NETHERLANDS

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1. Cases before the National Courts and Competition Authorities

In 1992, the European Commission imposed heavy fines[1] for bid rigging on a number of associations in the Dutch construction sector, representing around 4200 Dutch construction companies.[2] The decision[3] was upheld by the Court of First Instance.[4]

In November 2001, whistle-blower Ad Bos claimed that agreements on the prices quoted in tenders were as widespread a practice as ever, producing

[1] Decision of European Commission, Cases IV/31.572 and IV 32.571 [1992] OJ L92/1.

[2] The Commission claimed that the associations had, in practice, been acting for around 3000 Dutch companies. *Ibid*, para 11.

[3] This decision is referred to as the "SPO decision". SPO stands for the Association of Collaborating Price-Regulating Organisations in the Construction Sector (*Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid*).

[4] Judgment of the Court of First Instance, Case T 29/92 *SPO* [1995] ECR II 289.

evidence of duplicate bookkeeping covering the period from 1988 to 1998 and showing the virtual[5] amounts his company owed to competitors (and were owed) under the bid-rigging scheme.

A parliamentary board of enquiry set up to investigate described the Dutch construction sector as "infected".[6] The Dutch Competition Authority (NMa)[7] carried out a large-scale and wide-ranging investigation of the building sector.[8] In 2003 it rendered six decisions.[9] Twenty-six companies were found to have coordinated their actions in public tenders and were fined for infringements of the Dutch Competition Act (DCA).[10,11] The evidence put forward by Ad Bos played a significant role in the largest of these cases.

In February 2004, further evidence of duplicate bookkeeping was uncovered. Whereas the Bos bookkeeping records had primarily concerned a specific sector (the earthworks, road works and hydraulic engineering (GWW) sector), these new records brought to light bid-rigging practices that had existed in another sector (the civil and utility sector) years before Ad Bos went public.

The government set an ultimatum.[12] Companies who failed to admit, before 1 May 2004, to previous cartel practices could, as decided on a case-by-case basis, be shut out of future public procurement tenders.[13] A massive 473 companies[14] filed for leniency and exceptional procedural measures were required in order to ensure swift and adequate settlement.

(a) Four Subsectors

The NMa distinguished between four subsectors: (i) the GWW sector;[15] (ii) the installation sector; (iii) the residential and non-residential construction sector;[16] and (iv) other construction-related sectors.

On 13 October 2004, the NMa issued two statements of objection[17]

[5] Actual payments were alledgedly only made in a small number of cases.
[6] Lower House (*Tweede Kamer*) 2001–2, 28093, No 11. Report of 12 December 2002.
[7] NMa stands for *Nederlandse Mededingingsauthoriteit*. See www.nmanet.nl
[8] According to a letter from the NMa to the Minister of Economic Affairs, 4 June 2004, statements of objection had been prepared in 13 cases.
[9] Decisions of NMa: Case 3055 *Scheemda* [2003]; Case 2873 *Noord Holland Acht* [2003]; Case 2906 *Heijmans/Soletange* [2003]; Case 3054 *Atletiekbanen* [2003]; Case 3064 *Asfaltzware wegenprojecten Noord-Nederland* [2003]; Case 3272 *Aambeeldstraat en Mokerstraat* [2003].
[10] The total fine amounted to approximately €100 million.
[11] All six decisions are currently the subject of administrative reconsideration proceedings before the NMa.
[12] Letter from the Minister of Economic Affairs to Parliament, 20 February 2004.
[13] This threat of being shut out only concerned contracts awarded by the central government. However, local governments are likely to apply the same rules.
[14] Letter from the NMa to the Minister of Economic Affairs, 12 October 2004.
[15] In Dutch: *grond-, weg- en waterbouw*.
[16] In Dutch: *burgerlijke- en utiliteitsbouw*, or B&U. Literally, the Dutch term means "civil and utilities construction".
[17] Under Art 59 of the DCA.

with respect to the GWW sector. The first dealt with approximately 400 companies[18] suspected of infringing the DCA between 1998[19] and 2001 by participating in various combinations relating to tenders and consulting with each other beforehand with a view to coordinating their bidding behaviour (Case 4155). The second report specifically concerned the cooperation between two groups of six companies,[20] one group focusing on the road construction sector and the other on the concrete and hydraulic engineering sector (Case 3183). The companies were accused of dividing up the Dutch market for large infrastructural work in the Netherlands, which includes the high-speed rail link to Belgium and France, and the rail link through the Betuwe region to Germany (Betuweroute).

