

# Competition

## Newsletter

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### Recent developments

in the Netherlands relevant for the international practitioner

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#### High trust, high fines

The NMa has imposed a fine of EUR 19 million on Dutch media company Wegener as well as fines totalling EUR 1.3 million on five of its executives<sup>1</sup> for failure to comply with a merger remedy made in regard of Wegener's acquisition of publishing company VNU Dagbladen in 2000.<sup>2</sup> It is the first time that the NMa has imposed fines on individuals for non-compliance with a merger remedy. So far, the European Commission has not imposed fines for non-compliance with remedies.<sup>3</sup>

<sup>1</sup> See the NMa's [press release](#) of 14 July 2010.

<sup>2</sup> At the acquisition of VNU Dagbladen, Wegener acquired (*inter alia*) regional newspaper *BN/De Stem*, resulting in an overlap with its existing regional newspaper *Provinciale Zeeuwse Courant*. To resolve this, Wegener committed to guarantee the independence of these two regional newspapers.

<sup>3</sup> See Article 14(2) of [Regulation 139/2004](#), OJ 2004, L24/1 and the DG Competition's [statistics](#).

Four of the five executives who received personal fines were appointed in 2002 as special supervisory directors to ensure Wegener's compliance with the merger remedy. Their fines range from EUR 250,000 to EUR 350,000. The remaining executive was fined EUR 150,000 for his involvement in the violation.

The NMa also imposed an order subject to periodic penalty payments, ordering Wegener to comply with the earlier imposed merger remedy within a year. If it fails to comply with said order, Wegener risks penalty payments of EUR 1 million per quarter with a maximum of EUR 20 million.

In the press release announcing the fines, the chairman of the NMa's board reminded readers of the NMa's "high-trust" approach: "*you have our trust, but if you violate that trust, you will be fined severely*".<sup>4</sup> Wegener has stated in a press release that it considers the fine "*unjustified and disproportionate*". The company will appeal the NMa's decision.

#### Informal advice on full functionality

**The NMa concluded in an informal advice that a joint venture does not automatically qualify as a notifiable full function joint venture<sup>5</sup> if, for an**

<sup>4</sup> See the NMa's [press release](#) of 14 July 2010.

<sup>5</sup> A full function joint venture is a joint venture which performs on a lasting basis all the functions of an

**initial start-up period only, it achieves a substantial part of its turnover with third parties.**<sup>6</sup>

The parties requesting the informal advice indicated that the joint venture would at first achieve a substantial part of its turnover with third parties, but within approximately one year would generate more than 70% of its turnover with the parent companies.

The NMa agreed with the parties that initial large sales to third parties did not necessarily result in full functionality of the joint venture, taking account of the joint venture's object (i.e., achieving substantial sales to the parent companies) and the prospective ratio between sales to the parent companies and third parties. The NMa, however, referred to the European Commission's Consolidated Jurisdictional Notice<sup>7</sup> to warn the parties that any alteration of this sales ratio could affect the NMa's view on the full functionality of the joint venture.

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

#### **Constructive approach to construction fraud**

**The Trade and Industry Appeals Tribunal considers the NMa's approach to the construction fraud not unreasonable. According to the Tribunal, opting for the accelerated procedure was a well-considered choice of the relevant construction companies, which choice still stands in appeal. This would only be different if the construction companies convincingly argue that the facts established by the NMa or the NMa's related legal assessment were incorrect.**<sup>8</sup>

The NMa imposed fines on specific construction companies in the context of the construction industry fraud investigation initiated after evidence of large-scale rigging of public bids was revealed in a television broadcast in 2001.

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autonomous entity. Similar to the EU's merger control regime (cf. Article 3(4) of [EU Merger Regulation](#)), full-function joint ventures qualify as concentrations and need to be notified under the Dutch merger control regime (Article 27(2) of the [Dutch Competition Act](#)).

<sup>6</sup> Informal advice in [case 6992](#) of 7 July 2010.

<sup>7</sup> Commission [Consolidated Jurisdictional Notice](#) under Regulation 139/2004 on the control of concentrations, OJ 2008, C95/1.

