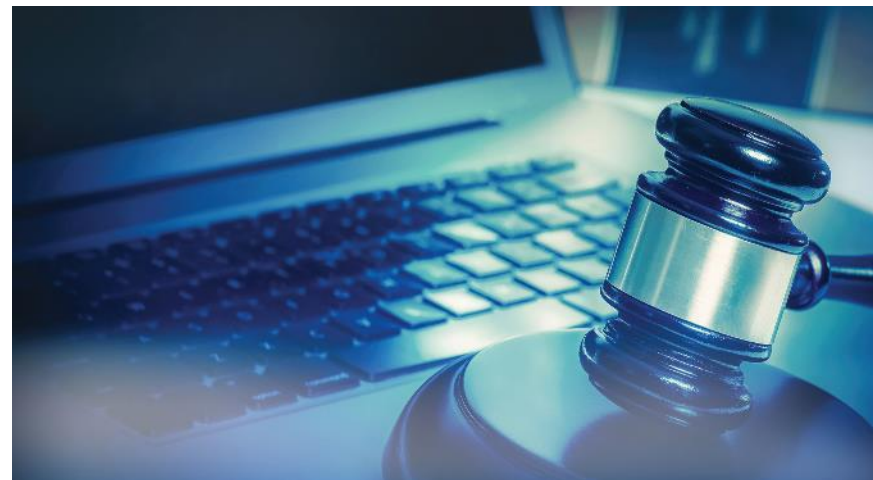
On 9 July 2020, the ACM published its draft [Guidelines on sustainability agreements](#). The main points of the Guidelines, which are also [available in English](#), are the following:

- In cases where agreements with the aim of promoting sustainability restrict competition, they will be permitted if certain conditions are fulfilled. One of these conditions is that the benefits of the collaboration must outweigh the disadvantages. A new feature in the draft Guidelines is the way in which these benefits are weighed against the disadvantages.
- Under the new rules, **the trade-off shall be assessed differently**: the benefits for society as a whole must be equal to or greater than the disadvantages for users. The ACM believes that if the benefits for society as a whole are taken into account, the benefits will more quickly outweigh the disadvantages. The agreement will then be permitted.
- The draft Guidelines also include some simplified conditions. For example, it is no longer necessary to carry out a numerical analysis in all cases. In some cases, it will suffice to give a full account of the benefits and disadvantages, for example if the combined market share of the undertaking entering into the agreement is below 30% or the benefits clearly outweigh the disadvantages.
- Finally, ACM will **not impose any fines** for joint agreements where companies have clearly followed the Guidelines in good faith, but ultimately do not meet all the conditions in the ACM's opinion. In such case, the ACM will only ask for the agreements to be amended.

The ACM has not announced when it intends to publish the final version of the Guidelines.

New investigations

- On 20 February 2020, the ACM announced that it has started an investigation into a possible buyer cartel involving certain reusable waste products. As part of this investigation, the ACM conducted dawn raids at the premises of various buyers of these waste products. The ACM suspects that the buyers secretly made illegal arrangements involving the purchase price. The ACM also suspects that the buyers divided suppliers among themselves. As a consequence, the suppliers' ability to sell would have been restricted. No further details about the state of this investigation have been announced.
- On 18 September 2020, the ACM announced that it is conducting an investigation into a possible cartel in the home-decor sector. As part of that investigation, the ACM had conducted several dawn raids at various businesses. The ACM suspects that various suppliers instruct retailers about the prices they should charge to their customers for their products. Furthermore, ACM suspects that these suppliers have also concluded illegal agreements between each other about the prices that they charge to these retailers. No further details of the investigation have been made public.





Study on big tech and payments: ACM pleads for level playing field

On 1 December 2020, the ACM published the results of its market study into the activities of 'Big Tech' companies such as Apple, Facebook, Ant Group (Alibaba) and Amazon, in the (online) payments market. The role of Big Tech companies in the payments market has remained rather modest thus far, but the ACM observes that Big Tech companies are strengthening their market positions through acquisitions and collaborations. Big Tech companies are increasingly offering their own payment facilities, both online and at the point of sale.

