

Competition

Newsletter

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Recent developments

in the Netherlands relevant for the international practitioner

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Forced friendship among regulators?

At the announcement of its 2009 annual report, the NMa's chairman Pieter Kalbfleisch stated that the Dutch government's intended budget cuts may result in more cooperation between fellow regulators. At the same time, it could, however, lead to less effective regulation.¹

Regardless of intended budget cuts, cooperation between regulators has intensified over the years. The NMa has increasingly tapped new sources of information on possible competition law infringements through cooperation with, for

instance, other competition authorities², the Fiscal Intelligence and Investigation Service³ and the Public Prosecutor⁴. According to the NMa, the budget cuts aimed at intensified cooperation between fellow regulators could lead to more synergy, but may also jeopardise effective regulation.

Notable activities in 2009 include a number of firsts for the NMa. In 2009, the NMa for the first time intervened as *amicus curiae*⁵, imposed a fine on a cartel facilitator⁶ and accepted an efficiency defence⁷.

A stitch in time saves EUR 2.15 million

The NMa has imposed a fine of approx. EUR 1.4 million on British insurer Amlin and EUR 782,000 on the Dutch State for failure to notify

¹ See the NMa [press release](#) of 22 April 2010.

² See also *NMa paints bleak picture for cartel facilitators* in our [Competition Overview](#) of June 2009, in which the NMa requested the Belgian competition authority to search the home of the cartel facilitator's manager.

³ See also *Fines grow on trees* in our [Competition Overview](#) of October/November 2007, in which the NMa was tipped off by the Fiscal Information and Investigation Service, which found cartel-related documents during its investigation.

⁴ See District Court of The Hague, 26 June 2009, [LJN: BJ0047](#), discussed in our [Competition Overview](#) of July 2009.

⁵ See our [Competition Newsletter](#) of November 2009.

⁶ See our [Competition Newsletter](#) of June 2009.

⁷ See our [Competition Newsletter](#) of March 2009.

Amlin's acquisition of Fortis Corporate Insurance from the Dutch State.

Differing from the notification of concentration at EU level⁸, the purchaser as well as the seller has a responsibility to file concentrations meeting the Dutch merger thresholds. A fine was therefore imposed on Fortis Corporate Insurance as well as the Dutch State.

The NMa overturned the Dutch State's argument that it could not be caught by the merger control provisions of the Dutch Competition Act since it did not qualify as an "undertaking". Similar to the EU Merger Regulation, Dutch merger control is not limited to acquisitions by "undertakings"; it also includes acquisitions by "persons already controlling at least one undertaking".⁹ The NMa considers that the term "person" in this context extends to private entities as well as public bodies, including the State itself.¹⁰

Increased buyer power protection?

The European Commission is not alone in its quest for more protection against buyer power. The Dutch parliament recently adopted a bill to increase the market share threshold of the national *de minimis* clause to provide small and medium-sized companies with more leeway to join forces against buyer power.¹¹

Currently, the *de minimis clause* laid down in the Dutch Competition Act provides for an exemption for restrictive agreements, including hardcore cartels, where no more than eight participants with an aggregate turnover of less than EUR 5.5 million (for companies whose primary business is in the affected markets) or EUR 1.1 million (for other companies) are involved. Also exempt are restrictive agreements where the parties' combined turnover does not exceed EUR 40 million and their aggregate market share remains below 5%. The latter thresholds have been based on the

European Commission's guidelines on the effect on trade concept¹², according to which inter-State trade will not be appreciably restricted when these thresholds are met.

The increased buyer power of big retailers was one of the main reasons why the European Commission introduced an additional buyer's market share threshold in its new Block Exemption on vertical restraints.¹³ The initiative to raise the national *de minimis* clause was also inspired by increased buyer power: it intends to provide small companies more leverage against big retailers by being able to conclude e.g. joint selling arrangements without competition concerns.¹⁴

The recently adopted bill proposes to amend the latter exemption by abandoning the turnover threshold and raising the market share threshold to 10%. As a result, the national *de minimis* clause will no longer be in line with the thresholds of the European Commission's guidelines. One of the main hang-ups of the bill was whether this would constitute an infringement of European law, since it would mean that certain hardcore cartels caught by Article 101 TFEU due to an appreciable effect on inter-State trade, would be exempted under national law. The Parliament adopted the bill on 15 June 2010.

