



**International
Competition
Network**

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

**The Netherlands
1x/01/2016**

ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning (hardcore) cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

[Please include, where applicable, any references to relevant statutory provisions, regulations or policies as well as references to publicly accessible sources, if any.]¹

1. Information on the law relating to cartels

A. Law(s) covering cartels: [availability (homepage address) and indication of the languages in which these materials are available]	Section 6 of the Dutch Competition Law (as amended). http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_16-12-2015 (Dutch only) Unofficial translation available at: http://www.dutchcivillaw.com/legislation/competitionact.htm Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty
B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	Fining Guidelines http://wetten.overheid.nl/BWBR0035322/ (Dutch only) Leniency Guidelines http://wetten.overheid.nl/BWBR0035329/ (Dutch only)

¹ Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template, but will be removed once the completed template is made public.

<p>C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>Vertical agreements https://www.acm.nl/nl/download/publicatie/?id=14164 (Dutch only)</p> <p>Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l26114</p> <p>Guidelines cooperation between businesses http://wetten.overheid.nl/BWBR0033027 (Dutch only)</p> <p>https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/wet--en-regelgeving/wet--en-regelgeving-concurrentie-en-marktwerking/</p>
<p>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking (Dutch only)</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”? [Please quote.]</p> <p>If not, please indicate the term you use instead. [Please quote.]</p>	<p>No.</p> <p>Section 6 of the Dutch Competition Act defines anti-competitive agreements as:</p> <p>Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have as their object or effect the prevention, restriction or distortion of competition on the Dutch market or on a part thereof, are prohibited.</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas²) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</p>	<p>Yes, Article 2.2 of the Fining Guidelines states that the level of the basic fine will, insofar applicable, in any case be based on: a) The seriousness of the violation; b) The circumstances in which the violation was committed; and c) The duration of the violation. ACM determines the basic fine, giving weight to: the nature of the violation; this includes the extent to which the interests which the violated provisions seek to protect are or may be harmed; the scope and special characteristics of the market in which the violation was committed; the degree of market power of the offender or offenders; the nature of the products or services concerned; the extent to which the violation gave rise to any advantage and/or the extent of the impact on the economy the violation might potentially have or has actually had.</p> <p>The interpretation of section 6 of the Dutch Competition Act is inspired by Article 101 of the TFEU. So, there is a distinction</p>

² In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

<p>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]</p>	<p>between violations by object and violations by effect.</p> <p>The prohibition of cartels is not applicable in case of the following: bagatelle, statutory exception and block exemption.</p> <p>Bagatelle: lower limit (Section 7 of the Dutch Competition Act)</p> <p>The prohibition of cartels (in its entirety) does not apply to agreements, if either:</p> <ul style="list-style-type: none"> • no more than eight undertakings have been involved in the agreement; and • the total combined turnover of the undertakings is at least €5.5 million (if the undertakings primarily produce goods) or the total combined turnover of the undertakings is at least €1.1 million (if the undertakings do not primarily produce goods). <p>or:</p> <ul style="list-style-type: none"> • a horizontal agreement is concerned, and the combined market share of the undertakings involved does not exceed 5 per cent; and • the total combined turnover of the undertakings involved in the agreement is at least €40 million. <p>The prohibition in Section 6 of the Competition Act shall not apply to agreements, decisions and concerted practices which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not: a) impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question (this provision is equivalent to Art. 101(3) TFEU).</p> <p>In addition, the European and Dutch legislatures have ruled that, under certain conditions, the exemption provision can also apply to certain categories of agreements. The Dutch Minister of Economic Affairs has granted two generic exemptions from the prohibition of cartels on:</p> <ul style="list-style-type: none"> • certain types of collaborative arrangements in the retail industry; and • industry protection agreements with regard to shopping centers. <p>A third generic exemption, which was the exemption on combination agreements relating to tenders, was repealed on January 1, 2009. The exemption has been replaced with policy rules of the Minister of Economic Affairs, which came into effect on October 1, 2009, and can be found on the ACM website (www.acm.nl).</p>
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D. Is participation in a hardcore cartel illegal <i>per se</i>³? [If the situation differs for civil, administrative and criminal liability, please clarify this.]	Yes.
E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?	Administrative. Damages may be claimed in the Civil Court.

