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Antitrust Oversight: More an Art than a Craft

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Would it lead to more effective sanctioning of cartel violations if attention were shifted from sanctioning undertakings to primarily sanctioning those individuals who, de facto, either exercised leadership over or gave instructions to a cartel violation, along with those who refrained from taking any measures to stop the violation, even though they had the power to stop the violation or to prevent it from happening? This article will examine why the answer to this question is both yes and no.

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I. Introduction

Would it lead to more effective sanctioning of cartel violations if attention were shifted from sanctioning undertakings to primarily sanctioning those individuals who, de facto, either exercised leadership over or gave instructions to a cartel violation, along with those individuals who refrained from taking any measures to stop the violation, even though they had the power to stop the violation or to prevent it from happening? Yes and no. Cartels will not become a thing of the past if only undertakings are dealt with, as Ginsburg & Wright have also noted. Despite the ever-increasing fines that are imposed, it is obvious that forming a cartel is and will continue to be a tempting prospect. The option of sanctioning the undertakings' executives by imposing personal penalties, such as a disqualification order or a prison sentence, might change this. However, I must add that merely the power to impose fines on executives will not necessarily bring about this change. Personal fines lack a sufficiently deterrent effect if the undertaking indemnifies the executive in question against such fines, or reimburses them.

It is not my preference to solely sanction individuals for conduct that violates competition law. In my opinion, penalties on individuals are necessary to complement fines on undertakings as deterrents against antitrust violations. I would therefore argue in favor of using a combination of compliance tools in order to achieve maximum compliance with competition regulations.

IN MY OPINION, PENALTIES ON INDIVIDUALS ARE NECESSARY TO COMPLEMENT FINES ON UNDERTAKINGS AS DETERRENENTS AGAINST ANTITRUST VIOLATIONS.

For the Netherlands Competition Authority ("NMa"), as regulator in the Dutch context, it is about looking at, on a case-by-case basis, what solution can and should be chosen that does justice to the NMa's mission of making markets work, as derived from the Dutch Competition Act. This calls for a considerable degree of leeway with respect to the regulator's actions within the existing legal and jurisprudential boundaries. Oversight thus becomes more of an "art" than a "craft." The NMa's role as regulatory body is explained in more detail below, as well as the system of enforcement of the Dutch Competition Act. The NMa's powers and tools will be discussed, including what principles the NMa applies when using those powers and tools. In addition, attention will be focused on a power the NMa does not possess, which is the power to impose a disqualification order. Finally, criminal enforcement of antitrust regulations and the deterrent effect of fines will be dealt with.

II. The NMa as Regulator

In 1998, the NMa was charged with enforcement of the Dutch Competition Act. The NMa was to put an end to the "special status" of "the Netherlands as

Europe's cartel paradise." In part because of this objective, the NMa's actions are not so much aimed at maximum enforcement of the Dutch Competition Act as at maximum compliance—in other words, stimulating behavior that is in accordance with antitrust standards.

From the onset, the NMa knew perfectly well that enforcement actions alone would not be enough for achieving its objectives. It is reasonable to expect that undertakings active in the Dutch market, or in other geographical markets for that matter, are aware of the rules and regulations in place, that they comply with them, and that, if necessary, they consult professional advisors in all of their activities. The NMa has, nevertheless, put and is still putting a tremendous amount of time and effort in providing market participants with education and guidance regarding competition laws. In the early years of its existence, the NMa predominantly provided general education about competition rules and the NMa's tasks and powers. Later, the NMa also started to provide sector-specific education, for example, to the health care industry. In addition, the NMa is willing, under certain conditions, to answer concrete questions from a market participant in a so-called informal opinion.¹

In the beginning, most of the NMa's time and resources were spent on numerous exemption requests.² In addition, the first steps were taken, albeit tentative ones, in enforcing the Dutch Competition Act. Cartel oversight also took off, in part because of the 2002 evaluation of the Dutch Competition Act and the conclusions of the report of the parliamentary inquiry committee into the Dutch construction industry.³ The NMa also began to take action not only as a result of complaints or tip-offs,⁴ but also on its own initiative (for example as a result of media reports).

