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Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases:

A Perspective of the Netherlands Competition Authority

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Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases: A Perspective of the Netherlands Competition Authority

Pieter Kalbfleisch[1]

I. Introduction

Issues concerning the standard of proof, the burden of proof and the evaluation of evidence in antitrust and merger cases may vary from state to state. Such issues may seem procedural, but they go to the core of how a national competition authority conducts its day-to-day cases, and indeed, on the structure of its organisation.

This contribution focuses on an important issue every competition authority is faced with: the art of delivering evidence in competition cases. After a brief description of the rules on the burden of proof and standard of proof in competition cases in the Netherlands, the paper will elaborate on several concrete cases which illustrate the way courts in the Netherlands deal with the evaluation of evidence.

In conclusion, the paper addresses the impact that the decisions of the courts in the Netherlands in these matters have had on the NMa.

II. Rules on evidence in cartel cases

General remarks

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,[2] the NMa currently imposes fines and other measures through administrative decisions, which are reviewed by specialised administrative courts. These courts are the Rotterdam District Court and the Trade and Industry Appeals Tribunal ('CBb').

Dutch administrative law does not provide for general rules on evidence. In principle, the NMa can deliver evidence by all legal means available. This forms part of the so-called "free evidence doctrine", which prevails in procedural administrative law. The rules on evidence

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[1] Chairman of the Board of the Netherlands Competition Authority (NMa), The Hague. With thanks to Milou Dijkman, Senior Advisor of the Netherlands Competition Authority, for her assistance in reworking my speaking notes into the present form.

[2] The Ministry of Economic Affairs is currently drafting a law which should create the possibility of criminal enforcement of competition rules.

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that apply in the criminal[3] and civil law[4] area, were explicitly left aside by the legislator in administrative law. However, in cases where penalties may be imposed, certain principles that are derived from the European Convention on Human Rights (ECHR) will come into play.

For example, the presumption of innocence embedded in Article 6 ECHR requires the NMa to carry the burden of proof for cartel infringements, as will be elaborated on below. Furthermore, discussions about the admissibility of evidence may sometimes arise. A very recent example in that regard is a case where the NMa is using wiretap-transcripts that were provided to us by the Public Prosecutors Office, as evidence in a cartel investigation against several construction companies. The NMa has no power of its own to use wiretaps on undertakings suspected of cartel arrangements. Only the Public Prosecutor can wiretap an undertaking under the authority of the court. The wiretap-transcripts were the result of a different and separate criminal investigation, in which the same construction companies are suspected of bribing civil servants. It turned out that these transcripts also contained elements that pointed in the direction of price-fixing and market-sharing arrangements. The wiretap-transcripts were provided to the NMa by the Public Prosecutor on the basis of ongoing contacts and in particular the Judicial Data and Criminal Records Act, which contains the possibility of providing third parties (in this case the NMa) with information obtained within the context of a criminal investigation. Such a provision of information to third parties is only justified when this is necessary in view of a substantial public interest. 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 against this, stating that there is no legal impediment for this exchange of information between the two enforcement agencies and that Article 8 ECHR was not at stake here.

An important issue was that there was no interference of the NMa in the investigation of the Public Prosecutor. The NMa was not involved in the wiretap search itself, nor in the decision to start the wiretapping. In its judgment of 26 June 2009,[5] the judge in these interlocutory proceedings ruled in favour 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 also 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 now that 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

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[3] See e.g. Rotterdam District Court, 15 July 2002, JB 2002/289 and Administrative Jurisdiction Division of the Council of State, 15 July 1996, AB 1996/414 and Dutch Supreme Court 23 June 1993, BNB 272.

[4] See e.g. Central Appeals Tribunal 19 September 2002, JB 2002/341.

[5] The Hague District Court, Janssen de Jong Groep B.V. and others v. Staat der Nederlanden, 33760 7/KG ZA 09-616.

not disproportional in the light of this interest of economic welfare 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 generally not laid down in writing. 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 behaviour, this information can be lawfully provided to the NMa and be used as evidence in cartel investigations.

