



*Please note that, although every effort has been made to ensure this translation is accurate and consistent, it is for informational purposes only. In case of any dispute or inconsistencies, the Dutch version is authentic.*

## ACM's guidelines for simplified resolution of cases involving a fine

The Netherlands Authority for Consumers and Markets,

considering ACM's power to impose fines for violations of statutory provisions it enforces<sup>1</sup> and considering Section 4:81 of the Dutch General Administrative Law Act (Awb);

decides the following:

### I Introduction

1. ACM has the power to impose fines on individuals or undertakings for violation of various statutory provisions. If an individual or undertaking involved in such a case is prepared to acknowledge the violation, and to accept a fine for that violation, ACM can decide to simplify the procedure for that case. ACM will then issue a streamlined fining decision. This will finally resolve the case and avoid protracted legal proceedings. In return, ACM will lower the fine by 10%.
2. ACM has gained experience with simplified resolution in several competition and consumer cases.<sup>2</sup> With these guidelines, ACM provides clarity regarding the process that has been established. The guidelines provide information about the basic principles, rules, and procedural steps that ACM applies. This process will continue to evolve.

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<sup>1</sup> In particular Section 4.21, paragraph 1 of the Dutch Public Procurement Act 2012; Section 3.8, paragraph 1 of the Dutch Public Procurement Act with regard to Defense and Security; Section 77i of the Dutch Electricity Act 1998; Section 60ad of the Dutch Gas Act; Section 12l, paragraph 3 and Section 12m, paragraphs 1 and 2, of the Establishment Act of the Netherlands Authority for Consumers and Markets; Section 45f, paragraph 1, preamble, and under a, of the Dutch Pilotage Act; Section 56, preamble, and part a, Section 70a, preamble and part a, Sections 71, 73, 74, preamble and parts 1° through 5°, under a, and Section 75, preamble and part a, of the Dutch Competition Act; Section 49, paragraph 1, of the Dutch Postal Act 2009; Section 76, paragraph 2, preamble, and under a, of the Dutch Railway Act; Section 15.4, paragraphs 2 and 3, of the Dutch Telecommunications Act; Section 18, paragraph 2, of the Dutch Heat Act; Section 2.9, paragraph 1, part b, in conjunction with Section 2.15 of the Dutch Act on Enforcement of Consumer Protection; Section 22 of the Act on the implementation of EU directives on energy efficiency; and Section IXc, paragraph 4, preamble, and part a, and paragraph 5, preamble, and part a, of the Act of 23 November 2006 amending the Electricity Act 1998 and the Gas Act in connection with detailed rules regarding independent grid administration (Dutch Bulletin of Acts and Decrees 2006, 614); Section 8.25h, paragraph 4, and Section 11.24 of the Dutch Aviation Act; and Section 96a of the Dutch Passenger Transport Act 2000.

<sup>2</sup> See, among other decisions, ACM's decision of 25 June 2015 in case 14.0705.27 (*natural vinegar*); ACM's decisions of 22 December 2015 in cases 13.0698.31 and 15.0327.31 (*freezing and refrigerated storage*) with reference, ACM/DJZ/2015/207566\_OV and ACM/DJZ/2015/207552\_OV; ACM's decision of 26 May 2016 in case 15.1118.52 (*excessive roaming costs*), and ACM's decision of 30 June 2017 in case 7615 (*forklift batteries*) with reference 7615\_11/84.

## II Advantages of simplified resolution

3. Simplified resolution entails a process that is more efficient and more cost-effective for ACM and the parties involved. As a result, parties are able to make a clean sweep, and ACM is able to handle other cases.
4. The goal of this simplified procedure is to finally resolve the case in which ACM has identified a violation. ACM orally informs the parties involved of its assessment of the violation, and of the fine that is to be imposed for it. The parties involved will have the opportunity to respond. ACM will then inform the parties involved whether their responses change ACM's assessment of the case. ACM does not negotiate on the violation or the fine. The simplified procedure will result in a streamlined fining decision.
5. Parties that cooperate with ACM in the simplified procedure will be eligible for a 10% reduction of the fine.<sup>3</sup> ACM will apply this reduction after it has taken any mitigating and aggravating circumstances into account, and after the test against the maximum fine has been concluded. This ensures that parties will actually be able to take advantage of the reduction.<sup>4</sup>

## III Basic principles and rules

6. In the simplified procedure, ACM uses several basic principles and rules. These are explained below.

### *Initiative*

7. If ACM considers a case involving a fine suitable for the simplified procedure, it will contact the parties involved in order to assess whether they are open to a simplified resolution. Parties are able to express their interest in this to ACM.