The surge in cartel oversight is also related to the repeal, in 2004, of the option to apply for an exemption from the cartel prohibition (as a result of bringing EC antitrust law⁵ up to date). Instead, the criteria on the basis of which the NMa used to be able to grant an exemption are now legal exemptions from the prohibition of cartels per Section 6, paragraph 1, of the Dutch Competition Act. Thus, undertakings have been forced to do self-assessments since 2004. This change has also allowed the NMa to free up resources to investigate possible violations of the Dutch Competition Act.

Shortly after the start-up phase, in 2004, the NMa was faced with a widespread cartel in the Dutch construction industry, involving around 1,400 undertakings, of which more than 1,200 were fined a total of almost EUR 300 million. To assess the numerous violations, the NMa opted for an innovative approach, which proved to be successful: The NMa offered those construction firms, that were willing to accept the facts and violations the NMa found them guilty of, the opportunity to go through an expedited procedure (so-called fast-track procedure) in exchange for a fine reduction of 15 percent. More than 80 percent of the 1,200 undertakings in question agreed to these conditions, accepting the

offer of an expedited procedure combined with a 15 percent fine reduction. Only a handful of undertakings appealed the fines. The majority of these appeals were ruled in the NMa's favor.

In the twelve years that the NMa has been enforcing the Dutch Competition Act, the discussions inside and outside of the courtroom have shifted from issues concerning procedural matters and powers relating to the NMa's enforcement's actions to the material side of cases, thereby also focusing on the fines set by the NMa. Fines for anticompetitive behavior are becoming higher and higher, as Ginsburg & Wright noted. Fines, including high ones, are a natural part of the kind of professional approach towards antitrust law that the NMa strives for.

The self-assessment trend, introduced by the 2004 modernization of antitrust law, is also reflected in the principle of high trust. This principle was introduced in 2008 in Dutch competition law and other regulatory areas, and was presented by the Dutch Minister of Economic Affairs as the preferred method of enforcement.

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The idea behind the high-trust principle is that, on the one hand, fewer people and resources are needed to investigate conduct and activities that *prima facie* actually benefit competition. On the other hand, more people and resources are needed to track down and severely sanction harmful hard-core cartels, which means imposing high fines. The principle of high trust was laid down in the new policy rules that the Dutch Minister of Economic Affairs set in 2009, as suggested and applied by the NMa.⁶ The amendments that the Minister of Economic Affairs made to the original fining policy rules enable the NMa to impose higher fines than ever on violators of the Dutch Competition Act.

It should be noted that the level of the fines has been capped. The Dutch Competition Act set a legal maximum of 10 percent of the global turnover of the undertakings in question. As equally important—or possibly even more important—is the fact that virtually all undertakings that are imposed a fine by the NMa file an appeal against their fine with the court, which tests each fine against the principle of proportionality.

That the high-trust principle is the cornerstone of the NMa's approach of assessing antitrust cases does not take away the fact that, in any concrete case, a different enforcement instrument (other than fines) may be selected. In order to ensure transparency, consistency, and proportionality in all of its actions, the NMa has established criteria for making such a choice in any given case. These are: 1) the violation is immediately and permanently suspended; 2) benefits go directly and appreciably to consumers; 3) interested third parties' interests are not harmed in any way; 4) structural adjustments supersede cultural or behav-

ioral adjustments; and 5) there is no clear hard-core violation of the competition regulations.

In each case, it needs to be examined what enforcement instrument is the most effective to stimulate compliance with the Dutch Competition Act. Alternative enforcements vary between making arrangements with undertakings about measures to be taken (such as damage control, compensations, or adjusting the form of cooperation) and encouraging and stimulating the creation and adoption of a compliance program. The benefits of this form of enforcement include time savings, a rapid change in behavior among undertakings, a reversal of the violation, and direct advantages to consumers.

As I mentioned at the beginning, and which is contrary to Ginsburg & Wright, I am in favor of applying a combination of enforcement instruments to achieve maximum compliance with antitrust regulations, instead of shifting the focus from sanctioning undertakings to strictly sanctioning individuals. However, this does not mean that I do not share their opinion of individual penalties having a greater deterrent effect, provided that these individuals can be personally affected. Imposing fines on individuals alone—and not the undertaking—is not enough to realize the desired deterrent effect. I have already

explained that the undertaking could indemnify the individual, or it could reimburse the fine, either directly or indirectly.

