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Dutch Cartel Law

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In this contribution we will describe the legal framework for the assessment of cartels in the Netherlands and set out the latest developments in policy as well as civil and administrative case law.

Legal framework

The cartel prohibition

The prohibition of cartels is contained in section 6(1) of the Dutch Competition Act (DCA). This provision can be considered the national equivalent of article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81 EC Treaty). It stipulates: 'Agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings that have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof, are prohibited.'

Section 6(2) DCA provides that such agreements and decisions are legally null and void.

Unlike article 101 TFEU, section 6(1) DCA does not include examples of anti-competitive behaviour. Nevertheless, the Dutch equivalent likewise comprises the situations mentioned in article 101 TFEU such as bid rigging, price fixing, allocation of customers or territories and limiting production, distribution, investments or innovation. The restriction of competition must concern the Dutch market 'or a part thereof'. The volume of this market is determined by the relevant product and geographic market, as described in the Commission Notice on the definition of relevant market (OJ C 372, 09/12/1997).

Exemptions to the cartel prohibition

There are several exemptions to the Dutch prohibition of cartels. First of all, section 6(3) DCA contains a general exemption on the prohibition which is similar to article 101(3) TFEU. It entails that the prohibition shall not apply to agreements, decisions by associations of undertakings and concerted practices that contribute to the improvement of the production or distribution or to the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefit. To qualify for such an exemption the agreement, decision or concerted practice should not impose restrictions that are not indispensable to the attainment of the aforementioned objectives, nor should they afford the possibility of eliminating competition in respect of a substantial part of the products and services in question. Until 2004, undertakings could apply for an individual exemption given by the Dutch Competition Authority (NMa) on these grounds. At present, undertakings must assess themselves if they fulfil these exemption conditions. In unclear cases the NMa may give an informal opinion on request of the undertaking. Furthermore, the NMa may issue policy guidelines (most recently with respect to combination agreements) that offer help to assess if the general exemption applies.

Secondly, the DCA provides that the European block exemptions also apply to national situations. At this time, these block exemptions concern certain vertical agreements, specialisation agreements, research and development agreements, technology transfer agreements and some sector specific regulations, among others for motor vehicle distribution and transport.

A purely national exemption is the 'bagatelle provision' contained in section 7 DCA. This legal provision exempts agreements, concerted practices and decisions by associations of undertakings that are considered of minor importance. The bagatelle provision applies if:

- no more than eight undertakings are involved whose combined turnover in the preceding calendar year, does not exceed €5.5 million (when the core activity of the involved undertakings is the supply of goods) or €1.1 million (in all other cases); or
- in the case of agreements between actual or potential competitors on one or more relevant markets, the combined market share of the undertakings or associations of undertakings involved is no greater than 5 per cent on any of the affected relevant markets, and their combined turnover from the goods or services falling within the scope of the agreement, decision or concerted practice during the previous calendar year, did not exceed €40 million.

This bagatelle provision is considered to be even exempting hardcore restrictions. The NMa may, however, always declare the prohibition nonetheless applicable if in view of market relationships on the relevant market, agreements, decisions or practices have a significant detrimental effect on competition. In any case, the NMa may only intervene if the anti-competitive behaviour has or may have an appreciable effect on the relevant national market.

Finally, section 15 DCA provides that by Order-in-Council, subject to conditions and restrictions if necessary, the prohibition of cartels may be declared inoperative in respect of certain categories of agreements, decisions or practices. Currently, one Order-In-Council exempts certain retail exclusivity agreements between shopping centres and retailers. Another Order-In-Council exempts certain cooperation agreements in the retail sector with respect to advertising and purchase obligations. On 1 October 2009 the minister of economic affairs replaced an Order-In-Council exempting certain combination agreements with Policy Rules. As a result, guidance is provided now instead of an explicit exemption.

The status and powers of the NMa

The NMa is responsible for the monitoring and enforcement of the DCA. It is an autonomous administrative authority that falls under the political and policy-based responsibility of the Ministry of Economic Affairs, whereby the minister cannot give the NMa instructions in individual cases.

The NMa has communicated the following areas of focus for 2010 and 2011: the processing industry (the NMa already suspects a flour cartel), financial and business services, the health-care sector, the provision of information to consumers in the energy and transport sector and the integration of wholesale markets in these sectors, the investment climate with regard to energy infrastructures and the development of supervision in transport markets.