3. Investigating institution(s)

A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]	Netherlands Authority for Consumers and Markets
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	Visitors: Muzenstraat 41, 2511 WB The Hague, The Netherlands Postal Address: PO Box 16326, 2500 BH The Hague, The Netherlands Telephone & fax: (T) +31 70 7222 000, (F) +31 70 7222 355 https://www.acm.nl/ (Dutch) and https://www.acm.nl/en/ (English).
C. Information point for potential complainants:	https://www.acm.nl/en/contact/tip-offs-or-indications/submitting-your-tip-off-or-indication-to-acm/
D. Contact point where complaints can be lodged:	https://www.acm.nl/en/contact/tip-offs-or-indications/tip-off/
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	The European Commission and other NCA's under Regulation 1/2003.

³ For the purposes of this template the notion of 'per se' covers both 'per se' and 'by object', as these terms are synonyms used in different jurisdictions.

4. Decision-making institution(s)⁴ [to be filled in only if this is different from the investigating agency]

<p>A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]</p>	
<p>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</p>	
<p>C. Contact point for questions and consultations:</p>	
<p>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</p>	
<p>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</p>	

5. Handling complaints and initiation of proceedings

<p>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</p>	<p>Complaints and information from other sources, ex officio, leniency application, possibility of whistleblowing anonymously.</p>
<p>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]</p>	<p>Yes, see https://www.acm.nl/en/contact/tip-offs-or-indications/submitting-your-tip-off-or-indication-to-acm/</p>
<p>C. Legal requirements for lodging a complaint against a cartel:</p>	<p>None for a tip-off or indication. A formal enforcement request requires the complainant to be an interested party.</p>

⁴ Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

[e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]	
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]	ACM has the possibility to set its own priorities and can reject complaints for instance on the basis of lack of economic importance, or lack of consumer interest.
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	Yes, where there has been a formal complaint, ACM provides a reasoned decision where it intends not to pursue the complaint. ACM also has the possibility of applying its prioritisation policy . Prioritisation policy http://wetten.overheid.nl/BWBR0037737/2016-03-18 (Dutch only)
F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?	Yes, 8 weeks without notice.

6. Leniency policy⁵

A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]	ACM Leniency Policy Rule, which can be found on https://www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?	Yes, see the Leniency Guidelines http://wetten.overheid.nl/BWBR0035329/ (Dutch) and https://www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/ (English).
C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?	The first one to come forward.
D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or	No. Yes, depending on the category (see F).

⁵ For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

<p>insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p>	
<p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>A leniency application may be submitted by:</p> <ul style="list-style-type: none"> a. an undertaking that has participated in a cartel, represented by someone who is authorized to make binding arrangements on the undertaking's behalf; b. a natural person, not representing an undertaking but explicitly acting on his/her own behalf, who has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in a cartel; or c. multiple natural persons simultaneously, not representing an undertaking but explicitly acting on their own behalf, who have given instructions or have exercised de facto leadership with regard to the participation of an undertaking in a cartel, provided that they work at the same undertaking involved in the cartel, when submitting the application.
<p>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution, etc.]</p>	<p>Article 4</p> <p>1. ACM shall grant immunity from fines to a leniency applicant, provided that:</p> <ul style="list-style-type: none"> a. the applicant is the first to submit a request for immunity from fines with regard to a cartel; b. the application concerns a cartel into which ACM has not yet launched an investigation; c. with his application, the applicant provides ACM with information that enables ACM to perform a targeted inspection; d. the applicant has not coerced another undertaking into participating in the cartel; and e. the applicant complies with the obligation to cooperate as referred to in Article 17.