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This problem of indemnification or reimbursement is less of an issue, if one at all, with other types of penalties on individuals, such as prison sentences or disqualification orders. Unfortunately, disqualification orders have not yet been introduced in the Netherlands.

Personally, I am all for introducing this type of penalty in antitrust law. Considering the reputation that the Netherlands had until 1998 of being Europe's cartel paradise, I am additionally a proponent of sanctioning both the undertakings as well as the individuals that gave instructions to the cartel violation.

III. The Dutch Competition Act's Enforcement System

A. ADMINISTRATIVE LAW ENFORCEMENT

Competition law in the Netherlands is embedded in administrative law, most importantly the General Administrative Law Act ("Awb"). Although criminal enforcement may become part of our future in the coming years,⁷ the NMa currently imposes fines and other measures through administrative decisions, which are reviewed by specialized administrative courts. These courts are the

District Court of Rotterdam and the Dutch Trade and Industry Appeals Tribunal (“CBB”).

When the Dutch Competition Act was established, lawmakers deliberately opted for a system of administrative law enforcement instead of a system of criminal law enforcement, such as the one that existed under the then Dutch Economic Competition Act (“WEM”). Although administrative law enforcement was not new, back in 1998, the NMa, under the Dutch Competition Act, did receive powers that, at the time, were more far-reaching. This development led to heated discussions in Dutch parliament on, among other things, the principle of the two-tier system.

The reason behind the lawmakers’ choice to enforce the Dutch Competition Act through administrative law is twofold: 1) with a view to achieving the objectives of the Act, it is more effective to make an administrative body responsible for the use of different legal enforcement instruments, and 2) the administrative body’s expertise can be optimally utilized through direct involvement in both the investigation and the assessment phases when dealing with violations of the Dutch Competition Act (two-tier system), which is obviously safeguarded by a critical *ex-ante* judicial test.

B. TWO-TIER SYSTEM

As already mentioned earlier, the two-tier system laid down in the Dutch Competition Act means that the NMa has both the power to investigate violations of the Dutch Competition Act as well the power to issue decisions, including fining decisions. Despite the fact that this particular model has sparked numerous (political) debates, the model has proven itself to be efficient and effective. For the sake of legal protection however, lawmakers have separated those officials who exercise oversight (i.e. investigation) from those who impose sanctions—the so-called “Chinese wall.” This separation is laid down in Section 54a of the Dutch Competition Act, which states that NMa officials who are involved in the drawing up of the report and in the investigation that preceded that report are not also involved in sanction procedure activities.

The NMa has always known that a strict implementation of the Chinese wall-rule would be of vital importance to its authority. In all enforcement dossiers, the NMa maintains a strict separation between the investigation phase (including drawing up the report) and the sanctioning phase; different departments carry out these phases. When the report has been signed by the director of the Competition Department, the report and the entire dossier is handed over to the Legal Department, which issues the decision. All of these subsequent activities are recorded and filed in the dossier as well.

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Even though the NMa has been accused, and sometimes still is accused, of bias, bias has never been officially claimed in court proceedings. However, an accusation of bias was the main issue in a case against another Dutch regulator, the Netherlands Authority for the Financial Markets (“AFM”). The CbB reversed an important fining decision the AFM had imposed on Fortis Bank for insufficient separation of duties.⁸ In the AFM’s case, it concerned the separation on the Board level. The CbB allows the board to be involved in cases during the investigation phase, provided that its involvement is limited to the investigation’s objective, general instructions, and monitoring the investigation’s progress and execution. In the Fortis case, however, one AFM board member’s involvement went further. The CbB ruled that the board member was incapable of rendering a decision on the alleged violation with the required objectivity and impartiality, which meant he should have recused himself.

