

Agenda

Advancing economics in business

Dutch competition law enforcement: recent developments

National competition authorities are facing increasingly demanding challenges as markets across Europe are opened to competition. René Jansen, Board Member of the Dutch competition authority, outlines this year's priorities, and explains how the NMa intends to tackle these challenges

In setting its 'Agenda 2007', the Nederlandse Mededingingsautoriteit (NMa) has selected specific areas of attention, as it has done in previous years.¹ In doing so, the NMa takes into account market structure and market behaviour, as well as public relevance.

'Agenda 2007': areas of focus

- Sector-specific areas
 - energy sector
 - transport sector
- General areas
 - media and communications markets
 - financial sector
 - healthcare sector

One of the important differences between 2007 and previous years is that the construction sector is no longer a prime focus for the NMa. Most construction cases have been dealt with through the leniency programme,² while some cases are still pending before court. In previous years, investigations into the construction industry exposed cartel structures in various sub-sectors—including the large civil engineering and infrastructure sector, and the housing and utility engineering sectors—and fining procedures were largely completed in 2006. However, excluding the construction sector from the NMa's 'Agenda 2007' does not preclude further investigation into the sector if infringements are believed to have taken place.

In addition, the liberal professions have been dropped from the list since regulatory concerns were addressed after discussions with representatives of a number of professional groups.³ Of course, the NMa Agenda does not enumerate all areas of attention, but leaves scope for so-called 'unannounced chapters'.

2006: achievements

One of the key achievements in 2006 lay in successfully completing a significant number of construction cases. This enabled the NMa to turn its attention to other areas, and it accordingly initiated a number of market assessments in various sectors. During this period, sectors such as healthcare and energy became increasingly active as the liberalisation of markets continued.

In addition, the NMa has intensified its efforts to measure the effects of its enforcement policy by appointing a Chief Economist and creating the Office of the Chief Economist. In short, 2006 was an important year of reorientation for the competition authority, and this is particularly apparent in the focus it has adopted for 2007.

2007: focus

Energy sector

Energy has become one of the most important sectors for the NMa, particularly for the Office of Energy Regulation (DTe), which is the sector-specific regulator that is integrated within the NMa. In this context, it should be noted that the energy sector is a prime example of the close relationship and interaction between the DTe and the anti-trust and merger control sections of the NMa. Since energy is a basic need for all consumers, energy security and price transparency are of paramount importance. To achieve these objectives, the DTe employs a range of instruments, including regulation and monitoring activities, offering advice to the Minister of Economic Affairs, setting codes, and coordinating initiatives that are of an international scope.

The focus of the DTe is threefold:

- wholesale markets;

- the network companies responsible for the transport grid;
- the consumer market.

As regards wholesale markets, the process of internationalisation and continuing enlargement is intensifying, which requires the balanced integration and keen coordination of regulatory, monitoring and transmission systems. The DTe also prioritises increasing market transparency where trade is effected through brokers (ie, the OTC market). Similarly, monitoring the release of valuable and timely information to market parties is considered essential. Finally, providing further boosts to gas market operations, by removing entry barriers and safeguarding a sound investment climate, also merits special attention.

Where network companies are concerned, the DTe closely monitors quality and capacity planning, as well as quality management systems. It is also important to assess financing methods employed in network operating, with a view to avoiding risks to the provision of transport security.

The NMa considers the issue of consumer trust to be a priority for 2007. Trust stimulates consumer switching, thus creating stronger incentives for competition. The NMa focuses on the provision of sound information services to consumers and effective processes dealing with switching, changes of address and billing. Furthermore, consumer-friendly complaint processing is a particular priority. In this context, the planned merger between Essent and Nuon, the two largest energy suppliers in the Netherlands, will be a major focus of attention in this sector.

Transport markets

Within the NMa, the Office of Transport Regulation is charged with the enforcement of compliance with transport legislation in the areas of aviation, rail, and passenger transport. Recent modifications to aviation regulations have granted the Office of Transport Regulation the power to monitor the system applied by Schiphol Airport to calculate the user fees imposed on airlines for aviation activities at the airport.

In this framework, Schiphol Airport must submit the system of calculation for approval to the Office of Transport Regulation. In the event of objections by airline companies, the Office of Transport Regulation can review the fees and, if they are deemed to be out of line with the legal rules, adjust them accordingly.

As regards maritime pilotage (ie, directing cargo vessels into and out of the harbour), the NMa will advise the Ministry of Transport, Public Works and Water Management on regulated pilotage services and will implement relevant regulation. To this end, the

government approved draft legislation in 2006, which is currently being considered by Parliament.

Media and communications markets

Investigations into possible infringements (eg, regarding the pricing of school books) were initiated in 2006. Moreover, various mergers in the cable sector and the acquisition by KPN, the incumbent telecoms operator in the Netherlands, of broadcast transmission company, Nozema, illustrate the dynamics of this sector. For example, the NMa examined the sale of Essent Kabelcom (a broadband cable company) to Cinven en Warburg Pincus (owner of competing cable suppliers Casema and Multicable), but decided after an investigation that there was no risk of market concentration resulting in the abuse of a dominant position and subsequent negative effects for competitors. However, the NMa is examining the planned takeover of Tiscali by KPN, since there is a risk that it could lead to problems in the broadband/Internet sector. More generally, the NMa will also analyse the relationship between innovation, intellectual property rights and competition, since this topic raises important issues that are particularly relevant for the media and communications sector.