The ECHR, especially Article 6, also plays an important role in other areas of the NMa's work, for example in the way the organisation is structured. The antitrust department (that issues statements of objections) and legal department (that imposes fines) work on the basis of so-called "Chinese walls" in penalty cases, which are imposed by the Competition Act to make sure the case handlers of the legal department have not been involved in the investigation leading to the statement of objections. Another area in which the ECHR plays an important role are the procedures surrounding penalty cases, where the parties concerned are explicitly reminded of their right to remain silent, are given access to the file and are heard before a decision to impose a penalty is taken. In addition, the principle of undue delay is fully applied by the courts reviewing the NMa's decisions, as was made clear in several court decisions in recent years. Where procedures take too long and lead to undue delay, the courts do not hesitate to lower the fines imposed by the NMa, sometimes substantially (by 20%).[6]

Burden of proof

As for the *burden of proof*, there is no discussion that it is up to the NMa to deliver the evidence of a cartel infringement. This follows from both the General Administrative Law Act and the presumption of innocence in Article 6 ECHR. However, if the undertakings concerned want to invoke the legal exception in Article 81(3) and its Dutch equivalent, section 6(3) Competition Act because of certain pro-competitive effects, they carry the burden of proof to demonstrate that they meet the criteria.

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[6] See Rotterdam District Court, 22 May 2006, case AUV/Aesculaap v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, MEDED 03/3824. In applying the principle of undue delay, the Court adhered to the time limits that were developed by the Dutch Supreme Court in tax cases, meaning that the administrative phase (from start of investigation to penalty decision) should, in principle, take no more than two years and the maximum period for the courts to review this decision should last (including appeal) no more than one and a half years. If these time limits are exceeded, the fines will be lowered unless special circumstances are applicable that justify the exceeding of these time limits. The CBb confirmed this approach on appeal in the AUV/Aesculaap case (3 July 2008, AWB 06/526 and 06/532), which can now be considered as settled case aw. In addition to the application of the principle of undue delay, a new law will come into effect in the Netherlands as of 1 October 2009 that provides the possibility for interested parties who have filed a request for a decision to demand a penalty payment against a public body, for each day this public body exceeds the maximum (prescribed by law) term for reaching a decision on this request. This new law (the 'Periodic Penalty Payment and Appeal in case of a Belated Decision Act'), which is primarily aimed at decisions on request and decisions on administrative appeal, will also be applicable to the NMa in certain cases.

When delivering the evidence for a cartel, the NMa can and does work with certain legal presumptions, which can be rebutted by undertakings with counter-evidence. These presumptions are mostly derived from case law of the European courts. In practical terms, applying such a legal presumption means the burden of proof shifts to these undertakings with regard to the elements that are covered by the presumption. If they fail to deliver the counter-evidence for the presumption, the presumption becomes a matter of fact that can be used as evidence against them.

An example is the presumption created by the ECJ in the *Polypropylene* cases[7], according to which a causal link between a concerted practice and market behaviour is presumed to exist, if undertakings remain active on the market after they have participated in concerting arrangements. The NMa has applied this presumption in several cartel cases, most notably in the case concerning a concerted practice between the biggest mobile telecom operators in the Netherlands. In this case, the NMa applied both Article 81 EC and its equivalent under the Netherlands Competition Act (section 6). This case is currently under appeal at the Trade and Industry Appeals Tribunal, which does not seem to favour the use of these kind of legal presumptions. It was this court that referred the case to the ECJ for a preliminary ruling on the application of this legal presumption, and questioned whether the case law of the ECJ concerning this legal presumption was binding on it in national procedures, or rather a matter of national procedural autonomy.[8] In its decision of 4 June 2009[9], the ECJ made it clear that this legal presumption is binding on all the courts of the Member States and that the NMa was right in applying it, even when it only concerned a brief or one-time concerted practice. The Court motivated its decision by pointing out, first, that Article 81 EC is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community. As such, Article 81 EC must be automatically applied by national courts.[10] Therefore, any interpretation that is provided by the Court in applying Article 81(1) EC is binding on all the national courts and tribunals of the Member States.