<sup>8</sup> Trade and Industry Tribunal, 7 July 2010, [LJN: BN0545](#) and [LJN: BN0540](#).

Due to the large number of companies and projects involved in the construction industry investigation, the NMa opted for a specific approach in dealing with the sector-wide cartel investigations by (i) making these investigations sub-sector specific, (ii) introducing an accelerated procedure for imposing sanctions with a condition on the companies to waive their right to dispute the facts and the related legal assessment<sup>9</sup> and (iii) using a simplified approach to levying fines<sup>10</sup>.

The construction companies concerned decided to participate in this accelerated procedure but in appeal argued that the continued application of the accelerated procedure principles during the judicial proceedings, particularly the waiver of their right to contest the facts and legal assessment, was in violation of their rights of defence.

The Tribunal dismissed these arguments by ruling that no rights of defence are being infringed if a company has to waive its rights to contest the factual allegations in exchange for a fine reduction. However, some leeway for disputing the facts and legal assessment should remain in the judicial proceeding. Considering the well-informed choice to participate in the accelerated procedure, the Tribunal found it up to the construction companies to provide convincing arguments and evidence why the said facts and assessment would be incorrect, as well as arguments as to why they opted for the accelerated procedure in the first place if they considered these facts and assessment incorrect.<sup>11</sup>

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<sup>9</sup> The NMa provided the construction companies a swifter alternative than the regular sanctioning procedure to "come clean": an accelerated procedure in which the companies would use a joint representative 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 related legal assessment. Companies opting for this accelerated procedure would receive a 15% reduction in their fines. Most construction companies chose to cooperate in the accelerated procedure.

<sup>10</sup> The NMa drew up special guidelines for the setting of fines for each construction industry sub-sector.

<sup>11</sup> If a construction company decided not to participate in the accelerated procedure, the regular procedure applied (without fine reduction, but also without having to waive the right to dispute the facts and related legal assessment).

### Contact information

For further information please contact one of our partners: Mark Biesheuvel, Erik Pijnacker Hordijk, Martijn Snoep, Jolling de Pree, or one of our senior associates mentioned below:

Mark Biesheuvel

T + 31 20 577 1429

E [mark.biesheuvel@debrauw.com](mailto:mark.biesheuvel@debrauw.com)

Erik Pijnacker Hordijk

T + 31 20 577 1352

E [erik.pijnackerhordijk@debrauw.com](mailto:erik.pijnackerhordijk@debrauw.com)

Martijn Snoep

T + 31 20 577 1365

E [martijn.snoep@debrauw.com](mailto:martijn.snoep@debrauw.com)

Jolling de Pree

T + 31 20 577 1355

E [jolling.depree@debrauw.com](mailto:jolling.depree@debrauw.com)

Maikel van Wissen

T + 31 20 577 1400

E [maikel.vanwissen@debrauw.com](mailto:maikel.vanwissen@debrauw.com)

Damianos Vainas

T +31 20 577 1368

E [damianos.vainas@debrauw.com](mailto:damianos.vainas@debrauw.com)

Stefan Molin

T +31 20 577 1351

E [stefan.molin@debrauw.com](mailto:stefan.molin@debrauw.com)

Simone Evans

T + 31 20 577 1344

E [simone.evans@debrauw.com](mailto:simone.evans@debrauw.com)

*De Brauw's Competition Law practice is one of the largest in the Netherlands and specialises in Dutch and EU competition work. It is involved in many international cases, working together with leading law firms across the world.*

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### Amsterdam

Claude Debussylaan 80

P.O. Box 75084

1070 AB Amsterdam

The Netherlands

T +31 20 577 1771

F +31 20 577 1775

### Beijing

2906/2908 China World Office 2

No.1 Jianguomenwai Avenue

Beijing 100004

People's Republic of China

T +86 10 5965 0500

F +86 10 5965 0550

### London

5th Floor, East Wing

10 King William Street

London EC4N 7TW

United Kingdom

T +44 20 7337 3510

F +44 20 7337 3520

### New York

650 Fifth Avenue, 4th floor

New York, NY 10019-6108

United States

T +1 212 259 4100

F +1 212 259 4111

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**Editors: Jolling de Pree  
Simone Evans**