The Public Competition Enforcement Review

Fifth Edition

Law Business Research

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The Public Competition Enforcement Review

Fifth Edition

Law Business Research Ltd

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FOREWORD

It is immediately apparent from the reports in *The Public Competition Enforcement Review* that competition enforcement remains vigorous across the world. An overwhelming majority of authorities continue to prioritise anti-cartel enforcement and 2012 witnessed, in the United States and the EU, some of the highest cartel fines ever to be imposed in respect of individual cartels. Authorities in newer competition law regimes such as India, China and Taiwan followed suit. There was a common focus on illegal conduct within the context of trade associations and bid rigging.

The Business and Industry Advisory Committee – representing business within the framework of the OECD – and its Competition Committee regard the pursuit and elimination of 'hardcore' cartel conduct as a priority. Businesses suffer when markets are not working effectively and are victims of cartel behaviour as much as consumers and society as a whole. But caution must always be exercised to ensure that justifiable, even pro-competitive, conduct is not inadvertently swept up into an offending category. The reports for Australia, India and the United Kingdom describe developments that serve as a reminder that many commercial activities – including information exchange, price parallelism and certain trade association activities – need to be analysed in context (and not simply presumed to be anti-competitive).

International cooperation and the convergence of laws and procedures are important objectives for many of the authorities covered in this book. There is a good reason for this. Not only did the infringing companies in many of the cartels uncovered have their headquarters outside the country imposing the penalties but, more generally, globalisation – particularly the transformation of regional markets into worldwide markets – has increased the propensity for conduct and transactions to be scrutinised by numerous competition authorities in parallel. Convergence of laws and procedures holds many attractions for competition authorities and business alike. But convergence is a complex matter. The keynote article in *The Public Competition Enforcement Review*, 'Public v. Private Enforcement: Rethinking the Thirst for Competition Litigation', is a strong reminder that a thoughtful approach to convergence is always needed. There may

be a logic to aligning a new regime with the most established regimes but in practice that may not be the most appropriate approach to every aspect of the law and policy.

To ensure that the law and related procedures develop optimally, authorities must take stock of what is working (and what is not working), reflecting on achievements but also re-examining fundamentals. This *Review* makes a useful contribution to the process of reflection with its timely and authoritative comments on the past year's developments and trends. *Ex post* evaluations (where an authority evaluates whether its intervention was appropriate and achieved its objectives) are also essential. These studies are becoming more common, particularly in the merger control sphere. They can be used in well-established regimes, but also by those countries that have newly amended their rules. The reports for Brazil, China and India describe major progress in respect of merger control activity. Evaluations can ensure that improvements are made in the early years to keep the merger control regime on track. A key work stream for the OECD is looking at how *ex post* evaluations are conducted, what methodologies function best in practice and how the process can be improved. Like the competition authorities, international competition organisations such as the OECD and ICN can usefully carry out evaluations of their own measures and recommendations. The OECD is setting a good example by evaluating its own merger recommendations from 2005.

The country reports also describe a substantial amount of enforcement activity taking place in relation to abuse of dominance. The wide variety of cases being brought by different competition authorities suggests that this area is perhaps the least convergent in terms of substantive competition law. This has been the case for so long that it is not surprising but nor is it without risk. The chapter for Argentina expresses concern that dominance cases may be targeted to achieve price control objectives. In Australia, misuse of market power is identified as a key priority. The US authorities are moving away from a policy that 'favoured extreme caution' in this area and are debating the scope of appropriate enforcement against unfair methods of competition. This *Review* encapsulates the fierce debates under way. International organisations should continue to help build consensus on the key elements of an abuse of dominance case. In 2012 the OECD produced a useful report on excessive pricing discussing how to ensure that intervention is principled and evidence-based.

It is also apparent that competition authorities are continuing to address industry sectors with growing global importance, including media and communications, the high-tech sector, the digital economy and financial services. The issues are complex and the global implications of intervention can be immediate. The OECD has developed roundtable reports on all these sectors where business input is a key contribution to the debate given the fast-evolving technological environment.