The Court went on to conclude that the legal presumption of a causal connection stems from the interpretation of Article 81(1) by the Court and therefore forms an integral part of Community law. Although the Court did not explicitly address the issue of national procedural autonomy raised by the referring court, it did make clear that it considers this legal presumption as intrinsic to the concept of concerted practice in Article 81(1) EC, which means this legal presumption cannot fall within the realm of national procedural autonomy to begin with. From the perspective of a uniform and effective application of Article 81(1) EC throughout the Member States, this is a logical line of reasoning. From the perspective of the national courts however, this judgment is likely to be perceived as very pro-European, leaving

[7] Case C-49/92 P, 8 July 1999, Commission of the European Communities v. Anic Partecipazioni SpA.

[8] See interlocutory judgment of the Trade and Industry Appeals Tribunal ('CBb'), 31 December 2007, AWB 06/657.

[9] Case C-8/08, T-Mobile Netherlands and others v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit.

[10] See para. 49 of the judgment of 4 June 2009.

little room for the concept of national procedural autonomy when it comes to the application of Article 81(1) EC.

Standard of proof

With regard to the *standard of proof*, the NMa is not faced with a criminal law standard in competition cases, due to the absence of criminal enforcement of competition rules in the Netherlands. Furthermore, a standard of proof is not, as such, formulated in general administrative law doctrine, nor in Regulation 1/2003 nor Article 6 ECHR. The consensus in general administrative law doctrine is that the evidence has to make an infringement of competition rules "sufficiently plausible". Nevertheless, at least in cases where penalties are imposed, "sufficiently plausible" implies that the evidence has to be *convincing* in the eyes of the court. This is not easily accomplished due to the fact that Article 6 ECHR and its underlying principles (especially the presumption of innocence) are fully applied by the courts in penalty cases. This can be explained by the fact that administrative fines are regarded as punitive sanctions and constitute a "criminal charge".

For example, where the courts conclude there is reasonable doubt about the participation of an undertaking in a cartel, the courts will give this undertaking the benefit of the doubt, and annul the fine the NMa may have imposed. This happened in the aforementioned case of the mobile telecom operators (T-Mobile and others), where the undertakings exchanged information about their future dealer commissions during a meeting in June 2001. With regard to one of the undertakings concerned, O2, the Rotterdam District Court found in 2006 that there was no evidence that O2 had been present at that meeting at all, and other (indirect) evidence the NMa had used to demonstrate O2's involvement was too circumstantial. Therefore, O2 could not be considered a participant in the concerted practice. The fine of € 4.5 million was consequently annulled. With regard to one of the other undertakings concerned, Orange, the District Court concluded that while it was clear that Orange had been present at that meeting at some point, the NMa should have demonstrated that it had been actually present at the exact moment the dealer commissions were discussed. This was particularly relevant since the statements of Orange and the other participants indicated that Orange arrived a little late, that the meeting itself progressed in a rather chaotic fashion and that it could not be established that the (entire) meeting as such had the pre-meditated goal of concluding cartel arrangements. Therefore, Orange also could not be considered a participant in the concerted practice. The NMa appealed the District Court's decision with regard to Orange, but the CBb dismissed this appeal in its interlocutory judgment in this case of 31 December 2007.