The NMa has extensive powers to trace and intervene in cartels. For example, it may search premises and computers in order to

find proof of illegal cartel activities and take far-ranging measures to prevent cartel activities such as searching private homes without the permission of the occupant.

The NMa closely cooperates with other regulators such as the Independent Regulator of Post and Electronic Communication in the Netherlands (OPTA), the Dutch Health-care Authority (NZa), the Consumer Authority, the Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank (DNB).

Sector-specific monitoring and enforcement

The Office of Transport Regulation, an organisation that forms part of the NMa, is responsible for supervising (competition in) the transportation sector. The Office of Energy Regulation, another division of the NMa, supervises compliance with the Electricity Act and the Gas Act and will also supervise compliance with the Heating Supply Act as soon as this Act comes into force.

Sanctions in the case of infringements

In the event of an infringement of the DCA the NMa is empowered to:

- impose a fine;
- impose an order for incremental penalty payments; and
- impose a binding order for the infringer to comply with the DCA without imposing a penalty.

Fines imposed on legal entities in case of an infringement of the cartel prohibition may be up to €450,000 or, up to 10 per cent of the total net annual turnover of the undertakings involved, whichever is higher. The NMa may also impose fines on natural persons. Such fines may be up to €450,000. A natural person can only be fined when he or she directed the anti-competitive behaviour or omitted to take measures to prevent the behaviour although he or she was empowered and reasonably bound to do so. To deliberately promote anti-competitive behaviour is also fineable. Fines for neglecting procedural obligations (like the obligation to cooperate with the NMa) may be up to €450,000 or, in case this is higher, 1 per cent of the net turnover of the involved undertakings. In the past year, the NMa actually fined natural persons several times.

The NMa may also impose fines on members of associations of undertakings (eg, members of trade associations) if the relevant association has violated competition rules but is unable to pay the fine within the specified term. The provision does not require these members to be aware of the violation of the competition rules by the association. Members can avert fines if they are able to demonstrate that they did not carry out the decision of the association of undertakings and that they were not aware of that decision or proactively and timely distanced themselves from that decision.

The ministerial 2009 Fining Policy Rules provide insight into the way fines must be calculated by the NMa. The fining methodology is largely the same as the methodology used by the European Commission. The starting point for the calculation of the fine is the 'basic amount', which varies from case to case. The basic amount of the fine is firstly related to the value of all transactions obtained by the offender for the total duration of the infringement through the sale of goods and the delivery of services to which the infringement relates, after deducting turnover taxes. Subsequently, the NMa will multiply this amount by a factor representing the seriousness and duration of the infringement as well as the importance of the infringer. The outcome of this multiplication equals the 'basic amount'. In the case of a repeated offence this basic amount can be doubled. Aggravating circumstances (for instance, hindrance of an NMa investigation) and mitigating circumstances (for instance, cooperation with the NMa) may adjust the fine. In any event, the NMa is obliged to observe the aforementioned statutory maximum. While calculating fines for natural persons, the NMa will take income and property into consideration.

The last-named sanctioning form – a binding order without a penalty – entails a milder form of enforcement. However, when the binding instructions contained in the order are violated, the NMa is still entitled to impose a fine or an order for incremental penalty payments. A binding order may be imposed by the NMa ex officio or on request.

At present, criminal prosecution of cartel activities is not yet possible. However, a legislative proposal introducing criminal enforcement is under preparation.

Leniency programme

There is an extensive system of fine reductions for those who are prepared to cooperate with the NMa. This system is similar to the European leniency programme. The bottom line is that legal entities and persons involved in a cartel can obtain a reduction of, or even a complete dispensation from, fines if they provide information to the NMa about a cartel. Important requirements are that the information is of substantial additional value (as opposed to the information already available to the NMa) and that all cooperation will be provided on request.

Negotiated settlements

Negotiated settlements between the NMa and the offenders are becoming more and more common. It entails that the NMa will discontinue its investigation into, or proceedings against, the involved (association of) undertakings or persons in exchange for appropriate measures or commitments. In the case of a negotiated settlement no decision is issued as to the lawfulness of the conduct. This can be an advantage to the offender if it fears civil actions, as the probability of success of a civil action is higher if the NMa has already decided that the defendant participated in a cartel (follow-on actions).

