

# Competition

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## Newsletter

### Recent developments

in the Netherlands relevant for the international practitioner

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**Horticulturist led up the garden path?**

The NMa imposed a fine of EUR 138,000 on a horticulturist, who at first it had let off the hook for insufficient evidence of his participation in bid-rigging.<sup>1</sup>

On 19 December 2005, the NMa announced that it levied fines totalling more than EUR 1 million on eight companies in the Netherlands in the field of landscape gardening.<sup>2</sup> The penalties were imposed for bid-rigging agreements made in 2004

<sup>1</sup> NMa press release of 7 December 2009.

<sup>2</sup> NMa press release of 19 December 2005.

in relation to five tenders for the maintenance of public "green" space in the city of Maastricht from 2004 to 2006. A number of these companies appealed before the District Court of Rotterdam against the NMa's decision not to impose a fine on the horticulturist in question. The District Court ruled that the NMa's decision should indeed be annulled since the horticulturist had been aware of the bid-rigging and should have distanced itself explicitly from it. The District Court concluded that by not doing so, the horticulturist had violated the cartel prohibition and the NMa should have imposed a fine.

**NMa: no abuse of dominance by TNT**

The NMa has rejected a complaint claiming abuse of dominance by postal company TNT by engaging in predatory pricing, tying and bundling, exclusive long-term agreements and discriminatory pricing.<sup>3</sup>

The NMa examined the predatory pricing claims on the basis of the European Commission's guidance in applying Article 102 TFEU (ex Article 82 EC) to abusive exclusionary conduct by dominant undertakings.<sup>4</sup> Conduct by a dominant undertaking

<sup>3</sup> NMa press release of 15 December 2009.

<sup>4</sup> Guidance on the Commission's enforcement priorities in applying Article 102 TFEU (ex Article 82 EC) to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7.

may be considered predatory if it charges such a low price that it is deliberately incurring losses or foregoing profits in the short term, so as (likely) to foreclose one or more of its competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.

According to the European Commission's guidance, pricing below the long-run average incremental cost (LRAIC) is normally capable of foreclosing efficient competitors from the market.<sup>5</sup> Since TNT at least covers its LRAIC with its mail delivery services, the NMa considered predatory pricing unlikely. In addition, the NMa found insufficient evidence of the other abusive conduct allegations to initiate an in-depth investigation. As a result, the NMa dismissed the complaint without needing to decide on whether TNT holds a dominant position.

### **Draft NMa guidelines on digital and analogue investigations published**

**The NMa published the consultation paper "NMa Procedure relating to analogue and digital investigations" on 8 January 2010. The draft text was available for public response until 12 February 2010 and is expected to be finalised mid-2010.**<sup>6</sup>

The consultation paper will replace the current 2007 guidelines on digital investigations<sup>7</sup> and expands its scope by, amongst others, including guidance on the NMa's procedure in regard of analogue data and information requests.

The consultation paper also takes account of last year's ruling by the District Court of The Hague against "fishing expeditions" by the NMa during dawn raids<sup>8</sup> by providing the relevant company the opportunity to be present during the examination of the digital copies it claims are outside the scope of the NMa's investigation. In addition, the NMa has introduced the "sealed envelope" procedure known from European case law<sup>9</sup>, to further safeguard

legally privileged documents during NMa dawn raids.

### **NMa sets out its priorities for 2010**

**The NMa presented its 2010-2011 agenda on 14 January 2010, in which it designated the following sectors as its 2010 priorities: the processing industry, the financial and business services industry and the health care industry.<sup>10</sup> The NMa will furthermore keep a close watch on the construction industry, the textbooks market and the mail services industry.**

The NMa's suspicion of a big cartel in the flour industry was one of the reasons for selecting the processing industry as a 2010 priority. Like the European Commission, the NMa has uncovered several cartels in this industry in the past.<sup>11</sup> In regard of the financial and business services, the NMa will focus on cooperation in the banking and the insurance industry. In addition, the NMa has indications of anti-competitive conduct in the real estate industry. The health care industry can expect new guidelines on the application of the Dutch Competition Act to the health care sector.

### **Before the courts...**

#### **Tax deductibility of cartel fines continued**

**The advocate general at the Supreme Court has concluded that cartel fines imposed by the NMa are not deductible for corporate tax purposes.<sup>12</sup> Even though admitting that NMa fines may partly be of a non-punitive nature and thus tax deductible for that part, the advocate general holds to the explicit exclusion of tax deductibility of competition**

<sup>5</sup> See point 67 of the [Guidance](#) on the Commission's enforcement priorities in applying Article 102 TEFU (ex Article 82 EC) to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7.

<sup>6</sup> NMa [press release](#) of 8 January 2010.

<sup>7</sup> NMa [digitale werkwijze](#) 2007, Stcrt. 2007, no. 243.

<sup>8</sup> District Court of The Hague, 13 October 2008, [LJN:BH2647](#). See also our [Competition Newsletter](#) of January and February 2009.

<sup>9</sup> See cases T-125/03 and T-253/03, [Akzo Nobel Chemicals Ltd](#), [2007] ECR II-03525, in which the

General Court ruled that during a dawn raid, a company may refuse European Commission officials looking at documents during dawn raids which the company considers confidential. Disputed documents should be placed in a sealed envelope. The contents of the documents should not be read by the European Commission until (i) it has adopted a decision allowing for the disclosure of the information which the undertaking can appeal to the General Court and (ii) the limitation period for bringing an action against this decision has expired.

<sup>10</sup> See the [NMa Agenda](#) 2010/2011.

<sup>11</sup> The NMa mentions cartels in the concrete and swimming pool chemicals industries. The European Commission has found cartels in the chemicals, textile and bitumen industries. See the [NMa Agenda](#) 2010/2011.

<sup>12</sup> Supreme Court 22 December 2009, [LJN: BL0214](#).

**law infringements in Dutch corporate income tax legislation. By the same token, he argues that an earlier ruling allowing for the tax deductibility of fines imposed by the European Commission for competition law infringements is wrong.**

The advocate general's conclusion was made in appeals against the rulings by the District Courts of Haarlem<sup>13</sup> and Breda<sup>14</sup> on the non-deductibility of NMa fines. In contrast, the District Court of Haarlem earlier ruled<sup>15</sup> that fines imposed by the European Commission for competition law infringements were indeed partly non-punitive in nature and thus tax deductible for that part.<sup>16</sup> The advocate general took account of this ruling because it was used to argue in favour of deductibility (in part) of NMa fines.

The advocate general finds that the parties may have a point by claiming that cartel fines are partly of a non-punitive nature since (i) the deterrent and penalising effect by fines can only start after the fine has compensated the profits made by the competition law violation and (ii) the European Commission's desired (civil) antitrust damages actions are still ineffective. However, since Dutch corporate tax legislation explicitly states that administrative fines, such as fines by the NMa and the European Commission, are not tax deductible, the advocate general is of the opinion that the Supreme Court should dismiss the appeals.

The Supreme Court is generally inclined to follow the advocate general's conclusion.

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<sup>13</sup> Haarlem District Court 3 October 2008, LJN: BF7320.

<sup>14</sup> Breda District Court 25 November 2009, LJN: BK6090 and LJN: BK6089.

<sup>15</sup> Haarlem District Court 22 May 2006, LJN: AX7112.

<sup>16</sup> The latter decision is currently under appeal, in which appeal the European Commission intervened as amicus curiae following a preliminary ruling by the European Court of Justice that the European Commission should be able to intervene. See our *Competition Newsletter* of June 2009.

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