The reports on the other subsectors are expected to be released between January and May 2005.

(b) Fast-track Procedure

To reduce the workload and speed things up, the NMa designed an accelerated sanction procedure for the GWW sector which, if successful, will be implemented for the other subsectors.

The accelerated process will be voluntary for the 400 companies involved which can opt out during the process, but companies completing the fast-track procedure are rewarded by a 15% reduction in the fine.

What does the procedure entail? First, the company must waive its right to submit a statement about the report and to conduct an individual inspection of a draft of the report or any other document relating to the matter.[21] The company must declare that it does not refute the factual and legal findings made in the report. Further, the company must give its authorisation to be represented by a single representative, who will represent all the companies that opt for this procedure and who will present generic arguments about the sanction.[22]

Companies that opt for the fast track, but have reason to believe that the fine to be imposed will jeopardise their corporate existence, are given an opportunity to substantiate this claim with bookkeeping records. The NMa may take this circumstance into account on a case-by-case basis.

The NMa will then make an individual decision for and impose an individual penalty on each company, which will then be able to challenge the factual and legal findings in the administrative reconsideration proceedings before the

[18] According to the letter from the NMa to the Minister of Economic Affairs, 12 October 2004, 136 companies out of 400 had given notification under the leniency programme.

[19] The DCA entered into force on 1 January 1998.

[20] All of these companies are also addressed in the statement of objection in Case 4155.

[21] DCA, Art 60, paras 1 and 2.

[22] In the GWW proceedings, this representative has been JC Blankert, former chairman of the Confederation of Netherlands Industry and Employers, an umbrella organisation of employers.

NMa itself[23] and in judicial appeal proceedings before the District Court of Rotterdam.[24]

In the GWW subsector, approximately 350 companies have opted for the fast track.[25] Generic arguments were presented in December 2004 and a preliminary draft of the template for the decisions was released on 24 January 2005. Participating companies now have a final opportunity to opt out. The final individual decisions of the NMa will be rendered in the weeks to follow.

(c) Guidelines for the Imposition of Fines

Since a strict application of the regular Guidelines for the Imposition of Fines[26] was likely to have overly harsh consequences for the construction sector,[27] the NMa has adopted special guidelines, called the Guidelines for the Imposition of Fines for the GWW Subsector (GWW Guidelines),[28] which apply regardless of whether a company has opted for the fast-track procedure or not.

Under the GWW Guidelines, the basis for determining the amount of the fines is the "turnover of the company achieved in 2001[29] on the basis of contracts awarded in tender procedures" (2001 Turnover).[30] The concept of 2001 Turnover raised many questions among the construction companies and their auditors and the NMa provided (some) further guidance in answers to specific questions posed by NIVRA, the association of Dutch accountants.[31]

The maximum fines in the general GWW case (Case 4155) will amount to 12% of the 2001 Turnover.[32] If a company is also found to have participated in the competition law infringements dealt with in the case dealing with the two specific groups (Case 3183), an additional maximum of 3% of the 2001 Turnover will be imposed per infringement.[33] This means that construction companies

[23] Art 7:1, General Administrative Law Act.

[24] Art 8:1, General Administrative Law Act in conjunction with DCA, Art 93.

[25] Since another 50 companies in the GWW sector must follow the regular procedure, the NMa still has its work cut out for it.

[26] Guidelines for the Imposition of Fines, 21 December 2001, *Staatscourant*, 19 December 2001, No 248.

[27] According to para 15 of the Guidelines for the Imposition of Fines, a fine is based on 10% of the entire turnover achieved with the products or services involved in the infringement. In the case of bid rigging, para 16 of the Guidelines for the Imposition of Fines states that each participant in the cartel is deemed to have had the turnover associated with the contract in which the price had been agreed upon, regardless whether this company was actually awarded the contract or not.

[28] Guidelines for the Imposition of Fines in the GWW Subsector, 13 October 2004, *Staatscourant*, 14 October 2004, No 198, 3.

[29] The NMa considers the year 2001 to be a representative year for the DCA violations at issue.

[30] GWW Guidelines, pars 7.

[31] NIVRA stands for *Koninklijk Nederlands Instituut van Register Registeraccountants*. See www.nivra.nl. Questions and Answers, 5 November 2004.

[32] GWW Guidelines, para 11.

