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Dearly earned lessons in merger control

The NMa has imposed total fines of EUR 1,302,000 for failure to notify in two (unrelated) concentration cases.¹ It is the second time the NMa has used its fining powers since these were expanded in October 2007.² To compare: the European Commission has imposed fines in three cases for failure to notify³ since the

entry into force of the EU Merger Regulation in 1990.⁴

In the first case, the NMa discovered through media coverage that NPM Capital neglected to notify its acquisition of shares of Buitenfood, a holding company of several frozen-food companies. This resulted in a fine of EUR 580,000 on NPM Capital as purchaser and EUR 15,000 on Driesprong Participaties as seller of Buitenfood. In addition, the NMa imposed an order subject to periodic penalty payments on NPM Capital, to notify the acquisition to the NMa within four weeks.

In the second case, the long overdue filing by holding company Sibco and raw-materials trading company Trafigura of joint control over ethanol trading company Alcotra led to a fine of EUR 118,000 for Sibco and of EUR 589,000 on Trafigura.

Incidentally, the NMa's first fine on the basis of this increased fine level was lowered by EUR 292,500 for the purchaser and EUR 69,500 for the seller in administrative appeal last year.⁵

¹ NMa [press release](#) of 24 February 2010.

² As of 1 October 2007, the fine for breach of the obligation to notify the NMa before completion was increased in line with the EU Merger Regulation, to 10% of turnover or €450,000 whichever is higher.

³ With total fines of EUR 20,224,000.

⁴ [Regulation 4064/89](#), the predecessor of the current [Merger Regulation 139/2004](#), entered into force on 21 September 1990. See also the European Commission's statistics on merger control: <http://ec.europa.eu/competition/mergers/statistics.pdf>.

⁵ NMa [press release](#) of 10 June 2009.

NMa reduces fine by approx. €1 million

The NMa reduced a fine on a Dutch swimming pool chemicals distributor for market-sharing by more than EUR 1 million after the distributor specified its relevant turnover⁶ in administrative appeal.⁷ The relevant turnover had initially been based on an estimate by the NMa due to lack of insight into the distributor's relevant turnover. The European Commission has a similar option in its fining guidelines.⁸

According to the policy rules on the imposition of fines⁹, the NMa sets the level of fine by determining the starting point of the fine on the basis of 10% of the relevant turnover. If the NMa is unable to determine the relevant turnover on the basis of information provided by the offender, the NMa may estimate this turnover. The basic fine is subsequently determined by multiplying the starting point for the fine by a factor (S) to represent the seriousness of the infringement and adjusted in accordance with aggravating and mitigating circumstances.

The NMa's estimate of the distributor's relevant turnover was based on statements by the distributor's general manager and other participating companies on the distributor's market position, as well as the relevant turnover achieved by the other participating companies. In administrative appeal, the distributor submitted a report by Ernst & Young Accountants with a significantly lower relevant turnover than estimated by the NMa. The NMa subsequently reduced the fine in accordance with this new information.

Continued sector-specific control for Schiphol?

As part of the evaluation of the Aviation Act, the Minister of Transport, Public Works and Water Management requested the NMa to investigate whether Schiphol Airport is still dominant in regard to its aviation activities, including landing and take-off fees and tariffs for handling passengers and baggage.¹⁰

Research agency German Airport Performance (GAP) carried out the study into a possible dominant position on the market(s) for aviation activities and activities closely related to aviation activities.

Based on GAP's findings, the NMa concluded that aviation activities constitute a single market: the market of making available the airport's infrastructure to airlines and other users.¹¹ From a geographic point of view, this market is limited to the catchment area of Amsterdam Schiphol Airport. NVLS, operator of Amsterdam Schiphol Airport, enjoys a dominant position on this market because it would be able to profitably increase its tariffs. Sector-specific regulation is thus desirable for the aviation activities.

In addition, GAP's findings reveal that activities closely related to aviation activities form a single market: the market of providing access to the airport's infrastructure for ground handlers and other organisations.¹² From a geographic point of view, this market is physically limited to Schiphol's land, possibly including locations close to the airport. Since NVLS manages access to the airport, and since it can charge a fee under the exclusive operation licence granted by the Dutch government, NVLS is dominant on this market. As a result, sector-specific regulation on

⁶ The relevant turnover relates to the revenue achieved by an offender for the total duration of an infringement by supplying goods and services to which that infringement relates, minus discounts and suchlike and minus turnover tax. See the [policy rules](#) of the Minister of Economic Affairs on the imposition of administrative fines, Government Gazette No. 14079 of 22 September 2009

⁷ NMa [decision](#) in case 6091/Distributors of natriumhypochloriet of 11 February 2010.

⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, [OJ 2006, C210/2](#), cf. para. 16.

⁹ [Policy rules](#) of the Minister of Economic Affairs on the imposition of administrative fines, Government Gazette No. 14079 of 22 September 2009.

¹⁰ See also our [Competition Newsletter](#) of October 2009.

¹¹ With a possible further subdivision into aviation activities (i) to airlines offering services to passengers who start their journey at Schiphol (so-called 'o/dpassengers', where 'o/d' stands for 'origin-destination'); (ii) to airlines offering services to passenger who transfer at the airport (so-called 'transfer passengers'); (iii) to freight airlines and (iv) to local flights and flight trainings.

¹² With a possible subdivision into non-aviation activities (i) for offering passenger-handling services; (ii) for offering freight & mail services; (iii) for offering aircraft-handling services; (iv) for offering catering services and (v) for offering refueling services.

this market will be necessary as soon as NVLS decides to charge access fees.¹³

Interested parties have until 26 March 2010 to comment on the NMa's findings.

Before the courts...

Cartel fines: who pays the piper calls the tune?

The District Court of Rotterdam found that the NMa was right to declare two former parent companies inadmissible in their appeal against a cartel fine imposed on their former subsidiary, despite the agreement to pay the fine at the sale of their subsidiary.¹⁴

Pending the NMa's investigation into potential bid-rigging by Lavaredo, a subsidiary jointly held by Lavason and Voilier, Laverdo was sold by its parent companies. At the sale of Lavaredo, Lavason and Voilier agreed to pay the potential fine imposed on Lavaredo. The NMa eventually imposed a fine on Lavaredo. Contrary to the European Commission's recent (and controversial) approach¹⁵, the NMa attributed the infringement solely to Lavaredo since its (former) parent companies had joint control and there was no reason to assume that Lavaredo did not decide on its own conduct independently.

Consistent with settled case law of Dutch administrative courts, the District Court ruled that the agreement by the former parent companies to pay the fine did not constitute a direct interest in the NMa's decision to impose a fine on Lavaredo. Neither the agreement to payment of the fine, nor the fact that Lavaredo could withdraw its appeal without the former parent companies being able to prevent that, could alter this.

¹³ NVLS is currently not using the dominant position because it is not charging any access fees (except for fuel supply concessions).

¹⁴ Rotterdam District Court, 2 February 2010, LJN: [BL2968](#).

¹⁵ See for instance [COMP/38.629](#) – Chloroprene rubber. The decision – of which no public version is yet available in full – is currently under appeal in the General Court.

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