Overall, the level and nature of enforcement described in the country reports demonstrates that competition authorities across the world have succeeded in 'holding the line' when budgets and even the role of competition law itself has been under fire. The chapters in this publication prove that the competition authorities did not let the rules slip in the face of economic difficulties. However, ongoing reflection is needed now

to ensure that there is a good understanding of how companies and governments respond to current economic challenges. Reflections in this post-crisis time will be essential for ensuring that business and regulators play their part in ensuring that the events leading to the global recession are not repeated. Surveying policies, objectives, enforcement and trends, *The Public Competition Enforcement Review* contributes to such reflections.

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April 2013

Chapter 18

NETHERLANDS

Ruben Elkerbout[1]

I OVERVIEW

2012 was a relatively quiet year for competition law enforcement practice in the Netherlands. During this year, the Netherlands Competition Authority ('NCA'), (i.e., the authority that is entrusted with the task of enforcing compliance with the Dutch Competition Act ('CA')), was rather occupied with the upcoming creation of the new Netherlands Authority for Consumers and Markets ('ACM'), merging the NCA, the Independent Post and Telecommunications Authority and the Consumer Authority into one authority. The rationale of the legislator for this consolidation is to increase procedural as well as financial efficiency in order to be able to provide better protection of consumer interests.

The new regulator was officially set to begin on 1 January 2013. According to the Chairman of the Board of Directors of the NCA ('the Board'), Mr Chris Fonteijn, who is also the Chairman designate of the Board of the ACM, the three regulators devoted a large part of their resources to completing the integration process in 2012 and were ready to kick-start 2013 with the official launch of the ACM. The consolidation of the three regulators, however, underwent some delay in the approval procedure in the Dutch Senate. The official voting on the ACM Establishment Act voting took place on 26 February 2013. Beforehand, in two extensive debates the Senate expressed its worries to the Minister of Economic Affairs ('the Minister'), in particular with respect to the independence of the ACM in relation to the Minister and the quality and effectiveness of the supervision of the ACM. The Senate furthermore criticised the timing of the official creation of the ACM, as the substantive bill containing the measures to improve and simplify the procedures, tasks and powers of the ACM has not yet been submitted by the Minister to the Dutch parliament. Nonetheless, the Senate gave its approval to the ACM

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Establishment Act. The ACM will now open its doors on 1 April 2013. Until then, the three authorities continue to exist as separate authorities.

2012 was also the year in which the NCA commenced its enforcement of the Dutch Act on Government and Free Markets. This Act contains important principles that aim to prevent unfair competition for situations where the government competes with undertakings.

The past year was furthermore marked by several important developments regarding the enforcement measures of the NCA. To begin with, 2012 was the year in which the highest administrative court with jurisdiction on competition law enforcement, the Trade and Industry Appeals Tribunal ('the Tribunal'), in a number of critical rulings quashed the enforcement methods of the NCA. In this regard, the Tribunal decided that the right to remain silent also applies to former employees of a company under investigation. The NCA had thus wrongly fined two former employees for not cooperating with the NCA in an investigation. In another critical ruling, the Tribunal exercised its unlimited power of judicial review regarding the calculation of imposed fines. The Tribunal ruled in favour of the concerned undertakings, quashing the imposed fines because of an infringement of the principle of equal treatment.

Finally, the use of alternative enforcement tools such as commitment procedures and market scans continued to increase and gained prominence.

i Organisation and resource allocation

The ACM will be a 'small autonomous administrative authority' ('ZBO') under Dutch law. Technically speaking, a ZBO is not a legal person. Its staff is officially employed by the Ministry, but its management lies with the Board, which consists of a chairman and two members. The ACM will be divided into five main departments, the Consumer Department, the Competition Department, the Energy Department, the Telecommunications, Transport and Postal Services Department, and the Legal Affairs Department. In addition, the ACM will have a Corporate Services Department, a Corporate Affairs Policy and Communications Department and an Office of the Chief Economist. The Consumer Department will be responsible for promoting fair business practices between businesses and consumers. All consumer-related subjects, such as spam, spyware, door-to-door selling and online shopping, will be dealt with by this department. In addition, it will focus on consumer education, enabling consumers to stand up for their rights (consumer empowerment). Finally, the department will ensure that the consumer markets for telecommunications and energy function properly by, *inter alia*, monitoring, advising and controlling the licensing process. The Competition Department will remain responsible for carrying out the investigations into possible violations of the CA and for merger control. The Competition Department will not investigate abuses of dominant positions in the regulated industries for energy, telecommunications, transport and the postal service. Those investigations will be carried out by the industry-specific departments. In its investigations, the Competition Department will work closely together with other ACM departments, as well as with partners outside the ACM. The Energy Department will be charged with regulatory duties and antitrust investigations regarding abuse of dominant positions in the energy industry (natural gas, electricity and heat). Another key area is promoting the proper functioning of the wholesale markets for

