

Competition

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Newsletter

Recent developments

in the Netherlands relevant for the international practitioner

March 2010

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New healthcare guidelines published

The NMa has published new guidelines on the application of the competition rules in the healthcare sector to provide guidance to healthcare providers and health insurers on acceptable forms of cooperation.¹ The guidelines are partly based on various European Commission guidelines, such as the guidelines on vertical restraints², horizontal cooperation agreements³, the application of Article 101(3) TFEU (ex Article 81(3) EC)⁴, the

assessment of horizontal mergers⁵ and the assessment of non-horizontal mergers⁶.

The guidelines use practical examples to explain the application of the cartel prohibition, the prohibition on abuse of dominance and concentration control to the healthcare sector. The guidelines also provide an overview of the market delimitations used by the NMa in the healthcare sector and the cooperation between the NMa and the Healthcare Authority in the investigation of healthcare cases. Furthermore, a flow chart is included as a quick-reference for healthcare undertakings in their self-assessment of intended forms of cooperation.

Before the courts...

Court supersedes leniency carrot

The Rotterdam District Court ruled that the NMa wrongly reduced construction company Vialis's full immunity by 20% for having organised information meetings on the NMa's leniency programme for its cartel members.⁷

Vialis initially received full immunity for being the first to submit a leniency application in regard of a possible cartel in the traffic regulation installation

¹ Richtsnoeren voor de zorgsector, 12 March 2010.

² OJ 2000, C291/1. New guidelines have been placed on the European Commission's website on 20 April 2010. The Guidelines still need to be formally adopted and will then be published in the Official Journal.

³ OJ 2001, C3/2.

⁴ OJ 2004, C101/97.

⁵ OJ 2004, C31/5.

⁶ OJ 2008, C265/6.

⁷ Rotterdam District Court, 5 March 2010, LJN: BL6819.

sector. The NMa reduced the immunity by 20% because Vialis organised information meetings which could have impeded the investigation into the possible cartel by increasing the risk of the other cartel participants destroying evidence after the information meetings.

Vialis argued that it merely organised the meetings to inform the other cartel members of the procedural aspects of the NMa's leniency programme for lack of a trade association in their sector. Similar information meetings had been organised by trade associations in other sectors of the construction industry to which the NMa had not objected.

The Court held that the NMa had insufficiently substantiated the reasons for applying a leniency reduction in this particular case and not in the other cases where similar information meetings had been held resulting in just as high a risk of destruction of evidence. The Court annulled the NMa's decision.

Tax deductibility of cartel fines: EU member states beware

In line with an earlier conclusion of the Advocate General at the Supreme Court⁸, the Amsterdam Court of Appeal has held that fines for cartel infringements imposed by neither the NMa nor by the European Commission are deductible for corporate tax purposes.⁹ In its *amicus curiae* intervention¹⁰, the European Commission considered tax deductibility of EU cartel fines contrary to the member states' Community loyalty. Other EU member states have thus been warned.

This ruling sets aside the earlier judgment by the Haarlem District Court allowing for the (partial) deductibility of European Commission fines.¹¹ According to the Haarlem District Court, it followed

from the wording of Regulation 17/62¹² that fines imposed by the European Commission for competition law infringements are partly non-punitive in nature and therefore tax deductible for that part.

In appeal, the Amsterdam Court of Appeal found that Regulation 17/62 confirms the punitive nature of cartel fines. The possibility for the European Commission to take account of the profit made by the illegal cartel in setting the level of the fine¹³ does not alter this, since this is merely meant to adjust the fine amount to the gravity and duration of the infringement. Moreover, the Dutch Income Tax Act explicitly leaves no room for a distinction between a (non-deductible) punitive part, and a (deductible) non-punitive part. Consequently, it is not possible to deduct European competition fines from taxes.

The Supreme Court will have the final say in the matter, as it still needs to rule on the case in which the Advocate General provided his conclusion earlier. The Supreme Court is generally inclined to follow the Advocate General's conclusion.

⁸ Supreme Court 22 December 2009, LJN: BL0214. See our *Competition Newsletter* of December 2009 / January 2010.

⁹ Amsterdam Court of Appeal, 11 March 2010, LJN: BL7056 and LJN: BL 7052.

¹⁰ The European Court of Justice ruled in case C-429/07 of 11 June 2009, that the European Commission should be allowed to submit written observations pursuant to Article 15(3) of Regulation 1/2003 in the case at hand. See our *Competition Newsletter* of June 2009.

¹¹ See our *Competition Newsletter* of October / November 2008.

¹² Regulation 17/62 is the predecessor of Regulation 1/2003.

¹³ See para. 31 of the *Guidelines* on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ 2006, C210/2.

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