Financial sector

The financial sector remains an important area of attention for the NMa in 2007. Complex market structures, involving equally complex products, require the NMa to constantly develop its knowledge and expertise. The markets concerned have been structurally monitored over a longer period by the Financial Sector Monitor (MFS); the NMa, however, considers market characteristics and ongoing developments in payment, capital, and insurance markets—for example, regarding health insurance and pensions. It is also taking a keen interest in the emergence of the Single European Payment Area, which is relevant to the market for debit and credit cards. In this context the NMa acts in an advisory capacity, on a national as well as an international level, and cooperates with the Netherlands Authority for the Financial Markets and the Central Bank of the Netherlands when required.

Healthcare sector

The healthcare sector is becoming increasingly important from a competition policy perspective. As a result of a new legislative environment, several mergers have taken place, including five large mergers involving various hospitals and homes for the elderly, which have been notified and conditionally cleared. Indeed, as a result of the planned lowering of the merger threshold (ie, the minimum threshold relating to the size of the undertakings wishing to merge), it is anticipated that an increasing number of mergers in the healthcare sector will be notified to the NMa. In addition, the House of Representatives of the Dutch Parliament has expressed

its desire for more preventative monitoring where mergers in this sector are concerned.⁴ The NMa will therefore continue to focus on this sector in conjunction with the newly established Dutch Healthcare Authority.

Developments in the health insurance market are also of interest to the NMa, since there has been a fundamental break with the past in this market in terms of the number and scale of mergers now being proposed—for example, the merger between health insurance companies VGZ and Univé, and the planned merger between Delta Lloyd, Menzis and Agis, which ultimately did not take place.

European focus

Since Dutch competition law is modelled according to European competition law, and since the European Commission is primarily responsible for the enforcement of competition law at the European level, close cooperation with the Commission and other competition authorities at the Member State level takes place as a matter of course. The NMa actively participates in the European Competition Network, which facilitates an exchange of information about ongoing competition investigations between the European Commission and the national competition authorities. Moreover, the NMa is part of the informal association of European Competition Authorities, in which the application and enforcement of competition rules, as well as the improvement of working relationships among national competition authorities, are discussed. Thus the European focus is always present in the enforcement policy of the NMa, and there are clear overlaps in terms of priorities (eg, the energy and financial sectors).

Measuring and visualising effects of enforcement policy

Besides focusing on a number of sectors, the NMa is also concentrating on developing methods to measure the effects of its enforcement policy and on designing tools to 'visualise' these effects.

In this context, effects are predominantly understood in economics terms. Accordingly, the NMa recently appointed Prof. dr. Jarig van Sinderen as Chief Economist of the NMa. The newly established Office of the Chief Economist measures the quantitative and, wherever possible, qualitative effects of NMa

enforcement policy. In addition, the NMa outlines the economic effects of its work in a more general sense. The Office of the Chief Economist aims to visualise effects by estimating in its publications the total economic impact of NMa performance.

The visibility of NMa activities is regarded as increasingly important. It requires high-quality and transparent communications on the outcome of cases, and—equally importantly—on the results of alternative modes of enforcement.

Moreover, the NMa invests heavily in market monitoring and market research, which enables it to supervise market behaviour and developments in various sectors. On the basis of such expertise, it acts as an advisory body for a range of stakeholders such as government ministries.

Another aspect of measuring the effects of enforcement policy is to consider the administrative burdens imposed on companies. The NMa considers administrative burdens to comprise company costs relating to obligations of disclosure as part of NMa regulatory policy. While the NMa acknowledges that its activities may impose a burden on market participants, responses submitted to the consultation document for the NMa Agenda suggest that this burden is not perceived to be disproportionate. Nonetheless, the authority is developing activities for assessing administrative burdens and considering ways of reducing them.

Outlook

The enforcement of competition law remains a cornerstone of a well-functioning market—particularly in sectors such as energy and healthcare. These markets are currently in transition from being closed and regulated to being more open and competitive. However, it is also important to ensure that the consumer is actually benefiting from this process. By focusing on a number of sectors, employing its own limited resources in the best way possible, while also calculating the benefits of its enforcement policy for the consumer and the economy as a whole, the NMa is able to enforce competition rules effectively.

René Jansen

¹ Available at http://www.nmanet.nl/Images/NMa-Agenda%202007%20ENGELS_tcm16-97592.pdf.

² The leniency programme allows an undertaking that has been part of a cartel to come forward and hand over to the NMa all available information regarding that cartel. In return, if that cartel is actually a hardcore cartel, the undertaking is rewarded with immunity or a reduction of the fine imposed by the NMa. In addition, a second undertaking that comes forward can obtain a reduction in a financial penalty.

³ 'Liberal professions are occupations that require special training in the liberal arts or sciences. These include e.g. lawyers, engineers, architects, accountants and pharmacists.' Source: EFTA Surveillance Authority, 'Liberal Professions and the EEA Competition Rules', <http://www.eftasurv.int/fieldsofwork/fieldcompetition/activities/dbaFile7413.html>.

⁴ <http://www.ggzbeleid.nl/pdfwtg/30186nr55.pdf>.

If you have any questions regarding the issues raised in this article, please contact the editor, Derek Holt: tel +44 (0) 1865 253 000 or email d_holt@oxera.com

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