# Dutch commitments

## The NMa should use its new powers more often

*by **Sarah Beeston****

The Dutch competition authority (the NMa) has a good reputation for alternative case resolution. This is largely due to its innovative approach in settling the construction cartel cases in the Netherlands. Whether the NMa can maintain its reputation remains to be seen, however.

Since October 2007, the competition authority has one more tool at its disposal: the commitment decision. This tool, which is the Dutch equivalent of an article 9 decision of the European Commission, allows the NMa to close a case without finding an infringement and without imposing a fine if the parties under investigation give commitments which ensure that they will not, in the future, breach the competition rules. The NMa may adopt such a decision if it is more efficient than a decision imposing a fine.

However, in the 18 months since the extension of its powers, the NMa has used this tool only once and in circumstances where, in the NMa's own words, commitments are not usually appropriate. The efficiency of the procedure followed in the case was also far from evident. In other instances, the NMa has refused to consider commitments because they were, in its view, offered too late or too early in the NMa's procedure. In short, the NMa's use of the commitment decision to date could be qualified as reluctant and unpredictable.

### Facts of first commitment decision

The NMa adopted its first and, to date, only commitment decision on 30 June 2008. It related to co-operation between five welfare and childcare organisations active in Amsterdam. Changes in the Dutch law led, in 2005, to a large reduction in subsidies for childcare (kindergarten facilities for children of pre-school age and after-school care for children of school age). As a result, demand for childcare dropped significantly. Underprivileged areas, where the organisations were largely active, were hardest hit.

Further changes in the law imposed an obligation on schools to provide lunchtime childcare and pre-school and after-school childcare. The organisations believed that, with their welfare knowhow, they could jointly develop products with which they would be able to compete with nationally active, and historically more commercial, childcare organisations in the provision of lunchtime childcare to schools.

A covenant agreed between the parties included an undertaking to respect each others' geographic area of activity and to request approval before engaging in childcare activities in each others' geographic area. This prior approval obligation was later replaced, in a subsequent partnership agreement, by an obligation to inform each other of such activities.

The NMa took the view that both the prior approval and the information requirements made it harder for the organisations to operate in each others' historically determined areas of activity. The requirements could function, according to the NMa, as a geographic division of markets.

### The decision

The childcare organisations which had already, prior to the decision, terminated the covenant and their subsequent partnership agreement, undertook not to exchange commercially sensitive information and not to inform each other of plans to enter each others' geographic areas. The organisations also sent a circular to schools in Amsterdam in which they clarified that schools could contact any of the organisations (and not just the local organisation) for lunchtime childcare.

The NMa found that a decision making these commitments binding was an efficient alternative to a fining decision and was in this case appropriate.

### Efficiency of decision?

Before entering into the covenant, the parties consulted the NMa's website for guidance as to the compatibility of their proposed co-operation with the competition rules. Their assessment was that the positive goals of their co-operation outweighed any potential negative effects. They entered into the covenant on 15 March 2006.

However, in June 2006, one of the parties decided to call the information line referred to on the NMa's website to confirm the parties' own assessment. The NMa employee who took the call requested a copy of the covenant and told the party concerned that the NMa would respond to their inquiry within 10 days. In September 2006 and having had no response, the organisation reiterated its question. The NMa again undertook to reply within 10 days. Several weeks later, an NMa employee called the organisation suggesting that he come to the offices of the organisation on 18 October to discuss the matter. He arrived with a colleague and read the management their rights. The visit took the form of a dawn raid.

The NMa then proceeded to investigate each of the organisations, sending question lists and interviewing management. The investigation lasted 18 months, during which time the parties terminated the covenant and their subsequent partnership agreement; provided the NMa with full co-operation; and requested the NMa to follow a less burdensome and more appropriate procedure. A full two years after the parties' first telephone call, the NMa closed the case with a commitment decision.

Although the commitment decision was clearly more

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efficient than a fining decision would have been, the handling of the case is hardly an example which other competition authorities are likely to emulate.

One of the parties approached the NMa under the misunderstanding that the latter would give it guidance. This misunderstanding was not corrected by the NMa in its further telephone and written correspondence with the party. The subsequent dawn raid evidenced the NMa's doubts about the compatibility of the parties' plans with the competition rules. In the light of this and the duty on the NMa to exercise its task in line with general principles of proper administration, it would have been appropriate for the NMa, already in June 2006, to indicate that elements of the co-operation could be illegal or simply refer the parties to a lawyer. If the NMa had advised the parties to seek legal advice, the organisations could have structured their nascent co-operation in a way that would avoid competition law concerns. The NMa could have saved itself and the childcare organisations, whose financial means are limited, a great deal of time and money.