natural gas and electricity. Finally, the Energy Department will advise on the regulation of drinking water companies. The Telecommunications, Transport and Postal Services Department will be charged with regulatory duties and antitrust investigations regarding abuse of dominant positions in those industries, including regulation and consumer issues. The Legal Affairs Department will be responsible for drafting the decisions imposing sanctions in order to ensure the fairness of the legal proceedings as well as dealing with objections and appeals. It will also provide legal advice and support to the Board and the other departments of the ACM.

ii Enforcement agenda

The NCA described its mission as 'making markets work'. It believed that in times of economic crises, healthy competition would contribute to the recovery of the economy. It also considered the protection of consumer interests one of its main goals. The NCA has stated that its aim therefore is to boost prosperity, thus improving the economic well-being of the consumer, by effectively enforcing competition law. Similarly, the ACM aims to be an effective regulator, a champion of markets in the interest of consumers. It wants to create opportunities and options for businesses and consumers alike. The three cornerstones of the ACM's activities are:

a general competition oversight;
b regulation of the energy, telecommunications, transport and postal service industries; and
c protection of consumer rights in the non-financial industries and providing information to consumers about their rights and obligations.

The Chairman designate stated that the ACM has a clear objective to become more than the sum of its constituent agencies. Although the exact functioning of the ACM is yet to be fleshed out, in obtaining this goal, a problem-oriented approach will be at the heart of the ACM's activities. Its starting point will be to identify and analyse existing problems on markets. This is not entirely new, as the NCA in the past few years had already started expanding its traditional narrow focus on the strict enforcement of competition law and sector-specific regulation. The ACM will further develop this problem-oriented approach. The challenge for the ACM will be to find creative and effective solutions for the identified problems at lower cost. For this reason the ACM will work in multidisciplinary case teams. The ACM will furthermore direct more attention to the demand side of markets. In this regard, consumer empowerment and behavioural economics will gain prominence. Notwithstanding the problem-oriented approach, the Chairman designate specified that the ACM will remain a strict enforcer. In that sense, the ACM will continue the 'high trust zero tolerance' approach of the NCA when companies or individuals violate the CA or sector-specific regulations.

The three traditional key focus industries for the NCA were: the processing industry, the financial service industry and the health-care sector. The ACM (as yet unable or willing to specify) stated that its primary focus will be on markets where the risks of harmful behaviour by market participants are the greatest.

Another important matter for the ACM will be the discussion on the relation between the free market system and public interests, including the fundamental debate

on the desirability and role of the free market system in public sectors, for example, the health-care sector.

II CARTELS

i Significant cases

Agriculture and food

In December 2010, the NCA found 15 flour producers from the Netherlands, Belgium and Germany guilty of cartel activities. The NCA imposed its second largest fine ever, a total of €81.6 million. In March 2012 in its decision on the objections of the flour producers, the NCA lowered seven of the 15 fines to a total of €65.9 million. In the objection proceedings, the NCA concluded that there was insufficient evidence that German flour producer VK Mühlen had taken part in the agreement to compensate one of the competitors. The fine on VK Mühlen was subsequently lowered to just over €1 million (formerly €2.3 million). The fine on another flour producer was considerably lowered by more than €10 million as a result of a successful inability-to-pay defence. The fines of five other flour producers were lowered either because their fines had been set higher than the fining rules would have allowed, or because of their limited role in the cartel. Appeals against the revised decision of the NCA were filed with the District Court of Rotterdam by all flour producers.