### *What cases involving fines are suitable for simplified resolution?*

8. Not all cases involving fines are suitable for simplified resolution. There is no such thing as a right to simplified resolution. Therefore, ACM does not offer the simplified procedure in all cases involving fines.
9. Simplified resolution is only suitable for those cases where the party involved is prepared to acknowledge their participation in the violation, and is prepared to accept a fine for committing that violation. In addition, ACM will only enter into discussions with a party to discuss the simplified procedure, if that party has terminated the violation. If this is not clear based on ACM's investigation, this party may provide ACM with corroborating evidence.

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<sup>3</sup> In order to qualify for this, the cooperation must go beyond what the party involved is statutorily required to provide. This is considered a mitigating circumstance under Article 2.10 of the ACM Fining Policy Rule 2014 (Policy rule of the Minister of Economic Affairs of 4 July 2014, no. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets, *Dutch Government Gazette* 2014, 19776, as amended by the Policy rule of the Minister of Economic Affairs of 28 June 2016, no. WJZ/16056097, amending the ACM Fining Policy Rule 2014, *Dutch Government Gazette* 2016, 34630).

<sup>4</sup> This is similar to ACM lowering the fine in cartel cases because of leniency. If leniency applies, too, ACM will add up the reduction percentages for leniency and the simplified procedure.

10. In addition, cases involving fines only lend themselves for simplified resolution if ACM expects sufficient efficiency gains from taking that route. For example, in a case involving multiples parties, ACM will, in principle, only offer the simplified procedure if all parties are prepared to acknowledge the violation and accept a fine. The simplified procedure is not an obvious choice if ACM has already reached an advanced stage in the decision-making process.

### *Opting for the simplified procedure is on a voluntary basis*

11. By opting for the simplified procedure, parties declare that they wish to finally resolve their cases, and to avoid protracted legal proceedings.
12. Opting for the simplified procedure is on a voluntary basis. Parties consciously and voluntarily opt for a procedure that is aimed at finally resolving the case by way of a streamlined decision. They have the option of ending the simplified procedure, and switch to the regular procedure. This option is open until the moment they have submitted a statement to ACM, and ACM has indicated that such a statement meets the requirements (see from paragraph 25 of these guidelines).

### *Suspension of the statutory deadline*

13. Parties that have opted for the simplified procedure agree in advance in writing to the suspension of the statutory deadline (for decisions) until the simplified procedure has been completed.

### *Confidentiality*

14. Parties that wish to opt for the simplified procedure will sign a confidentiality agreement in advance. In such an agreement, they declare that they will treat confidentially any information from the discussions that are part of the simplified procedure as well as any information that is exchanged with ACM as part of the procedure. They will thus not share this information with third parties, unless ACM has agreed to this in advance. Third parties are understood to include any individual or business other than the party involved or its representative(s). Other parties in the same case, too, are considered third parties for this purpose.
15. If the party involved fails to observe confidentiality, ACM may end the simplified procedure, and revert to the regular sanction procedure.
16. ACM is bound by statutory rules on confidential treatment of information that it receives when carrying out its duties. As in the regular procedure, ACM will therefore carefully treat any information that it obtains from parties as part of the simplified procedure.

### *Discussions in the simplified procedure*

17. ACM will hold individual discussions with each of the parties involved. If parties belong to the same undertaking, ACM will, in principle, hold joint discussions with these parties. Parties can have an authorized individual, such as a lawyer, be present in the discussions with ACM.
18. In these discussions, ACM presents the parties involved with the violation and the planned fine. Parties will have the opportunity to respond orally. ACM will subsequently inform the parties whether their responses have changed anything ACM's assessment of the case.
19. In order to ensure an expeditious process, ACM sets short deadlines for any responses from parties, and it is able to set limits to the volume of written documentation.