Another recent initiative against buyer power is the Minister of Economic Affairs' current examination of the possibility of a voluntary code of conduct between suppliers and customers against unilateral termination of agreements by suppliers without prior consultation of the specific customer.¹⁵ The European Commission is also

⁸ Pursuant to Article 4(2) of Regulation 139/2004 (OJ 2004, L24/1), mergers must be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification must be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

⁹ See also Article 3(1)(b) of Regulation 139/2004, OJ 2004, L24/1.

¹⁰ See also para. 12 of the European Commission's Consolidated Jurisdictional Notice, OJ 2008, C95/1.

¹¹ Second Chamber, 2007-2008 session, 31 531.

¹² Cf. para. 52 of the guidelines on the effect of trade concept contained in Articles 101 and 102 TFEU, OJ 2004, C101/81.

¹³ See the European Commission's press release of 28 July 2009 (IP/09/1197) and Regulation 330/2010, the new Block Exemption on vertical restraints, which entered into force on 1 June 2010 (OJ 2010, L102/1). The Block Exemption introduced an additional buyer's market share threshold. As a result, vertical agreements will now only benefit from the Block Exemption if the supplier's market share as well as the buyer's market share on which it purchases the contract goods, remains below 30% (and the agreement fulfils the other conditions laid down in the Block Exemption).

¹⁴ Second Chamber, 2007-2008 session, 31 531, no. 3, p. 1.

¹⁵ <http://www.rijksoverheid.nl/onderwerpen/mededinging/inkoopmacht>.

looking into resolving unfair contractual practices in the retail chain.¹⁶

Before the courts...

Bankrupt? Still need to pay antitrust fine

Similar to the European Commission, the NMa can be quite persistent in its pursuit of payment of antitrust fines.¹⁷ The Court of Appeal recently confirmed that the director of a bankrupt construction company can be held liable for payment of an NMa fine.¹⁸

The construction company Bouwbeheer was declared insolvent in July 2005. In October 2005, the director of Bouwbeheer applied for the NMa's accelerated sanction procedure¹⁹, which resulted in a fine of EUR 176,442 in 2006. Bouwbeheer never paid the fine and the NMa contended that the director should be held personally liable for non-payment.

The Court agreed that – subject to proof to the contrary – the director could be held liable for non-payment. As he himself had applied for the accelerated procedure, he should have reserved a substantial amount of Bouwbeheer's financial means available at that time for payment of the upcoming NMa fine.

¹⁶ See e.g. *Mlex, EC to push for crackdown on unfair contractual practices in retail chain*, 4 June 2010.

¹⁷ In a recent speech, European competition commissioner Almunia stated he was willing to consider firms' requests to waive antitrust fines on hardship grounds, but warned the bar would remain high in order to avoid undue preferential treatment of companies violating the law. See *Mlex, EC's Almunia wary of 'inequality problems' in waiving fines for struggling firms*, 12 May 2010. According to its 2009 *Annual Report on Competition Policy*, the European Commission waived nearly EUR 14 million in antitrust fines due to insolvency of the relevant companies.

¹⁸ Court of Appeal of 's-Hertogenbosch, 27 May 2010, LJN: BM5941.

¹⁹ Due to the large number of companies and projects involved in the construction industry investigation, the NMa provided the construction companies a swifter alternative than the regular sanctions procedure to "come clean": an accelerated procedure in which the companies would use a joint representative only to formulate a generic response to the allegations set out in the NMa's report and would waive their right to dispute the facts and the legal judgment thereof. Companies opting for this accelerated procedure would receive a 15% reduction in their fines. Most construction companies chose to cooperate in the accelerated procedure.

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