In June 2012 the NCA imposed fines on two cooperatives of bell pepper growers, as well as on five growers and processors of silverskin onions, totalling €23 million. According to the NCA, the cooperatives involved in the *Bell Pepper* cartel concluded price-fixing agreements between May 2006 and February 2009. In addition, they had allegedly also agreed to use minimum prices, to respect each others' customers, and to manipulate the prices at auctions. The NCA was notified of the *Bell Pepper* cartel by a leniency applicant who for that reason escaped a fine. The NCA furthermore imposed a small fine of €5,000 on a cartel facilitator, which marks the second time the NCA has done so.

According to the NCA, the growers and processors in the *Silverskin Onion* cartel concluded agreements on the maximum sown area of silverskin onions between 1998 and 2010. The combined production volume of the Dutch undertakings involved in this cartel represents 70 per cent of European-produced silverskin onions. For this reason, the NCA, controversially, based its fine upon the European turnover figures of the growers and processors. The NCA sent a letter to all European NCA's within the framework of the ECN to consult them on the legality of this measure. The NCA refuses to disclose this letter as well as the formal responses of the European NCA's.

In December 2012 the NCA imposed another fine on growers and processors of onions. In this instance, the NCA imposed a total fine of €4 million upon seven undertakings that grow, process and trade in first-year onion sets for illegal cartel activities concerning the destruction of sown acreage of onion sets in 2009. According to the NCA, the undertakings sought to reduce the supply of onion sets to bring about higher prices. Again, the level of the fine was based on the European turnover figure. The cartel was uncovered by anonymous tip-offs submitted to the NCA's Information and Tip-Off Line.

Health care

Following two critical rulings by the District Court of Rotterdam in June 2012, the NCA reconsidered the fines it had previously imposed in 2008 on seven home-care institutions. The Court argued that the NCA insufficiently demonstrated that these home-care institutions were actually able to compete with one another between 2005 and 2007. The Court was thus not convinced that any of the alleged agreements (to respect each other's catchment areas) were actually capable of restricting competition. The Court did give the NCA the opportunity to launch a more detailed investigation; however, the NCA did not believe such an investigation would be useful and it closed the cases against the home-care institutions.

In another related case, the NCA also decided against the imposition of fines, having reconsidered the case. The two undertakings in question, Vierstroom and Careyn, had filed objections with the NCA against its decision of April 2011 in which they were fined €4.3 million for an alleged market-sharing agreement. The objections raised doubts about the NCA's earlier interpretation of the agreement both home-care providers had signed. As a result, the NCA was no longer able to say with certainty whether these home-care providers actually made arrangements aimed at eliminating mutual competition.

Following these decisions the NCA concluded that awareness of competition law is increasing in home-care industry. The NCA therefore no longer considered the home-care industry a focus industry.

Construction

Following two critical rulings of the Tribunal, the NCA was forced to reduce the fines it imposed on seven companies regarding two 'old' bid-rigging cartel cases in the construction sector. The first case concerned bid-rigging by three large construction companies in tenders of large infrastructure projects in the Haarlemmermeer/Schiphol region between 1998 and 2000. The fines imposed on the three construction companies were reduced by the NCA due to the fact that the Tribunal ruled that the fines were too high compared with similar bid-rigging cases in the construction sector. The second cartel case concerned bid-rigging activities of four firms in tenders for public landscaping. The Tribunal ruled that the NCA had used the wrong turnover figures in calculating the fine and that it was not allowed to increase the fine based upon the reason that the firms needed to be aware of the seriousness of the infringement after the broad political and media coverage of bid-rigging in the construction sector, as the latter did not follow from the fining rules of the NCA.

In December 2012, the NCA imposed fines of €56,000 and €42,000 on two Rotterdam-based demolition firms that engaged in bid-rigging activities in four tenders for demolition contracts in Rotterdam between 2005 and 2009. A number of cases against five other demolition firms are currently pending. The NCA expects to complete those cases in the second quarter of 2013. The NCA announced that it will sit down with the Dutch Association for Demolition Contractors to discuss measures to prevent anti-competitive behaviour in tender procedures, for example, by setting up a compliance programme.