Civil claims

According to Dutch civil law, an entity or a natural person who has suffered losses due to a cartel can initiate a civil lawsuit in attempt to recover these losses. A claim submitted to the civil courts can be based on a wrongful act, unjustifiable enrichment or undue payment. In theory it should also be possible to recover 'scattered losses' (many individual small losses caused by a single cartel) through the civil courts. However, Dutch law does not yet offer the possibility to file for mass damages, nor does it provide for specific rules on compensation in case of infringement of competition law.

Recent developments

Next we will describe several relevant NMa activities. Furthermore, we will pay attention to an important decision of the Supreme Court of the Netherlands with regard to conversion of competition restricting clauses in agreements.

Supreme Court decision on the possibility of conversion of void clauses in agreements

The Dutch Supreme Court decided on 19 December 2009 that if an agreement contains a clause restricting competition, this clause is null and void and conversion of the relevant clause into a clause in line with competition law would be incompatible with the DCA. In the relevant case an agreement contained a non-competition clause for-

bidding one of the parties to start a competing company or to liaise with a competing company within a certain area during the first 10 years after the signing of the agreement. This clause restricts competition and is therefore not in line with the cartel prohibition of the DCA. However, thus far lower courts ruled several times that such a clause was not in line with the DCA, but then decided to convert the relevant clause in a valid clause by limiting the scope of the non-competition clause. This practice is no longer possible as the Supreme Court, in its decision of 19 December 2009, ruled that conversion of void clauses would not contribute to the abandoning of the practice to include clauses restricting competition in agreements.

Fines for cartels in the paint industry

The NMa imposed fines on participants in two cartels in the paint industry. The fines amounted to a total of €164,000 varying from €8,000 to €34,000 per participant. The cartels involved six companies, some of which participated in both cartels. The NMa found out that the involved companies harmonised their bids and divided the work between them prior to submitting their offers in two public tenders (bid-rigging). Some of the fined companies were already fined earlier for participating in a similar cartel. In addition, the NMa also imposed a fine for facilitating and maintaining the cartels on the facilitator of the cartels. The fined cartel facilitator was a company that already had been fined before by the NMa for similar activities. This is the second time in the Netherlands that a company has been fined for facilitating cartels.

Fine imposed on employee for lack of cooperation with the NMa

The NMa fined a former employee of a company that was subject to an investigation of the NMa for not cooperating with the NMa during the investigation. The fined person, a former member of the management board of the company, refused to answer the NMa's questions during the investigation, claiming that he had the right and even was obliged to remain silent, because he was contractually bound towards his former employer to keep business information secret. According to the NMa, the former employee violated article 5:20 of the Dutch General Administrative Law Act, which provides that every person should cooperate with supervisory officials as much as is required for the purposes of the investigation. Article 69 DCA provides that violation of this obligation can lead to a fine of up to €450,000 for natural persons or, if the infringer is an undertaking or a association of undertakings, 1 per cent of the turnover. Furthermore, in the opinion of the NMa only employees of a company subject to an investigation are entitled to exercise the right to remain silent during an investigation, and former employees cannot claim this right.

Dawn raids health-care sector

As indicated, the NMa communicated that the health-care sector is an area of focus on its agenda for 2010 to 2011. Within this area, the NMa has given particular attention to the home care sector, pharmacy sector, health-care insurance and hospitals.

In this context, the NMa carried out unannounced dawn raids at the association of health-care providers in Amsterdam (Sigra) and at two hospitals in Amsterdam (Academic Medical Centre and VU University Medical Centre) in February 2010. These dawn raids are inherent to an NMa investigation initiated as a result of tips from patients and because of a broadcast of a Dutch daily radio programme stating that two Amsterdam hospitals possibly rejected patients on the basis of their postal codes. The central issue of the investigation is whether the freedom of choice of the patients is restricted through mutual market-sharing agreements between the hospitalsor through their association with Sigra. In addition to the investigations into the conduct of these undertakings, the NMa also started investigations of the possible involvement of natural persons.

Later on (in April 2010) the NMa carried out unannounced dawn raids at several offices of the National Association of General Practitioners. Again, the NMa received tips from patients indicating that patients were rejected by general practitioners. The scope of this investigation focused on the freedom of choice of the patients regarding their own general practitioners. Furthermore, the NMa is investigating the business location policy of general practitioners. This policy might prevent new general practitioners from setting up a practice in certain (occupied) areas. The NMa considers it undesirable that patients, if required, would not be able to switch to another general practitioner.

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