

OVERVIEW: NETHERLANDS

M Chatelin and A van der Linden
Faasen & Partners

The Competition Act (DCA), which came into force on 1 January 1998, has brought Dutch competition law in line with EU competition law. One of the basic principles of the DCA is that the Dutch rules should be neither more restrictive nor more liberally interpreted than EU competition rules. The application of the DCA is significantly influenced by the general policy and individual decisions of the Commission and the judgments of the community courts.

The Competition Authority (NMa) is the competent enforcement authority to act under the DCA, EC Regulation 1/2003 and EC Regulation 139/2004. A European and international strategy team within the NMa is responsible for the coordination of these international tasks.

Antitrust

The NMa is empowered to initiate proceedings, terminate infringements and take administrative measures. For infringements of the general prohibition of article 6(1) DCA or the abuse of a dominant position of article 24 DCA, the board of the Authority may impose an administrative fine of €450,000, or 10 per cent of the turnover of the undertaking, whichever is the greater. The NMa may also impose a penalty (under conditions), imposed on a daily basis in case of non-compliance. Furthermore, the NMa may impose a penalty if the undertaking refuses to cooperate while under investigation. In 2005, the NMa has initiated 20 investigations and imposed a total penalty amount of €141.2 million.

The NMa has extensive investigatory powers to detect cartels, for instance price agreements between undertakings, and the abuse of dominant positions, prohibited by the DCA. If the NMa suspects an infringement, it conducts an investigation and produces a substantiated report setting out the alleged infringement. The undertakings in question will be given the opportunity to comment orally or in writing. In the course of the investigation, the NMa has the power to enter and seal offices or other premises and request information. The NMa may submit data and information obtained during its investigation to other national competition authorities.

Merger control

In 1998, the DCA introduced a system of concentration control for operations that affect the Dutch economy. It substantively incorporates and copies the system of EC Merger Regulation 4064/89, to the extent that it prohibits those concentrations that create or strengthen a dominant position resulting in a significant restriction of effective competition on the Dutch market or a part thereof. At present, a review of the DCA is being conducted with respect to changes in the substantive test incorporated in EC Regulation 139/2004.

Only transactions with a Dutch dimension must be notified to the NMa before their implementation. A concentration has a Dutch dimension if the combined aggregate worldwide annual turnover of the undertakings concerned exceeds €113.5 million, and at least two of the individual undertakings concerned each have an annual turnover within the Netherlands of at least €30 million.

If a concentration has a Dutch dimension, prior notification to the board of the NMa is mandatory. The implementation of a concentration within the first four weeks following the notification is prohibited. The date of filing is left to the discretion of the parties concerned; the DCA does not require that an agreement has been signed or controlling interest has been acquired. The transaction must, however, be sufficiently concrete in order to be able to provide the information requested. The NMa has to decide within four weeks whether a licence, and a second phase, is required for the implementation of the concentration. If the NMa decides that an application for a licence is required, the concentration will have to go through second phase procedures. In order to initiate this second phase, the parties concerned have to submit a separate application. The board of the NMa has to make a decision within 13 weeks of the application for a licence, during which implementation of the concentration is prohibited. In 2005, the NMa received 80 notifications and in five cases concluded that a second phase procedure was necessary.

From 29 December 2006, the NMa started charging the notifying parties for its decisions on the clearance of concentrations. The NMa Recovery of Costs Decree (Besluit kostenverhaal NMa) is based on article 93a DCA, and lays

down provisions on the reimbursement of costs that the NMa makes when taking a decision. According to this decree, the NMa will charge €15,000 for a decision on a notification. If the board of the NMa renders a decision whereby the parties have to obtain a licence, the NMa will charge an additional €30,000. For a decision regarding an exemption from the prohibition to implement the concentration before clearance, €2,000 will be charged. The NMa will send the invoice simultaneously with each decision, irrespective of whether the concentration or exemption is granted clearance or is opposed.

Further, the NMa has various responsibilities, which include:

- processing administrative and judicial notices of appeal;
- on request, giving advice to the government on the effect on competition of proposed and existing regulations and decisions;

- contributing to international consultative networks on the application of national and European competition rules;
- conducting or commissioning market studies; and
- providing public information.

NMa Agenda

Each year, the NMa publishes the NMa Agenda, in which it sets out the main areas for attention. For 2007, the focus of the NMa will be on the energy sector, transport sector, media and communication markets, health care sector and financial sector. At the end of the year, the NMa reports on its activities in its annual report.

FAASEN & PARTNERS BV

Wibautstraat 224, 1079 DN
Amsterdam

P.O. Box 12929, 1100 AX
Amsterdam
Netherlands

Tel: +31 20 5600 600

Fax: +31 20 5600 502

www.fplaw.nl

Contacts:

M. Chatelin
chatelin.michel@fplaw.nl

A. van der Linden
vanderlinden.annemieke@fplaw.nl

Faasen & Partners is a law firm with a practice directed at medium-sized and large companies, governmental agencies and financial market participants. Our lawyers are trained to look beyond the horizons of law and domestic issues and offer specialist advice in areas including corporate, commercial and financial law, (European) antitrust/competition, procurement law and labour law.

Our professionals offer assistance to both public and private clients in all fields of European law, such as giving advice in the fields of state aid, public procurement and privatisations in the health care, education and energy sectors, among others. We advise and assist clients with respect to acquisitions in the local market and transactions with multi-jurisdictional implications. We also draft distribution, franchise and joint venture agreements, advise clients on various merger control and competition issues, such as competition-related litigation and administrative proceedings before the Dutch Competition Authority.

Our familiarity with multidisciplinary solutions and our high level of specialisation in European and competition law and legal issues concerning regulated sectors, together with imaginative pricing of our services, gives us a competitive advantage in the Dutch legal service market.