



## Dutch commitments decision casts spotlight on sanctions policy

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The Dutch competition authority's decision to end a cartel investigation without penalties last month has raised questions about the consistency of its approach to remedies.

The Netherlands' Authority for Consumers and Markets (ACM) revealed on Friday that it had closed a cartel probe into three chiropractic sector trade associations after they promised not to prohibit their members from offering customers discounted prices and free examinations.

At a meeting with the Dutch Chiropractic Federation, the Christian Chiropractors Association and the National Register of Chiropractors Foundation in July 2024, the ACM flagged concerns that the ban on discounts and free tests could harm competition.

After the ACM opened an antitrust investigation last October, the groups promised to remove bans in remedies running until December 2027. In a decision issued on 20 December, the enforcer accepted the commitments, noting that the risks to competition had been removed and that the remedies avoided a potentially lengthy sanctioning procedure.

Though the case closed a month ago yesterday, it is now raising questions about uneven enforcement and transparency around prioritisation policies.

Ruben Elkerbout, a partner at Geradin Partners in Amsterdam, said he is sympathetic to the ACM's need to prioritise cases and enforcement measures based on resources and efficiency, but warned that accepting commitments in such a case could set a precedent that has wider potential ramifications.

The ACM has a strong reputation as a competition enforcer and is busy on a variety of large cases, having readily imposed hefty fines on companies that breach the rules, he said. However, further transparency from the ACM on how the possible efficiency and resourcing considerations came into play in this case would be helpful, Elkerbout said.

"There's no language on that – this is a missed opportunity to further explain these policies," he said, especially as it appears that the costs and complexities of progressing higher profile enforcement cases "were more important than sending the usual strong message to these associations that this will not be tolerated".

The commitments decision in the chiropractor investigation essentially states that the associations, which have clearly violated the cartel prohibition, will now abide by Dutch competition law – and that is "difficult to follow", Elkerbout said.

Dutch governmental agencies must adhere to certain principles of equality and prevent arbitrariness, but the result of this case may leave other companies previously targeted by similar probes to have wished for similar treatment from the ACM, he said.

"I understand all the policy considerations at play here – but is it really fair and part of a consistent policy?" Elkerbout asked.

In a statement to GCR, an ACM spokesperson said: "Given the size of the healthcare sector and the willingness of the parties to adapt, the commitment was in this case the most effective instrument."

Other lawyers who spoke to GCR underlined the ACM's wide discretion in deciding how to handle such cases.

Martijn Van de Hel, a partner at Maverick Advocaten, disputed that the decision marks an important precedent. This is the first time the ACM has accepted formal commitments from a trade organisation in exchange for closing a probe, but in the past, the agency has frequently accepted informal promises from such groups, particularly in the healthcare industry, he added.

But Van de Hel added the enforcer appears "less interested" in accepting commitments from individual companies. That is unfortunate, he said, because "a quick fix is often better for the market, the companies involved and the internal resources of the ACM."

According to CMS partner Edmon Oude Elferink, the agency "tends to be more reluctant" to penalise the healthcare sector than others. Though this may be arbitrary, the lack of sanction does not come as a surprise, he said.

Imposing actual sanctions would have taken a lot of time and resources that can now be dedicated to other issues, Elferink said.

Given the nature of the activities of the associations, it is unlikely that the fines would have been too hefty, he added.

GCR understands that no external law firms were instructed in these proceedings.

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