Real estate

In January 2013 the NCA fined 65 real-estate traders, with fines totalling €6.4 million for bid rigging. In late 2011, the NCA had already fined the 14 most active traders, with fines totalling €6.3 million. The real-estate traders involved manipulated foreclosure auctions between 2000 and 2009. After the official foreclosure auctions, traders re-auctioned homes at other, secret auctions often at a higher price. The 'profit' (the difference between the price at the official auction and the price at the after-auction) was split among the traders involved. The imposition of these fines marked the completion of an extensive investigation that the NCA launched in 2009 and that was triggered by information it had received from the Dutch Tax Administration. At the same time, the NCA released its publication 'Market recommendations for foreclosure auctions of real estate', in which it calls on all parties involved to improve the functioning of foreclosure auctions. The NCA also published 'Guidelines for foreclosure auctions of real estate' in order to make clear what is and what is not allowed at foreclosure auctions.

ii Trends and developments

In the previous edition of *The Public Competition Enforcement Review* we elaborated on three main trends that were discernible in 2010, 2011 and the beginning of 2012: (1) a growing collaboration between the NCA and other government organisations; (2) an increase in the number of formal commitment decisions and informal commitment procedures; and (3) an intensification in the focus of the NCA on smaller businesses. These trends continued to be noticeable in 2012 and the beginning of 2013. These trends, especially the first two, also fit the strategy of the ACM to enforce the CA in a faster and more effective and pragmatic way.

With regard to the first trend the *Property Auction* cartel is a perfect example. In 2005, the NCA had already commenced investigations, but had been unsuccessful in gathering sufficient evidence to find the real-estate traders involved guilty of an antitrust infringement. With the help of the tax authorities the NCA was finally able to track down the cartel in the business.

Secondly, as described in the 2012 edition of this publication, since October 2007, it has been possible for companies and associations to submit a commitment proposal to the NCA. By promising to refrain from certain behaviour that may violate the CA, companies or associations are able to avoid fines. The NCA, however, only adopts a commitment decision when three criteria are met: the NCA must be assured that the company in question will act in accordance with the CA; it must be plausible that the company will comply with the commitment decision in a verifiable manner; and adopting a commitment decision must be more appropriate than imposing a fine. In recent years, the power to adopt a commitment decision has become a rather popular enforcement instrument of the NCA. The legislator therefore (in the substantive bill on the streamlining of the powers of the ACM) extended this prominent power to all fields of work of the ACM.

In 2012, the NCA adopted two formal commitment decisions. The first decision concerned an approval of the commitments offered by the Dutch National Association of General Practitioners ('LHV') and the regional circles of the LHV to no longer (1) negotiate with health insurers on behalf of their members on, *inter alia*, tariffs of

treatments; and (2) give GPs advice on whether or not to sign contracts offered by health insurers. The commitments were submitted by the LHV nine months after the decision in which the NCA imposed a fine on the LHV and on two of its staff members for issuing recommendations restricting the freedom of establishment of new GPs. The second commitment decision concerned the future behaviour of certain art dealers. In December 2012, the NCA accepted commitments of five art dealers with regard to the bidding process at art auctions. Earlier in 2012, the NCA had launched an investigation into possible cartel activities in art auctions, particularly painting auctions.

In addition to the formal commitment decisions, the NCA also reached informal settlements in five cases, with:

a the Central Bureau for Rhine and Inland Shipping regarding its periodic gas oil price index letters;

b a regional transport association regarding, *inter alia,* its membership criteria;

c the VU University Amsterdam and the University of Amsterdam regarding the tuition fees for a second college degree;

d Dutch telecom incumbent, KPN, regarding contract terms for its business customers for fixed-telephony; and

e the Royal Dutch Notarial Society regarding their code of conduct.

As mentioned, the third trend is that the NCA in its last years increasingly targeted smaller businesses. The fines for the property traders, the Rotterdam-based demolition firms and the growers and processors of onions clearly illustrate this development.

iii Outlook

In February 2012, the NCA conducted dawn raids at the premises of several producers and suppliers of cement and concrete. At the time of writing, the NCA has not yet issued a report stating the allegations against the concerned undertakings. The same applies with regard to the notorious investigation into the suspected cartel arrangements of the three largest operators providing mobile telecommunications services in the Netherlands, which started in December 2011. It will be interesting to see whether the ACM will be able to finish the investigation in both cases in 2013.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In general, the enforcement priorities of the NCA lay with the detection and punishment of hard-core cartel infringements, for example, price fixing, market sharing, customer allocation and bid rigging between competitors. Although the ACM will have a larger focus on consumer protection, industry-specific regulation and competition oversight, a substantial shift in the general enforcement priorities is not expected. In practice, the investigations of the NCA rarely concerned vertical restraints. With regard to vertical restraints, the former Chairman of the Board announced that the NCA adopts a more economics-based approach to analyse the possible anti-competitive effects of vertical restraints. The same applies to dominance cases.