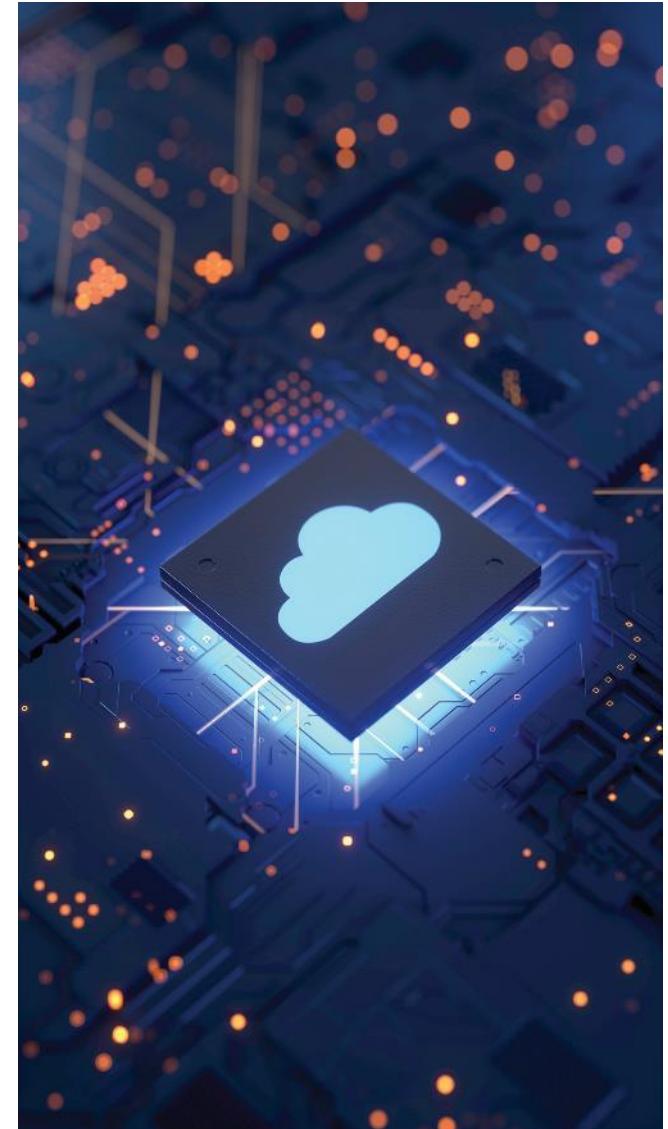
The ACM advocates the creation of a level playing field for all providers of payment services, now and in the future. The ACM believes that Big Tech companies should ensure that their platforms or devices are suitable for use by all payment service providers, just as the banks currently need to ensure for ATMs. According to the ACM, only a level playing field allows payment service providers to continue to compete and innovate, as a result of which consumers shall keep their freedom of choice.



Investigation into the effects of algorithms on competition

On 10 December 2020, the ACM launched a pilot on the monitoring of the operation of algorithms in commercial practices amongst market players and the consequences these may have. The ACM wants to use this knowledge to inform market parties on what they can expect in the case that the ACM starts an investigation into their algorithms. The ACM is doing the test in cooperation with Muziekweb, an online music library. On the same day, the ACM published a position paper on the monitoring of algorithmic applications. This position paper is a starting point from which the ACM wants to further develop this monitoring. The paper provides general guidance for investigations into infringements in which algorithmic applications play a role.

For the ACM, algorithmic applications are relevant when they play a role in activities which fall within the ACM's supervisory areas, such as activities that have an impact on consumers or market operators. Algorithmic applications can, for example, steer supply and demand on the energy market, lead to price discrimination or cartels between market operators, or guide consumers towards purchasing decisions that are against their own interests.



The ACM's oversight during the coronavirus crisis

In a press release dated 26 May 2020, the ACM announced that where companies see a need to cooperate in order to overcome the challenges of the coronavirus crisis, the ACM will always try to find the right balance between the interests of all parties involved and will not take any action if that balance is found. On the other hand, the ACM emphasises that companies should not take advantage of the current crisis for agreements or practices that, under normal circumstances, would not be allowed either, such as price-fixing or abusing a dominant position.