	<p>2. ACM shall also grant immunity from fines to a leniency applicant if the conditions referred to in paragraph 1 sub a, d and e have been met, and:</p> <p>a. the application concerns a cartel into which ACM has already launched an investigation, but ACM has not yet sent a statement of objections within the meaning of Section 59, paragraph 1 of the Act to any of the parties involved;</p> <p>b. the application provides ACM with documents that stem from the period of the practice in question, and that had not already been in ACM's possession, and on the basis of which ACM is able to prove the existence of the cartel.</p> <p>3. The moment ACM has internally laid down in writing its first suspicion of a cartel shall be considered the launch of an investigation.</p>
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an initiation of investigations?]</p>	<p>ACM shall grant a leniency applicant a reduction of a fine ranging from 0-50 percent, depending on whether the applicant is first, second or third and subsequent to submit a leniency application and also depending on the applicant's eligibility relating to the following factors as set out in Articles 5, 6, and 7 of the Leniency Guidelines:</p> <p>immunity from fines within the meaning of Article 4 is not available;</p> <p>ACM has not sent a statement of objections within the meaning of Section 59(1) of the Act to any of the parties involved in the cartel;</p> <p>the applicant complies with the obligation to cooperate, as referred to in Article 17.</p>
<p>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</p>	<p>Until the decision to impose an administrative fine becomes final with respect to all practices involved in the cartel, a leniency applicant shall fully and continuously cooperate as required in the interest of the investigation or the proceedings.</p> <p>2. The obligation to cooperate as referred to in paragraph 1 includes at least that the leniency applicant shall:</p> <p>a. Refrain from any action that may impede the investigation or the proceedings;</p> <p>b. From the moment of submission of the leniency application, provide ACM, of the applicant's own accord or at ACM's request, as soon as possible, with all information regarding the cartel that the applicant has or may reasonably obtain;</p> <p>c. Immediately after submission of the leniency application, cease any involvement in the cartel, unless and insofar as ACM considers the continuation thereof to be reasonably necessary in order to preserve the effectiveness of inspections; and</p> <p>d. Ensure that individuals who are working for the applicant and, insofar reasonably possible, individuals who worked for the applicant, are available for making statements.</p>

I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]

1. A leniency application shall include a written leniency statement that includes, insofar as is known to the applicant at the time of submission:

- a. a statement that the applicant will comply with all applicable leniency conditions under this policy rule;
- b. a statement that the applicant has participated in the alleged cartel as claimed by the applicant, if the applicant is an undertaking;
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- c. a statement supported with reasons that the leniency applicant is a natural person within the meaning of Section 51, paragraph 2, sub 2 of the Dutch Criminal Code, who has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in the cartel, if the applicant is a natural person;
- d. a detailed description of the cartel arrangement, including the products or services involved, the geographical scope, the duration, the functioning of the cartel and the estimated market volumes or sales affected by the cartel, as well as the specific dates, locations, contents of and participants in the cartel interactions;
- e. the name and address of the leniency applicant;
- f. the names and addresses of all the undertakings that participate or have participated in the cartel, as well as the names, positions, working locations and, where relevant, home addresses of the individuals who are or have been involved in the cartel;
- g. information on whether the leniency applicant has approached or may approach the European Commission in relation to the cartel;
- h. where applicable, which other competition authorities the applicant has approached or may approach in relation to the cartel, and

2. A leniency application shall also contain evidence corroborating the statement as referred to in paragraph 1, insofar the applicant has such evidence or such evidence is

	<p>reasonably available to the applicant at the time of the submission of the application.</p> <p>The leniency statement contains an explanation of the evidence. Contrary to Article 13, paragraph 1, a leniency statement may, with ACM's permission,</p> <p>be submitted orally, provided that the leniency applicant, in ACM's opinion, has a</p> <p>legitimate interest in doing so.</p> <p>2. In the event of an oral leniency statement, ACM shall record this statement, and draw</p> <p>up a transcript.</p>
<p>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision)?]</p>	<p>Yes.</p>
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p>	<p>1. Upon receipt of a leniency application that is in accordance with this policy rule, ACM shall draw up a grant of leniency as soon as possible.</p>
<p>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</p>	<p>Section 21 of the Framework Act on Autonomous Administrative Authorities, and Section 56 (a) of the Dutch Competition Act.</p> <p>ACM draws up a grant of leniency.</p> <p>ACM shall impose the fine in observance of the grant of leniency, provided that the leniency applicant fully complies with the obligations of the grant of leniency.</p>
<p>M. Do you have a marker system? If yes, please describe it.</p>	<p>A leniency applicant who submits an incomplete leniency application may be eligible for a marker, provided that:</p> <ul style="list-style-type: none"> a. the application offers, in ACM's view, a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel; and b. the leniency applicant provides at least information on: <ul style="list-style-type: none"> i. the name and address of the leniency applicant; ii. the cartel participants; iii. the affected products or services;

