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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS

-- 2011 --

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Introduction

1. Executive summary

2. 2011 was a successful year for solving problems in various targeted industries. The NMa focused its competition enforcement efforts on the processing industry, financial and business services and health care. In 2011 the NMa also commissioned several studies to increase its knowledge of the structure and the relationships within certain key financial sectors. The NMa imposed EUR 39.7 million in fines in 6 cases on 31 undertakings.

3. 2011 was also a busy year for the NMa internally, since it began preparations in the latter part of the year for its merger with the Netherlands Independent Post and Telecommunications Authority (OPTA) and the Netherlands Consumer Authority in January 2013. In July, Chris Fonteijn, the chair of the commission of the OPTA, replaced Pieter Kalbfleisch as chairman of the board of the NMa, ready for when he takes over the merged entity, the Authority for Consumers and Markets (ACM).

4. 2011 was a milestone year in terms of international cooperation as the NMa hosted the ICN's Annual jubilee conference. The event was held in the Hague and appears to have been an immense success. Thanks to the NMa's efforts in compiling an ICN report on consumer welfare, this topic has now really earned a place in the international spotlight. Two tokens of this success are the NMa's appointment as permanent member of the ICN Steering Group and its achievement at attaining a 4-star rating in the Global Competition Review's Annual rating of National Competition Authorities worldwide.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

5. In December 2011, the *de minimis* rule in Article 7 of the Dutch Competition Act was extended to exempt agreements between undertakings which collectively possess less than 10% of the relevant market shares from the cartel prohibition under Dutch Competition Law. The original rule had already been modified in October 2007, introducing a safe harbour from the prohibition on cartels, for undertakings with a small market share. The Dutch *de minimis* rule does not apply to agreements affecting trade between EU Member States.

6. Under the new Drinking Water legislation, introduced in 2011, the NMa is responsible for monitoring a prohibition on cross-subsidisation and rules requiring separate book-keeping for companies in the water sector. The NMa advises the Minister on parties' compliance with this legislation.

1.2 Other relevant measures, including new guidelines

7. In 2011 the NMa released various guidelines, brochures, vision documents, and informal opinions. The NMa focuses on those industries that need information the most, such as industries that are undergoing a transition to a market-based system, or those that face public interests, like quality of health care.

8. One of the vision documents published by the NMa in 2011, is the vision document regarding invoicing. Some energy companies were able to offer the same services to their customers at a lower cost than new entrants could. These were energy companies that used to belong or still belong to the same group as the regional network operator. One of the recommendations presented in the vision document is that all Dutch network operators should offer all energy companies the same services regarding invoicing to customers.

1.3 Government proposals for new legislation

9. On February 28, 2011, the Dutch Ministry of Economic Affairs, Agriculture and Innovation submitted the bill called ‘Rules on the establishment of the Netherlands Authority for Consumers and Markets (ACM Establishment Act)’ to the Dutch Parliament as part of the planned consolidation of the Netherlands Consumer Authority (CA), the Netherlands Competition Authority (NMa), and the Netherlands Independent Post and Telecommunications Authority (OPTA). The merger of the three regulators is expected to be completed in 2013.

10. The consolidation of the three authorities is realized through two separate bills: the establishment bill (mentioned above) and a substantive bill. The establishment bill concerns the creation of the new authority, making sure its independent position is properly secured. The substantive bill will simplify procedures, and streamline powers.

2. Enforcement of competition law and policies

2.1 Actions against anticompetitive practices, including agreements and abuses of dominant cases

2.1.1 Competition authorities

11. The NMa issued 10 statements of objections in 2011 and 6 cartel decisions. The NMa meted out EUR 39.7 million in fines, with an average of EUR 6.6 million per cartel. The NMa carried out dawn raids in 12 cases at 40 different locations in 2011. Several of these involved cross-border investigations where the NMa cooperated closely with neighbouring countries and of course, the European Commission. The largest fine imposed was in the industrial laundry market, where four laundry companies were fined more than EUR 18 million.

