Doing business in the Netherlands - Competition law

Competition law

Introduction

In the Netherlands, both European and Dutch competition law apply. Both areas of law are very similar, since Dutch competition law is based on its European counterpart.

European competition law is applicable to agreements, decisions or concerted practices that restrict competition and affect trade between member states of the European Union. Hence, application of European competition can extend to the territory of the Netherlands (and the companies active there) as well.

Dutch competition law is applicable only within the Dutch territory if competition within the Netherlands is restricted.

The Dutch Competition Authority (‘Autoriteit Consument en Markt’, ACM) enforces the Dutch Competition Act (‘Mededingingswet’), which entered into effect in January 1998. It also has the authority to enforce articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which affect the Netherlands directly. Dutch courts must apply these articles as well.

Agreements restrictive of competition

Article 6 of the Dutch Competition Act (the cartel prohibition) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object (or effect) the prevention, restriction or distortion of competition in the Dutch market. Contractual provisions and/or agreements that are restrictive of competition are null and void. This nullity can be established in civil court proceedings between private parties.

The cartel prohibition does not apply to:

- agreements in accordance with EU block exemption regulations (e.g. the EU block exemption regulation for vertical agreements or the EU block exemption regulation for technology transfer agreements)
- agreements which benefit from a block exemption determined by Dutch governmental decree
- certain agreements or practices concerning public service companies (undertakings entrusted with the supply of services of general economic interest)
- collective employment agreements and collective pension agreements in an industry
- agreements which are of minor importance. This so-called de minimis-exemption applies to agreements restrictive of competition that involve no more than eight companies whose combined annual turnover does not exceed €5.5 million (if the companies concerned are active mainly in the supply of goods), or €1.1 million (in all other cases). This exemption applies similarly to agreements between competitors whose combined market share does not exceed 10% on any of the relevant markets (if these agreements are not liable to appreciably affect trade between EU member states).
Furthermore, the Minister of Economic Affairs has issued policy guidelines in order to give more guidance to companies on the ‘dos and don’ts’ under Dutch competition law (e.g. guidelines on combination agreements and guidelines on private initiatives regarding competition and sustainability).

If a restrictive agreement cannot be categorised under one of the above-mentioned arrangements, companies can still resort to a general possibility of exception. Article 6 of the Dutch Competition Act provides a general exemption for agreements or practices whose economic and/or technical benefits outweigh their restrictions on competition and pass on a fair share of those benefits to consumers. An appeal to this exemption involves self-assessment by the companies involved in the restrictive agreement or practice.

**Abuse of dominance**

Article 24 of the Dutch Competition Act prohibits the abuse of a dominant position. Whereas the TFEU provides a number of examples of abuse of a dominant position (such as the imposition of unfair purchase or selling prices and the application of different conditions to equivalent transactions with other trading parties), the Dutch Competition Act does not set out any specific category of abusive conduct.

The Dutch prohibition of abuse of a dominant position does not provide for any exemptions, but does lay down the possibility of obtaining a specific waiver. Article 25 of the Dutch Competition Act indicates that a waiver may be granted upon request to undertakings entrusted with the supply of services of general economic interest.

Having a dominant position on a certain market is in itself not prohibited. Only the abuse of such a position is prohibited under Dutch competition law.

**Merger control**

Article 29 of the Dutch Competition Act specifies when a concentration of undertakings requires prior notification to the ACM. A concentration is subject to notification and prior approval where:

- the combined turnover of all parties involved in the proposed concentration in the previous calendar year exceeded €150 million and
- at the same time, at least two parties to the proposed concentration separately achieved a turnover in the Netherlands of €30 million or more in the previous calendar year.

To concentrations in the Dutch healthcare sector, different (lower) turnover thresholds apply:

- the combined turnover of all parties involved in the proposed concentration in the previous calendar year exceeded €55 million and
- at the same time, at least two parties to the proposed concentration separately achieved a turnover in the Netherlands of €10 million or more in the previous calendar year.

A concentration arises where companies merge; where one or more companies acquire control over (part of) another company (take-over); and where two or more companies set up a full function (i.e. independently operating) joint venture.

The notification process has several phases. In phase I, the ACM has four weeks to decide whether the concentration requires a permit (subject to phase II proceedings) or whether it can be cleared right away. In phase II, the ACM has 13 weeks in order to decide whether or not to clear the concentration and issue a permit.

Companies notifying an intended concentration to ACM are obliged to pay €17,450 for such notification (phase I). If a permit is required and companies submit an application accordingly to ACM, they must pay another €34,900 (for phase II).

**Public enforcement of competition law in the Netherlands**

The ACM may impose an incremental penalty payment or a fine of up to €450,000 or 10% of the annual turnover of the company that violated competition law. The ACM may also impose fines on individuals who gave instructions or exercised de facto leadership in the realisation and conclusion of restrictive agreements between companies.
As of 1 July 2016, legislative changes will presumably take effect, increasing the statutory maxima listed above. These legislative changes will apply only to infringements that have been committed after the legislative changes have entered into force.

The main alterations include an increase of the maximum fine (absolute amount) from €450,000 to €900,000, a multiplication of the maximum fine by the number of years that the cartel infringement has lasted (with a maximum of four years and a minimum of one year), and an additional 100% increase of the maximum fine in case of recidivism.

Private enforcement of competition law in the Netherlands

The Netherlands’ legal landscape regarding the private enforcement of competition law has evolved over recent years. Increasing numbers of civil liability cases on the basis of (alleged) competition law infringements have been brought before the Dutch civil courts.

The Dutch legal framework for cartel damages claims consists of the general rules regarding liability for wrongful conduct (tort). Under the implementation of EU Directive 2014/104/EU on antitrust damages actions, the Dutch government is implementing a number of amendments to the Dutch Code on Civil Procedure and the Civil Code with the aim of further developing and tailoring Dutch civil law to these private damages claims. The implementation deadline of the Directive is set for December 2016.