	<p>iv. the cartel's geographical scope;</p> <p>v. the cartel's duration;</p> <p>vi. the nature of the cartel's practices; and</p> <p>vii. whether the leniency applicant has approached or may approach the European Commission with regard to the cartel;</p> <p>8</p> <p>viii. whether the leniency applicant has approached or may approach other competition authorities with regard to the cartel.</p> <p>2. ACM shall furthermore establish a marker for a leniency applicant, provided that:</p> <p>a. the European Commission is particularly well-placed to investigate the cartel;</p> <p>b. the leniency applicant has also submitted a leniency application to the European Commission or intends to do so shortly; and</p> <p>c. the leniency applicant, when it submits the leniency application, provides at least the information as referred to in the first paragraph sub b, and specifies in which EU Member State or Member States the evidence regarding the cartel is presumably located.</p> <p>3. If ACM establishes a marker for a leniency applicant, it shall specify a time limit before which the applicant must have completed the leniency application.</p> <p>4. If the incomplete leniency application is completed within the time limit as referred to in paragraph 3, the application shall be deemed to have been completed from the moment the marker became applicable.</p> <p>5. If the incomplete leniency application is not completed before the time limit as referred to in paragraph 3, ACM shall turn down the application.</p>
<p>N. Does the system provide for any extra credit⁶ for disclosing additional violations? [e.g. a hardcore cartel in another market]</p>	<p>Information on additional violations as described could be seen as information providing significant added value depending on the circumstances of the case.</p>
<p>O. Is the agency required to</p>	<p>ACM shall not disclose the identity of</p>

⁶ Also known as: “leniency plus”, “amnesty plus” or “immunity plus”. This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

<p>keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>anyone involved in the cartel, unless a statutory obligation mandates otherwise, or the leniency applicant has consented to disclosure.</p>
<p>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</p>	<p>No.</p>
<p>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</p>	<p>Phone: +31-70-330-1710 Email: clementie@acm.nl Leniency officer: Mr. Pablo Amador Sanchez</p>
<p>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</p>	<p>Yes. If ACM establishes that applicant does not comply with the conditions for immunity or reduction. The decision to revoke a grant of leniency, may be appealed in an appeal against the fining decision.</p>
<p>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</p>	<p>There is no reference to this in the policy. But there is of course the possibility that supervisors raise awareness of the existence of the leniency program.</p>
<p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p>	<p>Yes. ACM operates a specific regime for granting <i>inter partes</i> access to leniency statements. The regime contemplates access to leniency statements exclusively in ACM offices, provided that the party who is given access undertakes (1) to refrain from making mechanical copies of the statements and (2) to exclusively use the information in the context of the exercise of its rights of the defence in the administrative proceedings.</p>