The fact that the NMa is applying the Chinese wall-rule strictly as well as correctly has also been noted in a 2007 report by the Netherlands Court of Audit.⁹ In its report, it concluded that the NMa has sufficiently implemented the legally required separation of duties between investigation and sanctioning in cartel and abuse cases, and that this separation works in practice.¹⁰

C. POWERS AND INSTRUMENTS

For its investigations into violations of the Dutch Competition Act, the NMa has been granted a number of far-reaching powers, including the power of entering undertakings’ premises, the power of demanding information, and the power of inspection, all with the assistance of the police if necessary. In addition, for its oversight and investigations, the NMa can impose the general obligation to cooperate whenever the regulator demands individuals do so. This may involve providing information or making documents available for inspection. The NMa has the power to fine individuals who refuse to give the kind of cooperation the NMa can reasonably ask them to give.¹¹

The NMa has outlined a number of principles for the use of its powers and instruments. The key principles behind the NMa’s actions are that its actions be aimed at inducing behavior that is in accordance with antitrust standards, and that they are based on the violation’s merits and scope. Other principles the NMa applies are to take action the moment a violation has come to its attention, in an efficient and effective manner, while applying the principles of sound administration.

It should be noted that violations do not always necessarily result in the use of a legal enforcement instrument. Alternatives that may play an equally important role in enforcement include stern conversations, informal opinions, or drawing up and adopting a compliance program, something I will touch upon later. Should these types of action have the desired effect, which is behavior in accordance with antitrust standards, then they render the use of legal enforcement

instruments no longer necessary. In other words, the NMa uses a combination of instruments. After all, not every situation needs to be dealt with in exactly the same way—at the end of the day, the NMa just wants its actions to have effect.

I would like to add that, with regard to the principle that the NMa takes action the moment a violation comes to its attention, other regulators may also inform the NMa of a violation. The NMa maintains good relationships with other regulators in the Netherlands, and it has concluded cooperation protocols with a large number of them. In a particular sanction case the NMa is currently dealing with, the NMa had received evidence from the Dutch Fiscal Information and Investigation Service and the Dutch Public Prosecution Service, which had collected evidence in a tax fraud case regarding participation in a criminal organization. This evidence, collected in a criminal investigation, consists of oral statements, wiretap transcripts, and supporting evidence (in writing).

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The question that subsequently arises is whether the NMa is allowed to use evidence that was collected in a criminal law investigation in its administrative law enforcement of the Dutch Competition Act. This question was brought up in another NMa case related to its investigation into bid-rigging in tenders. Here, the NMa used wiretaps it had received from the Dutch Public Prosecution Service in a criminal law investigation into possible corruption by civil servants and possible bribery of civil servants. The undertakings involved in this case started injunction proceedings, claiming that providing the NMa with the wiretap transcripts led to a misuse of power by the Public Prosecutor, and even to a violation of the right to privacy in Article 8 ECHR, meaning that this evidence was illegally obtained. Both the NMa and the Public Prosecutor argued strongly, stating that there is no legal impediment for this exchange of information between the two regulators and that Article 8 ECHR was not at stake.

An important issue was that there was no interference by the NMa in the Public Prosecutor's investigation. The NMa was not involved in the wiretap search itself, nor in the decision to start the wiretapping. In its ruling of 26 June 2009,¹² the judge in these interlocutory proceedings ruled in favor of the Public Prosecutor and the NMa on all counts. The judge stated that the concept of “substantial public interest” needs to be interpreted as including the economic welfare of a country. Since the NMa is charged, among other things, with the enforcement of the Netherlands Competition Act and, in particular, with the investigation of cartels, illegal price-fixing agreements, and other forms of collusion, there is a substantial public interest when the economic welfare of the Netherlands is potentially at risk. Therefore, making the wiretaps available to the NMa was lawful.

In addition, the judge concluded that the right to privacy under Article 8 EHCR had not been violated by providing the wiretaps to the NMa. The judge concluded that providing the NMa with the wiretaps was not disproportional when considering the economic welfare at risk, and that the information concerning the possible, mutual price-fixing agreements between construction companies could not have reasonably been obtained in a different, less disadvantageous way, since such agreements are not generally written down. Although wiretapping remains the exclusive power of the Public Prosecutor on which the NMa does not have any influence, this judgment does make clear that, where the wiretap search leads to information on possible cartel behavior, this information can be lawfully provided to the NMa and used as evidence in cartel investigations.

D. COMPLIANCE

Prevention of violations of the Dutch Competition Act can be realized by, among other things, undertakings introducing a compliance program. The purpose of such a program should be to change the culture in the undertaking or industry that considers violating antitrust regulations (in varying degrees) to be normal.

