

ACM correctly dismissed abuse complaint against mental health federation, court rules

[Olivia Rafferty](#)

15 February 2023

A Dutch tribunal has confirmed the national competition authority was right to dismiss an abuse of dominance complaint against a mental health association as the enforcer does not have jurisdiction to probe state-funded education.

In a **judgment** handed down yesterday, the Dutch Trade and Industry Appeals Tribunal rejected a challenge against a decision from the Netherlands' Authority for Consumers and Markets to **dismiss** the complaint four years ago because it did not concern an "economic entity".

The ruling confirms a Rotterdam District Court **judgment** from July 2021, which held that the ACM was correct in finding it could not open a probe into mental healthcare service provider Silver Psychology's complaint that the Federation of Healthcare Psychologists and Psychotherapists violated competition rules by imposing unnecessary accreditation requirements on psychology graduates.

The court held that the complaint was made against an entity that is mainly financed by the government.

In its complaint in May 2018, Silver Psychology alleged that the association's scheme requires psychology graduates in the Netherlands who want to become accredited psychologists or psychotherapists to take training courses at an institution designated by the country's Ministry of Health and meet certain training requirements.

Silver Psychology also provides mental health professional accreditation in the Dutch regions of Tilburg, Breda, Eindhoven, Rotterdam and Leiden. It claimed that the association's requirements are restrictive, meaning that psychologists are less likely to turn to rivals for those services.

But the ACM found in August 2019 that publicly-funded education is not considered an "economic activity" so it could not take any enforcement action.

In its appeal against the Dutch enforcer's decision, Silver Psychology argued that the association's activities are not mainly funded by the public, claiming that the market in question is private and that the members of the federation illegally collude when making professional accreditation decisions.

But the Rotterdam District Court upheld the ACM's decision in July 2021, ruling that Silver Psychology's appeal was unfounded as the majority of the Federation of Healthcare Psychologists and Psychotherapists' training scheme is funded by the government.

The court ruled that the ACM would only be able to investigate the complainant's allegations if the association was made up of several private companies, or if the association made a profit out of its scheme.

The Dutch Trade and Industry Appeals Tribunal yesterday fully confirmed the lower court's ruling.

It noted a [**preliminary ruling**](#) handed down by the European Court of Justice in June 2017, which held that education provided by institutions financed "wholly or mainly by public funds" does not constitute an "economic activity".

A spokesperson for the ACM said the authority has noted the tribunal's judgment. A spokesperson for the Federation of Healthcare Psychologists and Psychotherapists said it welcomes the decision.

Advocatenkantoor Breedijk partner Klaas-Jan Breedijk in Tilburg, who is counsel to Silver Psychology, said his client has noted the judgment and is considering whether it will file a private action against the federation, return to the Dutch Trade and Industry Appeals Tribunal to ask it to reconsider its ruling or accept the decision as final.

Breedijk noted that in July 2022, the District Court of Zeeland-West-Brabant ordered the ministry to take over the association's regulatory powers so that it could no longer impose its requirements on graduates. The tribunal noted this in its judgment yesterday by stating its allegations would no longer be "relevant" as it would not have the grounds to bring the abuse allegations against the association.

But five days after the ministry removed the association's powers in October, it allowed the federation to recommence its alleged problematic conduct, Breedijk claimed. The company might seek to bring this new information to the Dutch Trade and Industry Appeals Tribunal so it can issue a new judgment, he said.

Maverick Advocaten partner Cyriel Ruers in Amsterdam said companies may lodge a complaint with the ACM when they do not have enough evidence to bring a private action themselves. Complainants will often seek the ACM to take action as its decisions to investigate and any potential subsequent fines are very valuable in private lawsuits, he noted.

Ruers added that the tribunal's judgment confirms the ACM does not have jurisdiction to investigate a company if the activity concerned is completely – or predominantly – financed by public funds. But it does not clarify the exact share of public financing that is needed for a company's conduct to fall outside the scope of the country's Competition Act, he said.

Counsel to the Federation of Healthcare Psychologists and Psychotherapists

Van Veen Advocaten

Partners Kees van Dijk and Tjeerd Grünbauer in Ede

Counsel to Silver Psychology
Advocatenkantoor Breedijk

Partner Klaas-Jan Breedijk in Tilburg