Collaboration between healthcare insurers

In a press release dated 21 April 2020, the ACM announced that it would not object to agreements by healthcare insurers to support healthcare providers together, with the aim of contributing to their continuity. These agreements were deemed necessary to save healthcare providers from bankruptcy, because they cannot treat or treat fewer patients where they are not directly involved in helping corona patients. The healthcare insurers had agreed on a generic arrangement, based on a fixed percentage of the turnover achieved with the relevant health insurer, allowing for payment of fixed costs, freelance personnel and subcontractors. The ACM ruled that this agreement was necessary to offer care during and after the crisis. For the ACM, it was important that the health insurers engage an independent agency to calculate the amount of each contribution. Individual health insurers are also always allowed to do more to help healthcare providers (the agreement offers a minimum only). Finally, the ACM took account of the fact that the agreements are also of a temporary nature and do not go beyond what is necessary.

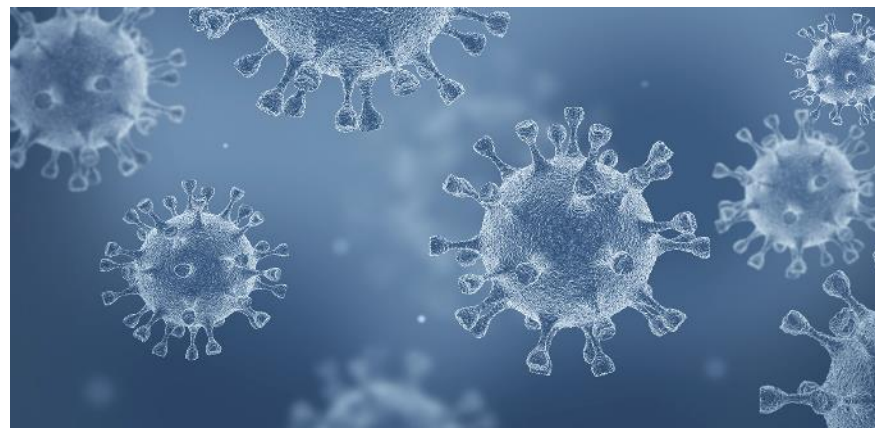
Cost-sharing between healthcare insurers

For 2020, the ACM allowed Dutch healthcare insurers to distribute the additional costs of the effects of the coronavirus (COVID-19) crisis among themselves. The ACM has come to this conclusion in reply to questions posed by health insurers. Without the arrangements described in the above paragraph, the continuity of health care provision could be at risk. In a letter to the insurers dated 26 October 2020, the ACM explains that, in normal times, such arrangements would infringe the cartel prohibition. However, the outbreak of the novel

coronavirus in the spring of 2020 led to an unprecedented level of uncertainty and urgency. The ACM has therefore decided that an arrangement regarding mutual equalisation for the year 2020 is necessary in order to guarantee the continuity of health care. [Loyens & Loeff](#) acted for the Dutch Association of Healthcare Insurers in this matter.

Cooperation hospitals, pharmacies and wholesalers

In a press release dated 26 May 2020, the ACM announced that hospitals, hospital pharmacies, and pharmaceutical wholesalers are allowed to collaborate closely during the current coronavirus outbreak in order to prevent or reduce any shortages of essential drugs. To that end, a National Coordination Center for Prescription Drugs (LCG) was set up. The LCG assesses supply and demand for 14 essential drugs and coordinates the allocation and distribution thereof among hospitals. These drugs are needed in the IC units and for surgeries (including emergency surgeries). Demand for these drugs has risen tremendously as a result of the current crisis. By coordinating procurement and distribution of these drugs, shortages may be prevented. The ACM finds that the proposed collaboration is transparent, temporary and necessary for the prevention of shortages. In addition, measures have been implemented in order to ensure that wholesalers are not able to exchange any information on prices or inventories.