A compliance program should be established, implemented, and monitored by the undertaking or trade association themselves. Such a program should at least include that: 1) everyone within the undertaking or the industry adhere to the compliance program; 2) monitoring takes place both bottom-up as top-down, and that everybody informs each other; 3) there is permanent education, both theoretical as well as practical education (e.g. by holding a “mock dawn raid”); 4) compliance officers get appointed; 5) the accountants, including external ones, are required to inform the undertaking’s board of directors and/or the board of supervisory directors about potential abuse, possibly including the requirement to consider applying for leniency; and 6) in case a violation is detected, it is immediately terminated by severing all ties with the cartelists. At this time, the undertaking’s board of directors or board of supervisory directors should encourage the application for leniency. The advantages of leniency are that a simpler gathering of evidence may help a regulator reach the completion of a case faster, which results in less costs to all parties involved, in a reduction of “naming and shaming,” and in the destabilization of cartels.

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However, having a compliance program in itself does not automatically result in fine reductions, although having one, but not acting in accordance with it, may actually lead to a fine increase. In the British Sugar case, for example, the European Commission used the undertaking’s failure to act in accordance with its own compliance program as an aggravating circumstance that justified substantially increasing the fine.¹³

E. DE FACTO LEADERS

Since its creation in 1998, the NMa has had the power to sanction undertakings. After October 1, 2007, the NMa has also had the power to search private homes and sanction individuals who gave instructions to or exercised de facto leadership over violations committed by undertakings.¹⁴ Within the context of investigations, this means that an individual can be imposed a fine for having given instructions to or exercised de facto leadership over a violation if the NMa is able to establish that an undertaking has committed a violation of competition regulations.

As evidenced by legal history, the ability to impose fines on those that gave instructions to or exercised de facto leadership over a violation is aimed at preventing executives, managers, and other staff members from violating material and formal provisions of the Dutch Competition Act.¹⁵ Therefore, the phrase “exercised de facto leadership” does not solely relate to an undertaking’s top-level executives. In addition, multiple leaders may concurrently be obligated to end certain conduct. A leader is an individual that, whether or not officially employed with the undertaking, is able to exercise de facto leadership over the undertaking’s behavior. In the case of leadership, the leader, barring any exceptional circumstances, will be reasonably bound to intervene. Therefore, refraining from intervening may also be fineable.

A compliance program should be established, implemented, and monitored by the undertaking or trade association themselves.¹⁶ This particular case was special because these individuals were working as supervisory board members at the undertaking, which is active in the Dutch newspaper industry. The fines were imposed for non-compliance with an instruction, which was a behavioral remedy imposed by the NMa in connection with an acquisition in 2000.

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The instruction had been to make sure that the undertaking, the Dutch media company Wegener, guaranteed the independence of two newspapers in the southwestern region of the Netherlands, thereby allowing the readers in that region to have freedom of choice. This independence would also prevent price increases and reader selection reductions. To that end, a board of supervisory directors was installed at each newspaper, and any link between the two was strictly forbidden. In order to further advance the newspapers’ independence, the board of Wegener and the supervisory directors signed an agreement committing themselves to set a course of action aimed at maintaining both newspapers’ mutual independence and existence. Both of these boards of supervisory directors were granted specific oversight roles, with approval rights to be focused on complying with the instructions. According to a recent NMa investigation, however, since 2002, neither newspaper has complied with the instruction. The

supervisory directors' executive role in connection with this non-compliance has resulted in them being fined along with the undertaking.

The individuals that exercised de facto leadership in the abovementioned case held positions of supervisory directors. Although it can be argued that supervisory directors, given their position's supervisory nature, are generally not in a position that would allow them to be considered de facto leaders, this case contained a number of unusual circumstances that considered these supervisory directors as such. First, these supervisory directors were given a special and—compared to regular supervisory directors—limited task, which was to exercise oversight on compliance with the behavioral remedy proposed by the undertaking in question. Second, they had signed an agreement with the undertaking to comply with the instruction.

The undertaking's fine is EUR 19 million, whereas the supervisory directors were each personally fined a total amount of EUR 1.3 million. Are these fines too high? No. In this case, too, the NMa first adopted the "high-trust" approach: you have our trust, but if you violate that trust, you will be fined severely.