In the review period, the NCA did not take any formal decisions concerning restrictive agreements other than the cartel decisions, the commitment decisions and

informal settlements mentioned above. The NCA rejected two complaints regarding abusive behaviour that are discussed below.

i Dominance

In May 2012, the NCA, concluded for the second time, after an extensive investigation, that it could not establish an abuse by Dutch incumbent postal service company PostNL of its dominant position on the Dutch postal service market. The NCA thus rejected the objections that rival company Sandd filed against the NCA's 2009 decision. Sandd had claimed that competition was being distorted because, among other things, PostNL's subsidiary Netwerk VSP alleged 'free' use of its parent's network. The NCA found no evidence that Netwerk VSP gained access at prices below cost price.

Interestingly, at the same time, the NCA noted that a level playing field in the Dutch postal market may be lacking. The NCA had already identified problems on the postal market in its first decision. The market situation has not changed since. As a former government monopolist, PostNL managed to build a vast network, allowing it to deliver mail at very low costs. PostNL must maintain this network, because it is statutorily required to deliver mail six days a week. The lack of a level playing field, however, is not something the NCA can take action against under the Dutch Competition Act.

In August 2012, after a detailed investigation, the NCA rejected the complaint that Amsterdam Airport Schiphol abused its dominant position as an airport by influencing national planning and zoning decisions and processes. The complaint was filed with the NCA by land developer Chipshol. Chipshol claimed that Schiphol, through its subsidiary Schiphol Real Estate, systematically succeeded in preventing Chipshol from developing its land, in particular the 'Groenenberg area' that Chipshol owns. According to Chipshol, Schiphol wrongfully prevented the Groenenberg area from being developed as its sole intention was to hinder competition on the aviation-related real estate market. Schiphol, on the other hand, claimed, *inter alia*, that aviation safety would have been jeopardised if the Groenenberg area had been developed. The NCA determined that Schiphol had indeed taken steps to prevent Chipshol from developing the Groenenberg area. In addition, Schiphol tried to keep the land reserved for the additional runway intact and undeveloped. Having conducted a detailed investigation, the NCA, however, did not find any concrete evidence that Schiphol's actions were solely meant to frustrate Chipshol as a competitor on the aviation-related real estate market.

ii Trends, developments and strategies

As mentioned in the previous edition, an increased emphasis on effects-based analyses has been noticeable in Dutch competition law since 2009. This is also illustrated by the *PostNL* case in which the NCA fully embraced the Guidance paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, more specifically the Commission's framework regarding price-based exclusionary conduct. This trend is expected to continue.

In the past, the NCA has been criticised for not making sufficient use of the prohibition of abuse of a dominant position. Once the ACM officially opens its doors, investigations into the possible abuses of dominant positions in the regulated industries for energy, telecommunications, transport and postal service will be carried

out by the industry-specific departments instead of the Competition Department. It will be interesting to see whether this organisational change will result in an increased enforcement against abuse of dominant position.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Sector specific enforcement

The NCA's duties were not confined to the enforcement of compliance with the CA. The NCA, in particular its Office of Energy and Transport Regulation ('OETR'), was also responsible for executing the task as set forth in the various sector-specific laws and regulations for the energy and transport industries. With regard to transport, the OETR regulated the rail market, aviation market, public transport markets and the pilotage industry, and it enforced laws written by the Ministry of Infrastructure and the Environment. With regard to the energy sector, the OETR regulated the electricity and gas network operators and, to a lesser degree, the electricity and gas suppliers. Under the ACM, the tasks of the OETR will be split up and carried out by the Energy Department and the Telecommunications, Transport and Postal Service Department.

ii Significant cases in regulated industries

Energy

2012 was an interesting and eventful year for the NCA's OETR. In March 2012, it published a semi-annual report in which it outlined the developments of the energy market for consumers during the second half of 2011. The NCA also approved a clear and easy-to-read model energy contract for the supply to small-scale users. The model consists of several fixed, predetermined components, which have been largely standardised, for example, the general conditions and the confirmation letter. The model contract was developed by the trade association of the Dutch energy industry.

