

***Seminar***  
***Sanctions, Fines and Settlements in Cartel Cases***  
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***Development of Policy on Fines***  
***in the Netherlands***

***Monique van Oers***  
***Director Legal Department***  
***Netherlands Competition Authority***

# *NETHERLANDS COMPETITION ACT ENFORCEMENT*

## **History**

- **1958 – 1998: Act on competition**

absence of pro-competition policy – no active competition law enforcement

- **1998: new Competition Act**

rules on competition similar to Articles 81 and 82 EC Treaty;  
establishment of NMa – independent agency

## ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

### **Competition Act 1998 – rules on enforcement:**

- Enforcement within an administrative law system
- NMa has investigatory powers (antitrust department) and powers to impose fining decision (legal department / board)
- NMa may impose fines up to 10% of the total annual turnover of a company
- All fining decisions of the NMa may be challenged before the administrative courts

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **Some facts & figures**

### **Over the last seven years:**

- Number of cartel cases (not including bid rig): > 20
- Number of companies involved: > 85
- Total amount of fines imposed: > € 185 million\*

### **Construction industry:**

- Number of companies involved in bid rigging: > 1.200
- Fines imposed for bid rigging: > € 300 million\*

**Largest fine imposed by NMa: ~ € 14 million\*** (annual turnover € 4.670 million)

**Largest fine so far upheld by Court: ~ € 8 million**

\* Fines may be reduced in appeal  
Most fining decisions are challenged before the court

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa - Fining guidelines**

- Competition Act provides Competition Authority with considerable power to determine its own fining policy  
.... the Netherlands Competition Authority may, depending on the severity and duration of the infringement, impose on companies a maximum administrative fine of *10%* of their annual turnover .....
- In 2001, after taking the first five fining decisions, the NMa published its **Fining Guidelines**

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa Fining guidelines**

### **Sources**

- Fining policy of foreign competition authorities
- Other national enforcement agencies (e.g. financial markets)
- Economic theory
- NMa fining practice so far

### **General Principles**

- special and general prevention (deterrence)
- principle of equality and proportionality
- no mathematic formula (flexibility; specific circumstances of the case at hand)
- transparency

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa Fining guidelines**

### **Basic approach:**

- Fine basis = 10% of turnover involved ('affected commerce')
- Involved turnover: the value of all transactions that the company realized during the entire period of the infringement through the sale of goods or services to which the infringement relates
- Base fine: fine basis x factor for severity of infringement

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa - Fining guidelines**

### **Fine tuning the level of the fine:**

1. Basis fine (10% turnover involved) x factor
  - very grave infringement : factor between 1,5 - 3} econ.
  - grave infringement : factor between 0 - 2} con-
  - less grave infringement : factor between 0 - 1} text
2. Possibility to increase the fine in view of the significance of the company (annual turnover) to the Dutch economy and the desired preventive effect.
3. Possibility to increase or decrease the fine for aggravating or mitigating circumstances.
4. Evaluation of the result in view of general principles of law and the statutory maximum fine.

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa - Fining Guidelines**

### **Fining system introduces**

- clear fining range for hard core cartels: factor between 1,5 - 3 => in the first step the fine is set between 15% and 30% (bandwidth) of turnover involved
- flexibility for non-hardcore infringements (large bandwidth for setting the factor; depending on economic context)
- Transparency
- Basis for leniency policy (NMa Leniency guidelines)

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa - Fining Guidelines**

### **Wisdom of fining guidelines?**

- Fining is an important instrument to create an incentive to comply with competition rules (but not the only one!)
- Setting the right fine is not easy - deterrence is crucial
- Transparency has helped to send the message
- Fining guidelines have been criticised for certain details but not for their existence (proven to be helpful tool, also to judges, practitioners/lawyers and companies)
- Contributed to a higher level of compliance in The Netherlands
- Case law on fining still developing

# ***NETHERLANDS COMPETITION ACT ENFORCEMENT***

## **NMa - Fining Guidelines**

### **Wisdom of fining?**

- Present discussion in The Netherlands : is fining companies really enough or does successful cartel enforcement require imprisonment for individuals ?

# NMa

E-mail: [m.t.p.j.vanoers@nmanet.nl](mailto:m.t.p.j.vanoers@nmanet.nl)

website: [www.nma-org.nl](http://www.nma-org.nl)