This decision of the District Court has had an important impact on the NMa and on the way we evaluate our evidence in cartel cases. An example thereof is another cartel investigation in 2005, concerning a bid-rigging arrangement that several competitors in green-space maintenance made during a meeting. There was a lot of discussion about one undertaking in particular, Van der Linden, and whether it could be regarded as a participant in the cartel. The evidence in this case mainly consisted of statements by the other cartel

participants. They were however not unambiguous and, on some points, even conflicting on whether Van der Linden had been present at the meeting where the bid-rigging took place. Van der Linden denied taking part in the bid-rigging arrangement. The NMa initially issued a statement of objections against Van der Linden and had a suspicion Van der Linden was involved. However, by the time the NMa had to decide whether or not Van der Linden should receive a fining decision, the judgment of the District Court in the Mobile Operators case had just come out. This forced us to critically re-evaluate the evidence in the Van der Linden case, especially when it came to the conclusions that could be drawn from the several statements about the presence of Van der Linden at the bid-rigging meeting. This resulted in the conclusion that the presumption of innocence required the NMa to give Van der Linden the benefit of the doubt, and that it could not be considered a participant in the bid-rigging arrangement. The other undertakings involved that were considered participants in the cartel and fined by the NMa, naturally appealed this decision. This led to a recent decision by the District Court, where it reached the opposite conclusion from its judgment with regard to O2 and Orange, three years earlier: this time the District Court concluded that the NMa was wrong not to consider Van der Linden a participant.[11] Although the Court's judgment was brief and not very specific, it apparently considered the statements to be sufficiently clear and precise to conclude Van der Linden was involved. In addition, the Court relied heavily on a behavioural aspect, as indirect evidence against Van der Linden, notably the fact that it was the joint-venture partner of one of the cartelists in this case, and placed a bid on the public service contract that was bid-rigged. Judging from this decision, it appears that the District Court wants to remind the NMa not to underestimate the importance of indirect (behavioural) evidence, which should be fully employed to prevent undesirable dismissal of probable cartel participants, like in the *Van der Linden* case.

Standard of review and evaluation of evidence

When it comes to the standard of review the courts apply in competition cases in the Netherlands, general administrative law doctrine distinguishes between review on establishing the facts, the assessment of the facts, and the interpretation of the law. It is generally assumed in the Netherlands that courts can fully review the facts of the case and the interpretation of the law. Full review of the facts means that the courts impose high demands on the evidence, which must show that the facts giving rise to the infringement have actually occurred, are realistic, and are complete. The evidence establishing these facts has to be coherent and reliable. In general, the courts want to get a broad picture of all the relevant and potentially relevant elements and have, as a consequence, repeatedly instructed the NMa to perform additional investigations with regard to certain parameters of competition or to the role of certain market players. I will elaborate on this further on. In penalty cases, full review also extends to the actual amount of the fines that are imposed by the NMa. The Rotterdam

[11] Rotterdam District Court, 6 May 2009, Hogenboom Beplantingen Maastricht B.V. and others v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, AWB 08/903-906 MEDED.

District Court and CBb will not hesitate to instruct the NMa to lower a fine with a certain amount or percentage (or even set a new amount themselves), for example when they do not agree with the NMa's assessment of the severity of the infringement or with certain aggravating circumstances the NMa found when determining the level of the fine.[12]

When it comes to the review of the interpretation of the law in competition cases, the Rotterdam District Court and CBb often follow the case law of the ECJ and CFI. This can be explained by the fact that Articles 6 and 24 of the Netherlands Competition Act are framed on Articles 81 and 82 EC Treaty. When the Competition Act was drafted, the legislator made it clear that these provisions of the Competition Act have to be interpreted in accordance with the interpretation by the ECJ and CFI of its European equivalents. However, the courts do remain independent thinkers, which was demonstrated most recently by the CBb when it asked the ECJ how to interpret its case law on concerted practices.

As for the assessment of facts in the light of the provisions of the Competition Act, the courts in general distinguish between legal assessments and economic assessments. The latter category can consist of assessments of (economic) facts, market data, empirical data and complex economic analyses and theories. Legal assessments are fully reviewed, while in the area of economic assessments, a certain margin of appreciation is left for the NMa. Still, even when the NMa has such margin of appreciation because economic assessments are concerned, the review carried out by the courts will entail the following elements:

- full review on the establishment of the facts and proper interpretation of the law, as mentioned above and
- review on whether the evidence presented forms the relevant factual frame for the assessment and whether the evidence is capable of substantiating the conclusions drawn from it.