[33] GWW Guidelines, para 12.

that are subject to the findings in both Case 4155 and Case 3183 can be fined a maximum of 18% of their 2001 Turnover.

Fines may be reduced, however, on various cumulative[34] grounds: (i) reduction of fines based on the NMa Leniency Guidelines;[35] (ii) reduction of fines based on the supply of information to the tax authorities (1% of the 2001 Turnover with a maximum of €10,000[36]); (iii) reduction of fines based on the payment of damages (1200 civil suits are currently pending and the sector is endeavouring to have these suits settled at once. The NMa stated that, if settlement is reached, it will grant an extra reduction of the fine for every company involved by 10% of the amount contributed to the settlement); (iv) reduction of fines for small and medium-sized businesses (for companies in Case 4155 with a total turnover of less than €10 million in 2001, the fine will be reduced by an additional 15% of the net fine after reductions given under items (i) (iii) above[37]); and (v) reduction of fines because of the threat of bankruptcy (if a company is able to substantiate that the fine would lead to bankruptcy, a payment schedule will be arranged or, as a last resort, a reduction of the fine will be granted[38]).

In its draft decision the NMa announced that it will impose fines amounting to €135 million.[39] Allegedly, this is only 50% of the amount that the NMa anticipated it would impose when it designed the specific GWW Guidelines.

[34] GWW Guidelines, para 19 says that the reduction for completing the fast-track procedure can be added to any leniency reduction. This is significant, because the NMa's Leniency Guidelines para 10 prohibits the accumulation of reductions.

[35] The NMa Leniency Guidelines divides leniency into three categories. Category A concerns fine immunity (essentially reporting the existence of a cartel before investigations), category B a fine reduction of at least 50% (essentially for the first cartelist reporting the existence of a cartel after investigations begin but before a report is issued) and category C a fine reduction of between 10 and 50% (for reporting the existence of a cartel after it has already been reported or when certain category B conditions are not met). It is unlikely that any company qualifies for the application of the reduction in categories A and B. The GWW Guidelines, para 17 seems to confirm this by providing the specific criteria for the application of only category C leniency reductions in the GWW subsector (a 20% reduction of a fine is awarded if a thoroughly specified notification is made; 10% reduction is awarded if the names of other participants of the cartel are given; 10% if works that the competition infringements relate to are specified; and finally 10% if a company has cooperated more than the law required).

[36] The NMa has promised that fines will be reduced if a company has given the NMa permission to pass on the information that was provided in the framework of leniency notifications to the Dutch tax authorities (letter from NMa posted on its website (www.nmanet.nl) on 11 October 2004). In the fast-track procedure this reduction has been set at 1% of the 2001 Turnover, with a maximum of €10,000. There is no reason why this percentage should not apply in regular procedures.

[37] This odd approach leads to a situation in which a company that has cooperated such that a 50% reduction of fine has been awarded under the Leniency Guidelines could actually be granted a *smaller* reduction than a small or medium-sized company that has not cooperated in this way.

[38] It is likely that this measure will be based on GWW Guidelines para 20.

[39] *Financiele Dagblad*, 25 January 2005; *NRC Handelsblad*, 25 January 2005.

(d) Comments

The efficiency with which the NMa has handled the mass leniency notification so far is impressive. However, it remains to be seen how many companies will exercise the option to get off the fast track. If this number is too high, the chaos that has so far been carefully avoided will likely set in after all, as the NMa would have to deal with an unprecedented number of individual proceedings. Presumably, this would also mean that the fast-track procedure in its current form would not be applied to the other subsectors.

Another question is how many companies will lodge administrative requests for reconsideration and subsequently judicial appeals. Too high a number will have a significant effect on NMa operations and the administration of the courts. It is at least likely that companies that operate in multiple sectors will lodge pro forma administrative requests for reconsideration in anticipation of the fines to be issued in other subsectors. The companies fined in December 2003 will also want to wait for the outcome of the appeals before giving up their rights of defence in the GWW cases.

In the administrative reconsideration proceedings the NMa will have to demonstrate sufficiently that the company concerned was actually and individually involved in the cartel that is dealt with in Case 4155 and/or 3183 and explain whether and why the fine in the case at hand is proportionate. Given the general nature of the reports and the procedure in this case, this will not be easy. In the event of a judicial appeal, the fast-track procedure and the GWW Guidelines will inevitably be assessed and appraised by the court. What the court has to say about the package deal that the NMa has cut the construction sector in this case will be an invaluable lesson for the future.