In 2012, the NCA imposed high fines on energy companies. Dutch regional grid operator Liander was fined over €3 million for having inadequately protected its customers' data, enabling energy supplier Nuon Sales to peruse that data. That situation created the possibility for Nuon Sales to use that information for its own marketing purposes. Interestingly, the NCA concluded that such abuse did not happen. That, however, did not stop the NCA from imposing a relatively large fine on Liander. According to the NCA, non-compliance with the confidentiality requirement in the Electricity Act is a serious violation. The NCA furthermore demanded that Liander take measures to ensure that Nuon CCC staff, which carries out tasks regarding customer care for both Liander and Nuon Sales, no longer has any access to confidential data of Liander's customers, insofar as these are not Nuon Sales customers.

The NCA also imposed fines of €450,000 upon two former executives of energy supplier Greenchoice. Late in 2011, the NCA fined the company for sending its final bills too late, or even failing to send any final bills at all, to customers that had cancelled their contracts and who were entitled to overpayment refunds. The NCA imposed the personal fines because the former executives were in charge of said violation.

In addition to such enforcement actions, the NCA had several statutory tasks to fulfil. Within this context, the tariff regulation practice of the NCA was boosted by several judgments of the Tribunal endorsing the policies of the NCA. Moreover, a study commissioned by the NCA revealed that, thanks to tariff regulation, between 2000 and 2012 energy bills were reduced by over €7 billion compared to what they would have been without tariff regulation.

Transportation

In February 2012, the NCA held a consultation on purchasing power in the Dutch rail and aviation industries. In September 2012 it concluded that airlines have no purchasing power in relation to Schiphol, nor do the rail transport undertakings have any purchsing power in relation to infrastructure managers ProRail and Keyrail. The findings of the study will be a starting point for further discussion with relevant parties about strengthening rail and aviation regulation.

iii Market scans

In 2012, the NCA frequently conducted market scans with the purpose of gaining insight into the functioning of a particular market and identifying potential bottlenecks. These market scans have taken place in, for instance, the health-care industry, the real estate sector, the real estate finance sector, the fishing industry as well as several others. If any competition issues are detected, the NCA presents a report to which the companies in question will then be allowed to react before the NCA adopts a decision on whether or not to impose a fine. It has been shown that these market scans can also lead to more informal settlements and recommendations in order to enhance competition. This was the case for instance when the NCA advised the Dutch Association of Travel Agents and Tour Operators to amend its General Agency Conditions.

iv Trends, developments and strategies

As noted in Section I, *supra*, a problem-oriented approach will be at the heart of the ACM's activities. The process of identifying and analysing existing problems on markets through market scans and consultations will therefore gain importance once the ACM is officially launched. Furthermore, the NCA did not have a solid reputation in advocacy of compliance. The ACM will be more engaged with the rest of society. Some of its strategies in this regard include consumer focus groups, roundtable discussions and heavy use of social media.

V CONCLUSIONS

2012 saw an increase in the number of commitment decisions and informal settlements. In light of the budget cuts, the search for efficient yet cost-effective ways to enforce competition law is excepted to continue in 2013 and 2014. The ACM, however, will remain a tough enforcer. Companies that knowingly and willingly violate the CA or sector-specific regulations will be subject to large fines. Furthermore, each time the ACM decides to impose fines on companies, it will always critically evaluate the role of the concerned managers. The ACM will not hesitate to hand out personal fines for managers

who fulfilled an executive role in relation to the infringement. This will also be expected by the Dutch government, as it stipulated in the Coalition Agreement that the projected total level of fines imposed by the NCA (ACM) in 2013 amounts to €75 million, increasing to €125 million in 2014. This fine quote has been criticised by many in the Netherlands, including in the Senate. In response, the Minister rushed to clarify that these amounts were estimates, not targets. Nevertheless, this sends out a clear message to the ACM and the rest of society that the Dutch government expects the ACM to increase the level of its fines in the coming years.

Appendix 1

ABOUT THE AUTHORS

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