7. Settlement

<p>A. Does your competition regime allow settlement?</p> <p>If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</p>	<p>Settlement is not prohibited by the competition regime.</p> <p>In order to be able to handle the enormous amount of construction fraud cases in the early 2000s (more than 1,400 construction firms), the Netherlands Competition Authority created a special fast-track procedure and special fining system. This strategy made it possible to process many cases in a relatively short amount of time. The Dutch Court of Final Instance approved this settlement approach. The Netherlands Competition Authority has the freedom to make its own choices, and to apply the sanction procedure and fining policy as appropriate. The court evaluates whether the Competition</p>
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	<p>Authority's choices are reasonable and proportional, and whether the parties have been informed properly in advance of the procedure.</p> <p>ACM recently published two cartel decisions in which parties availed of a simplified procedure.</p> <p>ACM currently acts on a case by case approach as to settlements. There are no publicly available guidelines. Until now, our practice is inspired by the approach of the European Commission. So there should be for instance a clear case with strong evidence.</p>
B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?	There is no prescription on the availability of settlement and it is in principle not limited to certain types of restrictive agreements.
C. What is the reward of the settlement for the parties?	This will depend on the circumstances of the case.
D. May a reduction for settling be cumulated with a leniency reward?	This will depend on the circumstances of the case.
E. List the criteria (if there is any) determining the cases which are suitable for settlement.	N/a.
F. Describe briefly the system [who can initiate settlement – your authority or the parties, whether your authority is obliged to settle if the parties initiate, in which stage of the investigation settlement may be initiated, etc.].	<p>This will depend on the circumstances of the case and in principle there are no limitations. So it is possible to initiate a settlement as an authority our self, but It is also possible that the parties take the initiative to enter into settlement talks.</p> <p>We can already talk about settlement during the course of the investigation, before the statement of objections is issued, but also in the stage were sanctions and fines are determined.</p>
F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].	Use of a simplified procedure can lead to procedural efficiencies, such as a shorter decision and speedier resolution of the case.
G. Does a settlement necessitate that the parties acknowledge their liability for the violation?	Parties are required to acknowledge the facts and every element of the violation as described in the decision.
H. Is there a possibility for settled parties to appeal a settlement decision at court?	Yes.

8. Commitment

<p>A. Does your competition regime allow the possibility of commitment?</p> <p>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc.].</p>	<p>Yes. Section 12 H of the Establishment Act of the Authority for Consumers and Markets.</p> <p>https://www.acm.nl/en/download/publication/?id=13190</p>
<p>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</p> <p>Are there commitments which are excluded from the commitment possibility?</p>	<p>In principle the policy of ACM is that commitments are possible were they fit in our policy to solve problems on the markets. The commitments should be more efficient than imposing a fine. The commitment should also fit in the total portfolio of ACM cases. In general, it is not likely that ACM will accept commitments in hardcore cartel cases.</p>
<p>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</p>	<p>See above.</p>
<p>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</p>	<p>All types of commitments are possible, there are no (legal) limitations to that. ACM will assess whether the commitments are effective and efficient.</p>
<p>E. Describe briefly the system [who can initiate commitment – your authority or the parties, in which stage of the investigation commitment may be initiated, etc.]</p>	<p>Commitments are initiated by the parties or ACM in a so called state of play meeting. When ACM and the parties agree on the commitments, the parties apply to ACM to make the commitments legally binding. ACM will draw up an envisaged decision and third parties will have the possibility to react to that. Next, ACM will declare the commitments binding for a certain period of time.</p> <p>Commitments are possible during the whole of the investigation, but are in general more likely to be offered in the latter part of it.</p>
<p>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</p>	<p>No. A commitment decision does not comment on any violation of the law.</p>
<p>J. Describe how your authority monitors the parties' compliance to the commitments.</p>	<p>This depends on the commitments offered by the parties. It is possible that ACM requests information from the parties who offered the commitments. It is also possible that a trustee will be involved.</p>
<p>K. Is there a possibility for parties to appeal a commitment decision at court?</p>	<p>Yes. Recently there was an appeal of a third party against a commitment decision of ACM. The Court ruled that ACM has discretion in accepting commitments.</p>

9. Investigative powers of the enforcing institution(s)⁷

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁸, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.	All such measures are possible, no warrant is required.
B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?	Yes. Subject to a court warrant.
C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?	Yes. ACM has the possibility to expand the scope of her investigation during the inspection if investigators find evidence that relates to other possible infringements.
D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.	<p>Yes, ACM's right to make use of wire taps gathered legally by the department of public prosecutions was unsuccessfully challenged.</p> <p>The way ACM gathered digital evidence was also challenged. ACM adjusted its method for the gathering of digital evidence. For the most recent procedure our website can be visited:</p> <p>https://www.acm.nl/en/publications/publication/12772/2014-ACM-Procedure-for-the-inspection-of-digital-data/</p>

10. Procedural rights of businesses / individuals

⁷ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁸ “Searches/raids” means all types of search, raid or inspection measures.