12. The NMa received 11 leniency applications between 1 January and 31 December 2011.

13. In 2011, the NMa commissioned a study into the deterrent effects of concentration control and cartel enforcement, which showed that companies anticipate the NMa’s concentration control and anti-cartel enforcement efforts. This research was carried out by the Dutch research firm SEO Economisch Onderzoek. The report estimated that for every cartel that the NMa fines, there are five cases in which companies adjust or dissolve their cartels as a pre-emptive move against possible NMa investigation. In addition, for every 100 merger notifications that the NMa processes, 18 concentration plans are either adjusted or cancelled. Companies and their advisors appear to take into account the NMa’s anticipated reaction to their plans for concentrations or anti-competitive agreements.

2.1.2 Legal track record

14. In 2011, the NMa won 83% of its 25 appeal cases before the Dutch courts. NMa decisions may be appealed at first instance to the Rotterdam District Court, and at second (and last) instance to the Trade and Industry Appeals Tribunal.

15. With regard to general antitrust law, this year, the highest court on antitrust matters (Trade and Industry Appeals Tribunal) handed down several fundamental rulings, such as the “Chinese Wall” provision in the ‘construction industry fraud’ case (explained in more detail below) and the cooperation from former employees during NMa investigation.

16. The number of construction-related cases was the same as in the previous year. With regard to the procedure the NMa had offered construction companies, the so-called ‘fast-lane procedure,’ which had been specially created for the construction industry fraud cases, the CBb fully agreed with the concept of

construction companies being offered two options (the fast-lane procedure or the regular procedure). However, in some cases, the CBb did lower the fines which the NMa imposed due to the fact that statutory time limits had been exceeded.

17. In one construction case, the Trade and Industry Appeals Tribunal gave judgment on a fundamental issue for the NMa: the “Chinese wall” provision in the Dutch Competition Act (Section 54a) that separates the NMa’s investigation unit (competition department) from the sanctions unit (legal service). The Tribunal found that the NMa had not respected the Chinese wall construction because the legal service had, in checking certain facts following the hearing, undertaken investigation activities which should be reserved for the investigation department. As a result thereof, the Trade and Industry Appeals Tribunal ruled that not only the evidence collected this way had been blemished, but that the entire assessment of the evidence had been feinted. Therefore, the NMa’s fining decision could not be judicially maintained.

18. The Rotterdam district court also handed down an interesting ruling on cooperation from former employees during NMa investigation. The court found that the right to remain silent (based on article 6 ECHR) does not apply to former employees of an undertaking subject to NMa investigation. The individuals have appealed the case to the Appeals Tribunal.

2.2 Description of significant cases, including those with international implications

2.2.1 Fines in the health-care industry, the Dutch National Association of General Practitioners (LHV)

19. General practitioners should be free to decide for themselves where they want to establish their practices. The Dutch National Association of General Practitioners (LHV), however, calls on its members to restrict this freedom. This policy not only restricted new general practitioners, but also restricted the choice of clients and health insurers. The NMa has therefore imposed a fine of EUR 7,719,000 on LHV. In addition, two LHV officials were personally fined EUR 50,000 and EUR 25,000 respectively, because the NMa holds them responsible for making LHV’s recommendations to its members. 95% of all general practitioners in the Netherlands are member of LHV.

2.2.2 Foreclosure auctions

20. Many homeowners, that were forced to sell their homes through foreclosure auctions, have been the victim of a cartel. The cartel existed between June 2000 and November 2009, and has affected foreclosure auctions across the Netherlands, involving more than 2,000 homes. The NMa therefore imposed fines, totalling EUR 6.3 million, on 14 Dutch real-estate traders. According to the fining decisions, these traders kept property prices at foreclosure auctions artificially low in order to make a profit at other, secret auctions (so-called after auctions).

2.2.3 Greenchoice

21. Between March 2005 and March 2011, Dutch energy supplier Greenchoice failed to send final bills on time in more than 20 per cent of the cases. More than half of the final bills within this group were not even sent at all. In most cases, these customers were entitled to overpayment refunds. The NMa therefore imposed a fine of EUR 7.2 million on Greenchoice. All affected customers have finally received their final bills, as well as their refunds. In close consultation with the NMa, Greenchoice has taken measures to prevent this from happening again.