F. DISQUALIFICATION ORDER

The imposition of fines on individuals — next to the power of the NMa to impose fines on undertakings—is simply not enough to increase the deterrent effect due to potential indemnification or reimbursement of the fine by the undertaking. As previously mentioned, I am a staunch proponent of the instrument of disqualification orders under administrative law. I believe that introducing disqualification orders for violators of antitrust regulations is of considerable value to achieving maximum compliance with these regulations. As Ginsburg & Wright noted, imposing high fines on the undertaking alone will not lead to a significant reduction of cartel behavior. The introduction of disqualification orders might change this. The same conclusion is drawn in a consultation document by the OFT¹⁷ in which it contemplates using disqualification orders in more cases than has been the case so far. The rationale is that individualized consequences to participants of antitrust violations are more effective than the consequences (of imposed fines) to the undertaking. Disqualification orders will send chills down the spines of individuals that gave instructions to cartels, and

their reputational damage will be severe—particularly if it involves people working at major international companies.

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Concerning the reputational damage, I would like to add the following remark. With regard to sanction decisions aimed at individuals, it is NMa policy to anonymize these decisions. In any case, anonymization will always take place with respect to the name of the individual. In principle, that individual's position within the undertaking is also anonymized, but this may not

always be the case when taking the circumstances of the case into consideration, for example, in order to achieve the desired admonitory effect. In the NMa's communication and publications about such a case, this is obviously something that is taken into account. However, that does not take away the fact that publicity surrounding such a case, too, acts as an instrument for the NMa to highlight its objectives, which is realizing maximum compliance and boosting the perception of the chance of getting caught.

IV. Criminal Enforcement

Enforcement of the Dutch Competition Act with regard to de facto leadership is currently based on administrative law. This may change in the future, meaning that competition law enforcement may be based on either administrative law or criminal law. Lawmakers are currently looking into the possibilities. Without a doubt, criminal prosecution (e.g. the mere threat of a prison sentence) has a major deterrent effect that may benefit the effective enforcement of competition regulations. But adding criminal elements to the current administrative enforcement may complicate this enforcement process, and could potentially even undermine effective enforcement.

Personally, I am not a proponent of introducing criminal law enforcement in the Dutch Competition Act. Administrative enforcement of the Competition Act has proven to be effective and efficient. The effectiveness of antitrust oversight may be jeopardized if an enforcement system is chosen in which undertakings and individuals are confronted with their conduct through either criminal law or administrative law. For example, which ministry would then be responsible for the enforcement of competition regulations? The Ministry of Economic Affairs—which is currently the case—or the Ministry of Justice? Also, does the Public Prosecution Service possess the required expertise to assess antitrust cases?

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Another uncertain aspect is the penalty itself. A criminal-law judge might very well be inclined to impose lower fines than the NMa in similar cases, given the Dutch sanction climate. If so, the Netherlands would risk being out of line with the European sanction climate. In addition, if an undertaking or natural person that filed a leniency request with the NMa ran the risk of being criminally prosecuted, it would undermine the leniency program. After all, there is no guarantee that the Public Prosecution Service and the judge would consider themselves bound to any grant of leniency.

Rather than introducing criminal enforcement, introducing the instrument of disqualification orders under administrative law may be another option (also see the foregoing). The introduction of such an instrument would surely help in

increasing the deterrent effect as well as in stimulating behavior that is in accordance with antitrust standards.

A major advantage of administrative enforcement of the Dutch Competition Act is that cases can be handled in flexible and innovative ways. In my opinion, emphasis in enforcement actions should not entirely be placed on the imposition of high fines. Enforcement actions as well as the imposition of fines serve the NMa's general objective, which is to stimulate behavior that is in accordance with antitrust standards.

V. Fines as Deterrents

Media reports on sanction decisions as well as competition law literature often suggest that fines are too high. They question whether or not the emphasis of regulators on increasing fines in order to deter undertakings as much as possible is the right one, and they wonder whether this has merely triggered a race of who imposes the highest fines.

