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Competition & Antitrust Guide 2005

Competition law in the Netherlands

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The Netherlands has a history of widespread anti-competitive practices. In recent years, the authorities have been combating these practices vigorously. On 1 January 1998, the Dutch Competition Act (the "DCA") entered into force. At the same time, the Dutch Competition Authority (Nederlandse Mededingingsautoriteit "NMa"), responsible for the implementation and enforcement of the Act, started its operations. The NMa includes several departments, like the Antitrust department, the Merger Control department and the Legal Department. It also contains two special chambers responsible for energy and transport. The DCA is based on European competition law and should for a large extent be interpreted in line with European case law. Dutch Competition law deals with anti-competitive agreements, abuse of dominant positions and merger control. The most important articles of the DCA are equivalents of the Articles 81 and 82 EC Treaty as well as the European Merger Control Regulation. Since 1998 the DCA has been amended several times in order to keep the DCA in line with the modernisation of the European competition law.

Enforcement

The NMa can trace infringements of the DCA through complaints and/or investigations. There is also a leniency-program, pursuant to which parties can reveal infringements of competition law in exchange for, under certain circumstances, reduction or immunity of fines.

Violations of the DCA could result in sanctions and remedies. However, the DCA is enforced under administrative law, not penal law. Fines, as well as interim measures subject to penalties can be imposed.

In a civil procedure, compensation can be claimed by a company from another company for the damages resulting from infringements of the DCA. The legal basis for such a claim is tort. However, a company will have the burden of proof to reveal anti-competitive practices of its rivals. In practice such may be a difficult task. Anti-competitive behaviour can as a result of a civil procedure lead to compensation for damages, in addition to the fines and remedies imposed by the NMa. When the NMa is investigating a case, a company could wait until the NMa has taken a decision and thereafter start a civil procedure. In that situation the decision of the NMa provides the evidence that violations of competition law took place.

The NMa has become known for its aggressive fining policy. In that respect it is about to become one of the more active competition authorities. In the year 2004 alone fines amounted to almost 80 million euro. In the first half of 2005 fines amounted already to more than 100 million euro.

Industry focus

Each year, the NMa publishes an agenda indicating which sectors of the economy are subject to particular scrutiny of the NMa. In selecting these sectors, the NMa takes note of the market structure, behaviour of the parties in the market,

and the social importance. In 2005, the NMa focuses on the construction sector, liberal professions, financial markets and the healthcare sector.

Widespread price fixing was uncovered in the construction industry. For many years, anti-competitive agreements through bid-rigging on public projects were a given fact. These practices have been highly damaging for the government and consequently the taxpayers and even lead to a Parliamentary inquiry into the construction sector. The parliament demands strong action. The NMa investigates the construction sector as a whole. As a response an unprecedented amount of construction companies used the leniency-program in order to achieve reduction or immunity of fines. The construction sector will continue to be an important area of attention. So far, almost 400 companies have been fined for hundreds of millions of euros.

With regard to liberal professions, like advocates, civil law notaries accountants and architects, competition has long been weak due to self-regulation and entry barriers that appear to be high. The NMa, due to complaints and requests from the European Commission and the OECD, carried out analyses of the rules applicable to these liberal professions on the basis of self-regulation. In doing so the NMa tries to find out whether those rules were necessary and proportionate for the achievement of the public interest objective, and whether those self-regulating rules are necessary for the good practice of the profession. In order to reach a bal-

anced assessment, the NMa, together with the professions, conduct further research in this area.

The financial sector is of considerable economic importance. Competition in this sector is likely to become an issue because of a lack of transparency, the complex nature of the financial products, and the structure of the different segments of the financial markets. In recent years, the NMa issued some important decisions, published the so called Financial Sector Monitors and launched a consultation procedure looking into the activities of insurance brokers. A notable case is, for example, the fine of 30 million euro imposed by the NMa on the monopolist Interpay for charging excessive rates for network services for electronic (PIN) payments. In addition, the NMa imposed 17 million euros on eight banks which are shareholders of Interpay for structuring the market in such a way that Interpay had obtained a monopoly. The NMa has stated that

intensified supervision continues to be necessary in the financial sector.

After the DCA came into force, the healthcare sector has frequently been subjected to scrutiny of the NMa. In recent years, more competition is introduced in this traditionally highly regulated sector. The applicability of the DCA lead to many questions in the healthcare sector. The NMa responded with the publication of 'Guidelines for the Healthcare sector' and consultation documents. Further introduction of competition will be a major challenge for the health care sector in the years to come. The NMa will continue to monitor the healthcare sector.

Compliance

After many years of more or less institutionalized anti-competitive practices, the Netherlands can, since the introduction of the DCA in 1998, no longer be seen as a 'Cartel-paradise'. The NMa has shown to be an active enforcer of the DCA. Dutch competition law is now

in line with European competition law and has an appreciable effect on many sectors. Annually, the NMa focuses on some particular sectors of the economy, but this does not mean that other areas of the economy are forgotten. In view of the consequences of violating competition law, companies active in the Netherlands must be aware of and comply with these rules. More and more companies install compliance programmes to prevent violations of Dutch competition law. Given often the perceived complexity of competition law and the active enforcement policy of the NMa the introduction of compliance programmes should be an integral part of sound business policy. ■

Biographical information

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