Investigation into AbbVie terminated

In a press release dated 24 September 2020, the ACM announced that pharmaceutical manufacturer AbbVie has agreed that it will not force hospitals to purchase exclusively or to a large extent from AbbVie through discount schemes. AbbVie has done so following an investigation by the ACM. The ACM believes that this will ensure that, once a patent has expired, there will be more room for new competing drugs (biosimilars). As a result hereof, the ACM decided to close its investigation into anti-rheumatic drug Humira, and into possible abuse of a dominant position by AbbVie.

Investigation into Leadiant intensified

By contrast, in a press release dated 29 June 2020, the ACM announced that it had intensified its investigation into the orphan drug chenodeoxycholic acid (CDCA) manufactured by Leadiant. CDCA is prescribed for the treatment of the rare metabolic disease cerebrotendinous xanthomatosis (CTX). In the Netherlands, approximately sixty people suffer from CTX. Leadiant charges approximately 153,000 euros for the treatment per patient per year.

Following a complaint, the ACM launched an investigation into the high prices of CDCA manufactured by Leadiant. The ACM is in the process of investigating whether these prices are excessive. In order to answer this question, the ACM has conducted an extensive study into the market conditions, the price of the drug, the costs associated with the drug, as well as the price increases implemented by Leadiant. As part of this study, the ACM requested information from the supplier of the raw material for CDCA and from the distributor of the drug in the Netherlands. The ACM has announced that in the context of this investigation, it also works together with competition authorities in other countries. In the press release, the ACM declares that it “*expects to complete its factual investigation after the summer*”. However, no further statements have been issued since and it seems that the investigation is still ongoing.



Trade and Industry Appeals Court (CBb)

Reduced fine due to coronavirus crisis

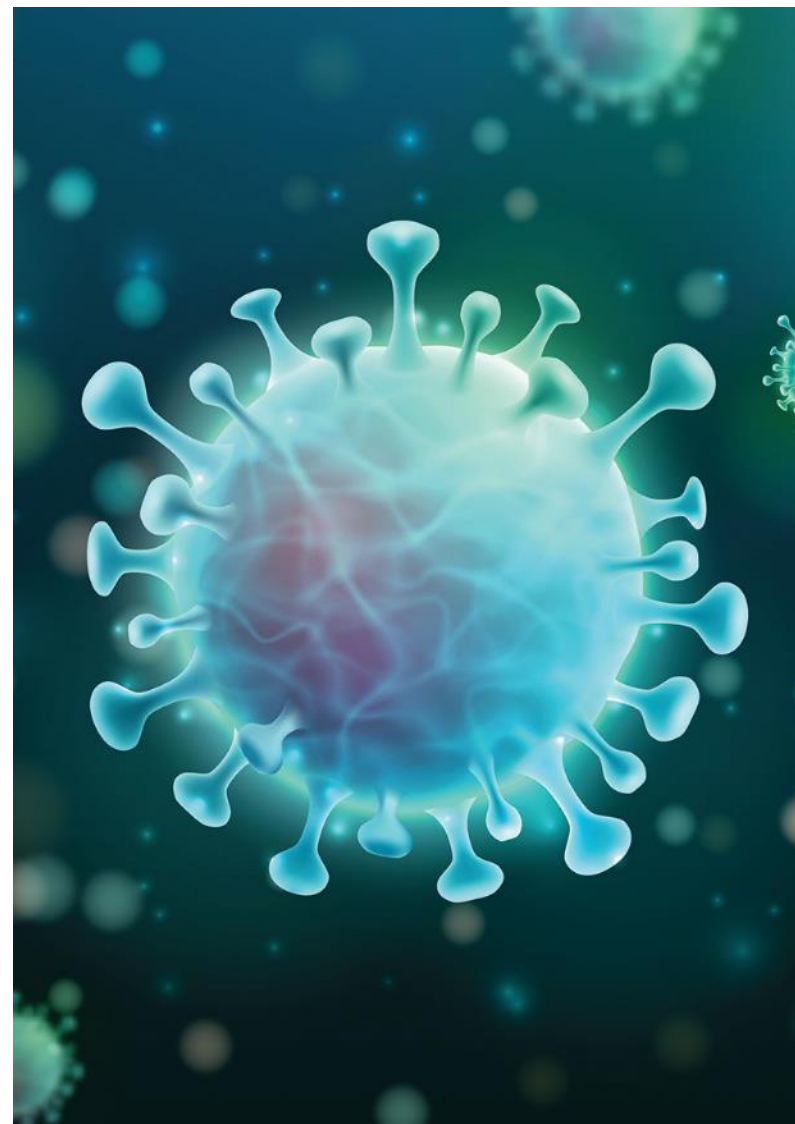
In an appeal judgment dated 18 August 2020, the CBb came to a significant reduction of a cartel fine imposed on a company active in an unnamed sector, due to very special recent circumstances. The fined company would have to wait too long for a final decision and would possibly go bankrupt due to the consequences of the coronavirus crisis. The fine on this company was reduced by the court from EUR 1 million to merely EUR 10,000. The judgment follows a decision of the ACM, not yet published but apparently taken in the beginning of 2017, that three companies had secretly entered into price agreements with the aim of limiting competition. According to the ACM's press release, the Rotterdam District Court confirmed this finding in 2018 in a judgment that equally has not yet been published. The ACM states that the decision in which ACM established the company's infringement has become irrevocable.