First of all, setting an appropriate fine for a violation of competition regulations is not an easy task, and it is certainly not a matter of mathematics. Fines are a last resort when the NMa believes that all other remedies will fail to yield the desired effect. The NMa will impose fines particularly in cases of a clear or continuous breach of standards, or in cases of conduct that frustrate the NMa's execution of its tasks. In almost all situations, the NMa can impose a fine of up to 10 percent of the undertaking's annual turnover. So, in effect, the maximum fine that the NMa can impose, in general, can be considerably high.

At the heart of this system lies the assumption that, if, for example, the prohibition of cartels is violated, the fine must be proportional to the relevant turnover, which is the turnover that the undertaking has generated through its illegal practices during the entire duration of the violation. This turnover is also known as the "affected turnover." The rationale is that undertakings only engage in illegal conduct because of the expected economic returns. As a proxy for these returns, 10 percent of the affected turnover is used as the so-called basic fine. However, it is my firm belief that the benefits that cartelists reap are not proportional to the damage that has been inflicted to the free market, which will often be many times greater. It is, however, virtually impossible to exactly quantify this damage, and it is nearly completely impossible to reclaim it through civil proceedings; for example, by a consumer claim.

A recent development is the issue of tax deductibility of fines imposed by the NMa. And although the NMa should actually not be involved, it is, however, in the NMa's interest that the discussion's outcome results in fines not being tax deductible, because the fines' intentions are to create a deterrent effect to realize general and special prevention. Dutch tax laws are clear that, when determining

profits, those costs and expenses related to administrative fines, or to fines imposed by an EU institution, should not be taken into account. Nevertheless, undertakings argue in favor of making NMa fines and Commission fines tax deductible, because those fines supposedly have a (partial) enrichment-depriving nature. After all, both the NMa and the Commission determine their fines using their Fining guidelines, which, in that respect, are similar, whereby the fine is systematically calculated on an estimation of the possible cartel profits.

Nevertheless, one of the Dutch courts ruled that fines imposed by the Commission have a ‘partially’ enrichment-depriving nature, and can thus be considered similar in nature to measures under tax law that *are* deductible.¹⁸ Such a line of reasoning rapidly diminishes the deterrent effect of fines imposed by either the NMa or the Commission.

However, that ruling was reversed on appeal, and the Court of Amsterdam ruled—after the Commission had intervened as *amicus curiae*—that the relevant legal text in Dutch tax law is crystal clear on this matter: Fines imposed by the Commission and the NMa are not tax deductible.¹⁹ The Supreme Court of the Netherlands—the highest judicial body in the Netherlands—still needs to comment on this issue. The NMa will closely follow the Supreme Court in this matter, because at stake is a deterrent that can be used for both general and special prevention.

VI. In Conclusion

The NMa in recent years has battled violators of the Dutch Competition Act in order to get rid of the Netherlands’ reputation of “cartel paradise.” Administrative fines as sanctioning instruments remain essential in that battle. Considering the Netherlands’ past, it is and continues to be necessary in the Netherlands to fine undertakings for violating the Dutch Competition Act.

Besides imposing fines on undertakings, the NMa will increasingly use its power to fine individuals who gave instructions to or exercised de facto leadership over violations. When fining these kinds of individuals, there is a risk that the undertaking with which they are employed will reimburse those fines, or that indemnification becomes widespread. That is why I argue for the introduction of disqualification orders, so that those who gave instructions to cartels are personally hit, which should significantly increase the deterrent effect of competition regulations.

The importance of antitrust oversight justifies strict actions to be taken by the regulator. However, the regulator, as part of his executive power, must have the

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necessary freedom to use its instruments and powers. In this respect, a regulator's work is more of an Art than a Craft—as I already mentioned at the beginning of this article—and the regulator thus has a hand in the legal state. ▼

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- 1 See also 2006 NMa Annual Report, p. 18.
 - 2 When the Dutch Competition Act came into effect in 1998, undertakings were given the opportunity, under a transitional program, to notify the NMa of the then existing cooperation agreements concluded prior to April 1, 1998, and have them tested against the new law. The NMa received 1,040 exemption requests, much more than the expected 350. Moreover, the NMa received exemption requests for cooperation agreements that were concluded after April 1, 1998.
 - 3 The Parliamentary Inquiry Committee into the Dutch Construction Industry ruled that the NMa:

... apparently [took] a somewhat wait-and-see attitude and [was] led by the Dutch Public Prosecution Service. The NMa let the Public Prosecution Service take control far too easily. The Parliamentary Inquiry Committee into the Dutch Construction Industry is of the opinion that the fact that the shadow bookkeeping system concerned the period of 1986 until the end of 1998 should have only played a minor role in this. After all, the fact that the NMa is only authorized to take action with regard to irregularities that have taken place after January 1, 1998, does not take away the fact that knowledge of this bookkeeping system could have given the NMa a good idea of the system of irregularities. Armed with such information, the NMa would have had a better starting position when carrying out investigations into the construction industry. Earlier investigations carried out by the Dutch Economic Investigation Service (ECD) already confirmed that there had been indications of price-fixing and market-sharing systems within the construction industry, of which whistleblower Mr. Bos already spoke. In conclusion, the Parliamentary Inquiry Committee into the Dutch Construction Industry believes that a more active role on the NMa's part would have been more appropriate.

Parliamentary Papers II, session 2002-2003, 28 244, no. 5-6, p. 157.
 - 4 The NMa was thus helped in the large-scale investigation into the Dutch construction industry by the public disclosure of a shadow bookkeeping system in the industry, done so by a whistleblower.
 - 5 Under the term "modernization process" is understood, among other things, to include the change in application where the monopoly of applying Article 81, paragraph 3, EC Treaty, which used to be applied solely by the European Commission., was terminated. On the basis of rulings, it had to indicate whether the exception to the prohibition of cartels, laid down therein, was under discussion in concrete cases. Today, Article 81, paragraph 3, EC Treaty, operates directly, and every undertaking or association of undertakings and every judge or regulator must determine for itself/themselves whether the conditions are met for overriding the prohibition of cartels.
 - 6 Policy rules of the Minister of Economic Affairs, containing guidelines on the imposition of administrative fines by the NMa 2009, Government Gazette. 2009, no. 14079.
 - 7 The Ministry of Economic Affairs is currently drafting a law which should create the possibility of criminal enforcement of competition rules.
 - 8 Dutch Trade and Industry Appeals Tribunal, dated February 9, 2006, AWB 03/918, Fortis Bank (Nederland) N.V. and Dutch Authority for the Financial Markets.
 - 9 Parliamentary Papers II 2006-2007, 31 055, no. 1-2, Antitrust oversight by the NMa.

- 10 Parliamentary Papers II 2006-2007, 31 055, no. 1-2, Antitrust oversight by the NMa, p. 14.
- 11 For example, see District Court of Rotterdam, dated August 7, 2003, MEDED 02/259, Texaco.
- 12 District Court of The Hague, Janssen de Jong Groep B.V. and others v. State of the Netherlands, 33760 7/KG ZA 09-616.
- 13 Decision of the Commission of October 14, 1998, case no. IV/F-3/33.78, OJ L 76/1-66, ov 208 ("British Sugar acted in violation of the clear terms of its compliance program"). Also see ECJ April 29, 2004, British Sugar v. Commission, case C-359/01P.
- 14 Act of June 28, 2007, containing an amendment to the Dutch Competition Act as a result of the evaluation thereof, Government Gazette 2007, 284.
- 15 Parliamentary Papers II 2004-2005, 30 071, no. 3, p.8.
- 16 Decision dated July 14, 2010 by the NMa in case 1528 / Wegener. This decision (in Dutch) can be downloaded from www.nmanet.nl.
- 17 The consultation document can be downloaded at http://www.offt.gov.uk/shared_offt/consultations/oft1111con.pdf. The OFT recently announced in what way it will exercise its power to impose a disqualification order. That document can be downloaded at http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft510.pdf.
- 18 Decision of District Court of Haarlem dated May 22, 2006, AWB 05/1452, X. B.V. and Dutch Tax Administration. The same court has also issued a decision ruling that fines imposed by the NMa are not tax deductible (District Court of Haarlem, dated October 3, 2008, AWB 08/493, X and Dutch Tax Administration).
- 19 Ruling of Court of Amsterdam, dated March 11, 2010, 06/00252, Dutch Tax Administration and X. B.V. and ruling of Court of Amsterdam, dated March 11, 2010, 08/01180, X. B.V.