2.2.4 *Fines in industrial laundry cartel*

22. The NMa has imposed fines, totalling EUR 18 million, on four major laundries for engaging in market-sharing activities. Between 1998 and 2009, a number of firms shared the market amongst themselves, and prohibited each other from actively recruiting customers outside their regions. These industrial laundries wash, among other items, bed linen and working-clothing for health care providers. The total annual turnover in this market is EUR 250 million.

2.3 ***Mergers and acquisitions***

2.3.1 *Statistics*

23. The NMa received 98 merger notifications between 1 January and 31 December 2011. In this period, the NMa challenged 15 merger cases in 2011.

Type of merger investigation	Number
Decisions on notifications	87
Withdrawn notifications	6
Decision of non-applicability	3
Approved due to remedies	4
Licence required for concentration	5
Licence applications	5
Licence applications withdrawn	2
Decisions on licence applications	4

3. **Summary of significant cases**

3.1 ***Merger review***

3.1.1 *Merger between health care providers blocked*

24. The Netherlands Competition Authority (NMa) has blocked the planned merger between health care providers Zorggroep Noordwest-Veluwe and Het Baken, both of which are based in Veluwe, a region in central Netherlands. The NMa argues that this merger would have eliminated each other's main competitor. It would have reduced health care options for patients, and would have taken away mutual competition between these providers.

25. In another case, the NMa has decided that the planned merger between TweeSteden Hospital and St. Elisabeth Hospital, requires a merger license. First phase investigations led to the conclusion that this merger could impede competition in the inpatient and outpatient care markets. If these hospitals submit a license application, the NMa is required to decide within 13 weeks whether or not the concentration is allowed. In the beginning of 2012, the hospitals did submit a license application. The NMa is currently working on the case.

4. **Resources of competition authorities**

4.1 ***Resources overall (current numbers and change over previous year)***

4.1.1 *Annual budget*

26. In 2011, the budget fell by EUR 0.4 million to EUR 45.5 million which is USD 56.51 million(excluding compensations).

4.1.2 *Number of employees:*

	Legal	Economic	L & E	Other	Total
Competition Department	53	35	1	34	123
Office of the Chief Economist		3		1	4
Legal Department	18		1	2	21
(Office of) Board of Directors	2	1			3
Strategy & Communication	6	1	1	4	12
Total	79	40	3	41	163

Other includes: Business, Mathematics, Accountancy, Political science, Communication studies and Engineering physics.

4.1.3 *All staff combined*

27. As of 31 December 2011, 395 people are employed by the NMa, this includes temporary staff and staff who work at the Office of Energy and Transport Regulation (DREV).

4.2 *Human Resources*

28. 190 people (including secretarial assistance and paralegals) are actively involved in competition enforcement. 163 non-administrative staff are actively involved in competition enforcement. Of these, 123 work in the Competition Department, 21 in the Legal Department, 5 in the Office of the Chief Economist, 13 in the Strategy and Communication Department and 4 with the Board of Directors.

29. These figures exclude the support staff associated with competition enforcement (such as library, archive, human resources and mailroom), staff of the Offices of Energy Regulation and Transport Regulation and the part of the Legal Department which is dedicated to those Offices.

4.2.1 *Enforcement against anticompetitive practices*

- Anti-cartel: 90 FTE
- Dominance-related issues: 8 FTE

4.2.2 *Merger review and enforcement*

- Mergers: 20 FTE

4.2.3 *Advocacy efforts*

30. Approximately 14.5 FTE. This includes, for example, Monitor Financial Sector; drafting of/providing information regarding regulations; issuing informal guidelines; sector specific and general public targeted education regarding the NMa's leniency program; publishing articles, holding bilateral meetings with other competition authorities; and giving speeches and holding seminars on both national and international competition related issue.

4.3 *Period covered by the above information*

- 1 January 2011 to 31 December 2011.