Amsterdam Court of Appeals

No abuse of dominance by housing website Funda

In an appeal against a judgment by the Amsterdam District Court, the Amsterdam Court of Appeals dismissed on 26 May 2020 accusations by real estate agents' association VBO that Funda – a website with a real estate platform co-owned by VBO's much larger competitor NVM – would have abused its dominant position. Funda was accused of preferencing advertisements of NVM members through lower fees, more enhanced website functionalities and a higher ranking on the platform. Furthermore, VBO argued that Funda's refusal to grant access to a database of NVM with historic sales information of past property sales by NVM-members constituted an abuse. The District Court had ruled earlier that Funda was indeed dominant but had not abused its position.

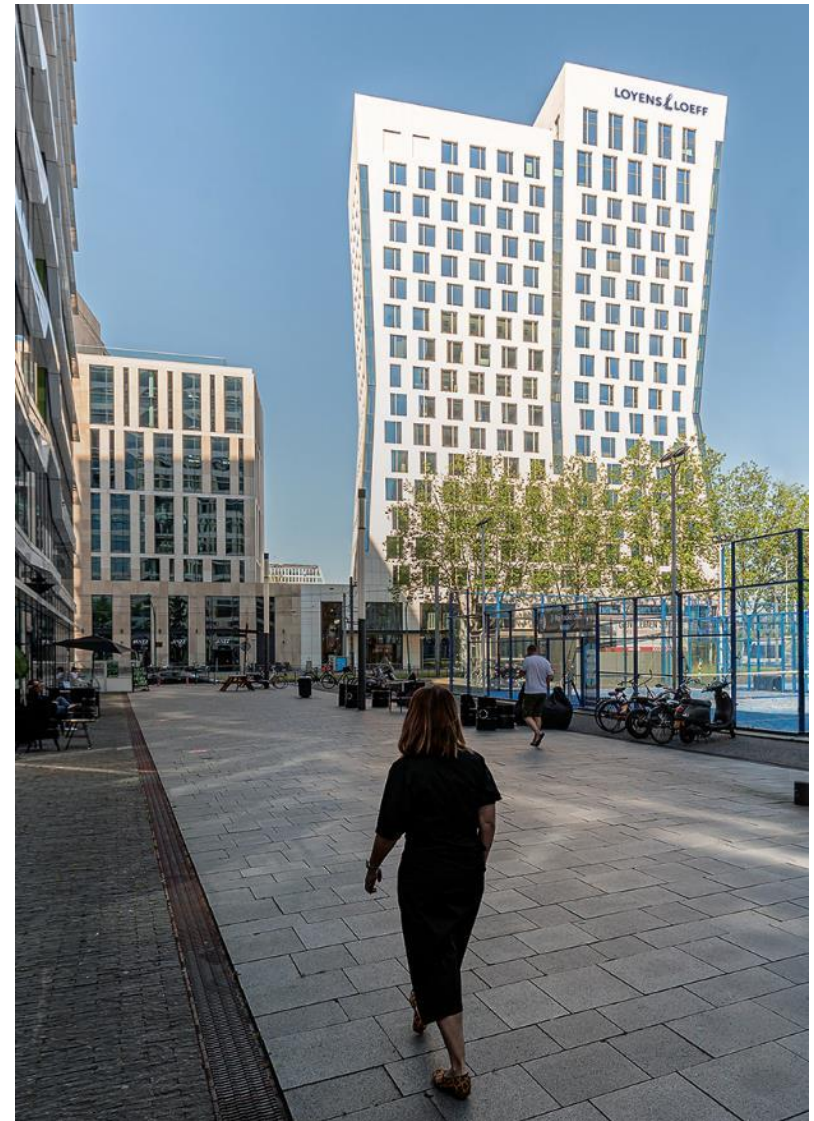
The Court assumed that this finding of dominance was correct and only addressed the question whether this position was being abused. The Court held in this respect that VBO needed to demonstrate that the alleged abusive conduct by Funda had an actual negative effect on the competitive position of VBO on the downstream market for real estate agencies. The Court continued to observe that **only a finding of discriminatory conduct as such by a dominant company does not suffice to establish an abuse**. VBO had failed to establish the actual negative effects of the discriminatory conduct on the market structure (supply and demand side), barriers to entry and other relevant factors. Consequently, its appeal was rejected.