The course chosen by the NMa was not efficient either from a procedural perspective or from the perspective of the result achieved. A warning email and possibly a follow-up dawn raid to verify whether the warning had been heeded would have been more efficient, given the clear intention of the parties to abide by the law and their willingness to adapt their behaviour.

## Appropriateness of decision?

But was a commitment decision appropriate in the circumstances? The NMa had concerns about geographic market sharing which could result from information exchange between potential competitors. The chairman of the board of the NMa has, on several occasions, publicly stated that a commitment decision is not appropriate for horizontal agreements. Fortunately for the parties, the board found in this case that such a clear-cut limitation of the application of a commitment decision is unnecessary. This seems sensible. Horizontal agreements between players in markets in transition, where the primary aim is not profit but welfare, are clearly not of the same order as horizontal agreements in markets which have long been fully liberalised and where profits are a primary goal. This does not mean that market players in such markets should be given a get-out-of-jail free card. However, sufficient account should be taken of the context of the agreements, including the history of regulation, the goals of the parties and the limited extent of any damage which may have been caused.

Given this distinction, a commitment decision would also seem an appropriate option in dealing with the NMa's apparent concerns about the healthcare sector. However, to date, the NMa has rejected requests for a commitment decision in this sector. Its rejections have not been based on the horizontal nature of the suspected breaches of the law but on the timing of the requests.

## Timing of commitments

The chairman of the board of the NMa has suggested that a commitment decision is not appropriate once a report, setting out the objections of the NMa, has been sent to the parties. This is in line with procedures adopted in some other European countries. However, it is contrary to the letter of the Dutch law, which explicitly provides that commitments may be offered up until the adoption of a fining decision.

In two cases, commitments have been refused because they were issued in a late phase of the NMa's investigation. The NMa found that, in such circumstances, a commitment decision would not be more efficient than a fining decision. The validity of this conclusion can, however, be challenged on two grounds. First, it assumes that the efficiency requirement relates to procedural efficiencies alone. Again, this limitative approach does not follow from the law. The efficiency of a decision can just as easily be assessed on the basis of results achieved. Second, it fails to take account of the largely consensual nature of a commitment decision, which is therefore less likely to lead to long drawn-out appeal procedures than a largely confrontational fining decision.

One detail of the cases concerned was that they involved suspected horizontal market sharing agreements for which, according to the earlier statements of the chairman of the board, a commitment decision was not appropriate. Once it became clear that the NMa was prepared to accept commitments in such cases, the parties informed the NMa of their wish to avail themselves of this possibility. The tardy submission of commitments was a direct result of the (in retrospect, misleading) public statements about the NMa's policy.

In cases where commitments have been offered in an early stage of its investigation, the NMa has refused to consider such commitments. It has justified such refusal on the grounds of its own uncertainty about whether the parties concerned have engaged or will engage in potentially anticompetitive acts and its obligation not to impose commitments which are unnecessary or disproportional. The practical consequence of this is that parties who wish to offer commitments have to admit facts about past or future behaviour which could give rise to concerns before offering commitments to solve such concerns. Parties who have not and would not in the future engage in the behaviour suspected by the NMa cannot give commitments to this effect to avoid a long and drawn-out investigation of the NMa.

## Conclusions

The NMa's reticent use of the commitment decision to date results from an unnecessarily restrictive view of the circumstances in which such a decision is appropriate. The restrictive policy may be influenced by comparisons with the approach taken in other European jurisdictions. It does not result from the wording of the Dutch law. The NMa has a wide discretion to use this new tool in a way which would confirm its innovative and practical approach to enforcement. The NMa should be encouraged to exercise it.

## References

NMa decision of 30 June 2008, case 5709, Kinderopvang Amsterdam (Childcare Amsterdam)

NMa decision of 19 September 2008, case 5851, Thuiszorg't Gooi

NMa decision of 19 September 2008, case 6108, Kennemerland

NMa annual report 2007

Speech of Mr P Kalbfleisch of 11 October 2007, nr 26