It is obvious that the CBb – albeit not always explicitly – is in effect applying the *Tetra Laval* test[13] as formulated by the ECJ in paragraph 39 of this judgment.

> "39. Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, *inter alia,* establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions

[12] See most recently Rotterdam District Court, 6 May 2009, BTL Uitvoering B.V. and others v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, AWB 07/4212, MEDED. In this case the District Court concluded that the NMa should not have increased the fines of the undertakings concerned by 30% due to an aggravating circumstance, but rather should have increased the fines by 10% for this reason.

[13] ECJ 15 February 2005, case C-12/03 P, Commission v. Tetra Laval.

> drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect."[14]

It can be concluded that the courts in the Netherlands, unlike the courts in some other member states in the EU, do not exercise a marginal review by only evaluating whether there has been a manifest error when it comes to (complex) economic assessments in competition cases. Furthermore, in applying the abovementioned *Tetra Laval* standard of review where economic assessments of the NMa are concerned, the CBb does not seem to distinguish between the retrospective analysis in cartel decisions[15] and the prospective analysis in merger decisions.[16] The demands on the evidence used for either type of analysis are equally high. In any case, it is fair to say that the margin of appreciation that the courts claim to leave for the NMa in economic assessments, can be quite small in reality, depending on the case and type of economic assessment at hand. Perhaps this can be explained by the fact that in the end, discussions about economic assessments and analyses often seem to boil down to a discussion about - and intense review of - the facts that are presented to support these assessments and analyses. This approach can, however, significantly reduce the margin of appreciation left for the NMa in its economic assessments, which is why the author in recent years has repeatedly proclaimed that the courts should apply a more marginal review when it comes to (complex) economic assessments in competition cases. At least, in determining the appropriate standard of review, the courts should strike a conscious balance in each case between effective legal protection on the one hand and, on the other hand, leaving enough room for competition authorities to ensure an effective enforcement of competition rules and the establishment of effective competition.

Examples of intensive review of economic assessments

One area where most notably the CBb has been increasingly demanding with regard to economic assessments by the NMa, are the cases where the NMa applied the so-called '*per se* rule' in cartel cases, in the sense that, where a cartel is restrictive of competition by object, no effects on the market have to be investigated. Case law in recent years has taught us that the CBb will not easily allow for the conclusion that no effects have to be investigated.

This trend was set with two landmark cases in the Netherlands in 2005, the *Modint* and *Secon* cases. The *Modint* case[17] concerned the question of whether the agreement at hand had the object of restricting competition. The case involved a horizontal arrangement between clothing producers, via the general terms of their trade association, that consisted of a system of rebates these producers applied in determining their selling price for retailers. These

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[14] See e.g. Trade and Industry Appeals Tribunal ('CBb'), 31 December 2007, interlocutory judgment in Mobile Operators, at paragraph 9.2.

[15] *Ibid.*

[16] Trade and Industry Appeals Tribunal ('CBb'), 28 November 2006, Raad van Bestuur van de Nederlandse Mededingingsautoriteit v. N.V. Nuon and Essent N.V. and Essent Energy Trading B.V., AWB 05/440.

[17] Trade and Industry Appeals Tribunal ('CBb'), 28 October 2005, Modint v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, AWB 04/794 and 04/829.

rebates were agreed upon between the producers and retail service organisations and were applied by the producers in terms of a percentage of the invoice or of the annual turnover of a retailer. The NMa decided that this amounted to a (partial) price-fixing between the producers with regard to the retail prices and that this agreement was illegal by object. Although the case is more complicated than presented here, basically the CBb decided that the NMa had not established that the agreement constituted a price-fixing agreement, since the rebates concerned did not have a sufficiently direct relationship with the level of the retail prices. The CBb emphasised that the agreement had to be analysed (which had not been done sufficiently by the NMa) in its economic context in order to determine whether the agreement actually constituted a price fixing arrangement at all. This could not be done *in abstracto* by looking at the content or wording of the agreement only. More specifically, the CBb was of the opinion that the system of rebates did not constitute a price-fixing agreement, but should rather be considered as a specific payment system for certain administrative services delivered to the producers by the retail service organisations.