### *Ending the simplified procedure*

20. During the simplified procedure, ACM is able to decide to end the procedure. One of the reasons could be that ACM and the party involved do not have a common understanding of the violation or that a party is not prepared to acknowledge the violation and/or to accept the planned fine.
21. If one party in a case with multiple parties opts for the regular procedure in which it is able to challenge ACM's findings, it may lead to ACM ending the simplified procedure for all parties. Such is the case if ACM is of the opinion that the simplified procedure consequently no longer offers sufficient efficiency gains. The regular procedure will then apply to all parties.
22. In addition, each party is able to decide of their own accord to end the simplified procedure, and to switch to the regular procedure.
23. If ACM or the party involved ends the simplified procedure, ACM will resume the regular procedure. The simplified procedure is a one-time option. This means that, once it has been ended, ACM will not resume or relaunch the simplified procedure.

*Separate file for simplified procedure*

24. For all correspondence in the simplified procedure, ACM will compile a separate file. If the simplified procedure is ended, the party's acknowledgement also lapses. ACM will not use against this party any information and representations that this party has provided in the simplified procedure. However, should this party wish to use some of the documents and representations, it is free to submit these to ACM in the regular procedure.

*Simplified resolution submission*

25. If a party is prepared to acknowledge their participation in the violation and to accept ACM's planned fine, it will submit a simplified resolution submission to ACM. This submission must be written in Dutch. ACM will provide the party with a framework.
26. The submission contains at least a description and acknowledgement of the violation, the confirmation that sufficient access to the file has been provided, and that there has been sufficient opportunity to be heard. The submission of the party involved must tie in with the results of its discussions with ACM. If necessary, ACM provides an overview of these results. With the submission, the party involved also confirms that it accepts ACM's planned fine, as well as the assumptions used to determine this fine.
27. ACM assesses whether the submission meets these requirements, and, if necessary, gives the party involved a one-time opportunity to complement the statement.
28. The party involved is no longer bounded by its submission, if, after receiving and approving the statement, ACM still decides to end the simplified procedure (see paragraphs 20 and 21 of these guidelines). ACM will inform the party involved of this decision.
29. With regard to third parties in any damages proceedings, ACM does not offer such third parties access to the statement.<sup>5</sup>

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<sup>5</sup> See Section 7 of the Establishment Act of the Netherlands Authority for Consumers and Markets (Iw). Pursuant to other statutory provisions, ACM may be required to provide information and intelligence (Section 7 paragraph 2, Iw). In accordance with Section 846 of the Code of Civil Procedure (in Dutch: *Wetboek van Burgerlijke Rechtsvordering*), ACM

*Streamlined fining decisions*

30. A streamlined fining decision consists of a concise description of the violation, and its gravity and duration. It ties in with the submission filed by the party involved, as accepted by ACM, and it states that the party involved has acknowledged their participation in the violation.
31. ACM offers the party involved the opportunity to peruse the streamlined decision before publication thereof.

*Publication*

32. ACM publishes the streamlined fining decision as statutorily stipulated, leaving out information deemed confidential as determined by law.<sup>6</sup>
33. Following the fining decision, ACM publishes a press release to account for its enforcement actions, and to state publicly that a violation was established.<sup>7</sup> ACM informs in advance the party involved of the contents of that press release. In the press release, ACM includes the company name and the fine of the party involved. In addition, ACM includes that the party involved has cooperated with ACM in the simplified procedure with a reduction of the fine in return.

#### **IV Citation and commencement**

34. This decision will be cited as follows: ACM's guidelines for simplified resolution of cases involving a fine.
35. This decision will come into force on the day after the publication date of the Dutch Government Gazette in which it is published.

The Hague, 13 December 2018

The Netherlands Authority for Consumers and Markets,

T.M. Snoep  
Chairman of the Board

F.J.H. Don  
Member of the Board

C.M.L. Hijmans van den Bergh  
Member of the Board

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does not provide access to, copies or excerpts of the submission that a party has given as part of the simplified procedure involving a fine. In that section, such submissions are described as 'submission with an eye to a settlement'.

<sup>6</sup> See Sections 12u and 12v Iw.

<sup>7</sup> See ACM Publication procedure.