4. What 2021 may bring



- Closer scrutiny in merger cases is likely to continue, in particular in the healthcare sector.
- 2020 saw the first publicly published cartel fines since 2015. Will we see more cartel fines in 2021?
- The Digital Economy will remain one of the spearheads of the ACM's enforcement agenda, with the investigations into Apple's App Store (see last year's edition) and the role of 'Big Tech' on the payments market being potential landmark cases to look out for in 2021.
- The coronavirus crisis will undoubtedly continue to leave its mark on the ACM's enforcement policy during at least the first 6-9 months of 2021.
- The ACM also announced that the energy transition will be one of its points of focus in 2021.
- ...and Loyens & Loeff looks forward to a continued fruitful cooperation with you!



“The coronavirus pandemic has enormous consequences for the economy. Some sectors are being hit hard, such as catering, events, public transport, shops and the travel industry, while others are growing. We want to do our part to combat the negative effects on the economy and prevent markets from becoming permanently disrupted. As an independent government organisation, we have a social responsibility to contribute to solving problems in society. The laws that we supervise offer opportunities to respond to this.”



5. Contact details

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Gert-Wim van de Meent

Attorney at law

Partner

Gert-Wim van de Meent specialises in EU law, competition law (merger control, antitrust and state aid), procurement law and healthcare law. His main focus is on regulated sectors such as food, healthcare & life sciences. He is currently heading the integrate legal/tax Food & Beverages team. Gert-Wim was a member of Loyens & Loeff's Executive Board between 2016 and 2018.

Gert-Wim is professor of European and national procurement law at the University of Amsterdam and regularly publishes in academic literature.

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Marc Wiggers

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Marc gives advice on the application of competition rules (cartel prohibition, ban on abuse of dominance, prohibition on state aid and merger control) and has broad experience litigating in this area, for instance in cartel and damages proceedings.

He is a member of the Loyens & Loeff Competition Litigation Team and the Corporate Investigations Team. He focuses on regulated sectors such as tech, life sciences, pharma and the financial sector.

Marc is senior lecturer at the Grotius Academy where he teaches postgraduate courses in healthcare and competition law. He also teaches at universities on a regular basis. He gives lectures and publishes frequently in professional journals on issues relating to competition, tech and healthcare law.

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Counsel

Marc specialises in EU law and competition law (merger control, anti-trust and state aid). He has broad experience in proceedings before the European and Dutch courts, the European Commission and the Dutch Competition Authority. He has also assisted clients in complex cartel damages proceedings and has been involved in various important state aid matters. Marc is editor of the Tijdschrift voor Staatssteun (a State aid journal).

Marc is a member of the Loyens & Loeff Competition Litigation Team. He also is a member of the Netherlands Association for European Law and the Netherlands Association for Competition Law. He has published various articles on competition law and is a regular speaker at conferences.

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We wish you
all the best for 2021!