<p>A. Key rights of defence in cartel cases: [e.g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc.] Please indicate the relevant legal provisions.</p>	<p>All apply. The European Treaty on Human Rights is applicable in the Netherlands. A cartel case is considered as a criminal charge.</p> <p>Title 5.4 of the General Administrative Law Act</p> <p>Section 12i and 12g of the ACM Establishment Act</p>
<p>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</p>	<p>No difference.</p> <p>Section 7 and Section 12u, 12v and 12w of the ACM Establishment Act</p>

11. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made?</p>	<p>The limitation period is five years after termination of the infringement.</p> <p>Section 5:54 General Administrative Law Act</p> <p>Section 64 Competition Act</p> <p>Section 12r ACM Establishment Act</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits?</p>	<p>For the cartel investigation there does not exist a deadline, other than internal deadlines. These are established on a case by case basis.</p> <p>For the fining decision there is a deadline of 13 weeks with the possibility of an extension with another 13 weeks.</p> <p>Section 5:51 General Administrative Law Act</p> <p>Section 12k ACM Establishment Act</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or</p>	<p>6 weeks after notification of the fining decision to the addressee(s)</p> <p>Section 6:7 General Administrative Law Act</p>

completion of an investigation or a decision regarding sanctions? (see also 15A)	
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12. Types of decisions

A. List which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]	<p>Imposition of fines</p> <p>Ordering to bring an infringement to an end</p> <p>Take a commitment decision</p> <p>Decision to close a case without measures</p>
B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).	
C. Can interim measures ⁹ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both ¹⁰ .) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?	Yes.

13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

A. Grounds for the imposition of	Failure to cooperate with the administrative powers of ACM,
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⁹ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

¹⁰ Only for agencies which answered “yes” to question 2.B. above

procedural sanctions / fines [e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.]:	which include amongst others the power to require information and the power to question people .
B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):	Administrative (fine).
C. On whom can procedural sanctions be imposed?	On everyone. Undertakings and natural persons.
D. Criteria for determining the sanction / fine:	The sanction is determined by the specific circumstances of the case.
E. Are there maximum and / or minimum sanctions / fines?	Yes. The maximum fine is 450.000 euro, or, if that is more, 1 percent of the annual turnover of the undertaking involved (Article 12m Establishment Act ACM). There is no minimum sanction.

14. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined): On whom can sanctions be imposed? [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual companies?]	Administrative. Undertakings, associations of undertakings and individuals can be fined.
B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]	Article 2.2 of the Fining Guidelines states that the level of the basic fine will, insofar applicable, in any case be based on: a) The seriousness of the violation; b) The circumstances in which the violation was committed; and c) The duration of the violation. ACM determines the basic fine, giving weight to: the nature of the violation; this includes the extent to which the interests which the violated provisions seek to protect are or may be harmed; the scope and special characteristics of the

	market in which the violation was committed; the degree of market power of the offender or offenders; the nature of the products or services concerned; the extent to which the violation gave rise to any advantage and/or the extent of the impact on the economy the violation might potentially have or has actually had.
C. Are there maximum and / or minimum sanctions / fines?	Maximum 10 percent of the annual turnover. NB: Legislation is being prepared to substantially increase this maximum
D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	See above.
E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?	No suspensory effect, but it is possible to go to Court to apply for suspension. There should be an urgent interest.

15. Possibilities of appeal

A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?	Yes. In appeal there is an integral examination of the procedural rules (for instance with regard to the gathering of evidence), the facts of the case and the assessment that these facts constitute a violation of the law.
B. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]	District Court in Rotterdam at First Instance. The Dutch Tribunal for Trade and Industry at Second and final instance.