The *Secon* case[18] concerned the question whether the agreement in that case led to an *appreciable* restriction of competition. This case was about vertical resale price maintenance (RPM) of G-star clothing. The NMa considered that RPM was prohibited by object and, hence, that the NMa did not have to analyse the effects of the RPM on the market. According to the CBb, RPM can indeed be considered as an agreement prohibited by its anticompetitive object, but it still needs to be proven that the agreement has the potential to *appreciably* restrict competition on the market. More specifically, the CBb ruled that it was the NMa's job to investigate and establish the appreciability of the restriction, which cannot be done *in abstracto* but has to be done by taking into account the concrete factual and economic circumstances. Since the NMa had failed to investigate these circumstances, its fining decision was quashed and the NMa was ordered to reassess the case.

In both the *Modint* and *Secon* cases, the CBb concluded the NMa had failed to take account of the legal and economic context in which the behaviour of the undertakings took place. The CBb was not convinced that the facts of these cases and the pricing-arrangements concerned, presented cases of typical agreements that fell within the category "illegal by anticompetitive object", and that therefore no investigation into the actual effects was necessary. The message the CBb gave us was clear: you are allowed to apply this so-called '*per se* rule' in your assessment of the anticompetitive object and the appreciability of a restriction, but you cannot do this *in abstracto*. Therefore, your investigation has to consider the *concrete* situation in which the agreement takes effect. This should include the legal and economic context, the nature of the goods or services concerned, the structure of the relevant market, and the actual conditions within which the market operates. And this is all the more important when the context in which the behaviour took place does not point at a typical type of infringement by anticompetitive object (e.g. a clear-cut price agreement).

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[18] Trade and Industry Appeals Tribunal ('CBb'), 7 December 2005, Secon Group B.V. and G-Star International B.V. v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, AWB 04/237 and 04/249.

Although the author would not deny that one always has to investigate the legal and economic context in which the behaviour took place, it is at the same time important to keep the distinction between object and effect restrictions clear in practice. Courts should remain aware of this distinction and ask themselves how far an investigation into the legal and economic context has to go before the NMa can conclude that an investigation into the anticompetitive effects of the agreement is not necessary, since it has an anticompetitive object. In some cases in recent years, the courts did not seem to specifically address this question, which led to decisions where the distinction between restrictions by object and restrictions by effect seemed to be in danger of becoming blurred. A very illustrative case in that respect is NIP, concerning trade associations of psychologists. These associations offered (fixed and equal) advice on tariffs to be employed by psychologists (differentiated with respect to specific types of psychological help, like, for instance, ‘psychotherapy’ or ‘occupational psychology’). The NMa considered this market to be a contestable market, open to competition between psychologists, and considered the advice on tariffs as a decision of an association of undertakings with the object of restricting competition. The Rotterdam District Court, following the line of arguments of the defendants in this case, was very sceptical about the actual possibilities for psychologists to compete. With an explicit reference to the *Modint* judgment, the District Court pointed out that the NMa should have established, on the basis of *facts*, that the psychologists did in fact have room to compete, given the role of health insurers and the way people requiring psychological help (‘consumers’) were steered by their general health practitioners to certain psychologists. The District Court, in other words, seems to suggest that the specific circumstances in this market, more specifically that ‘consumers’ did not in fact choose their own psychologist, nor would they be very interested to do so (given the nature of their insurance policies), meant that competition was weakened to begin with. The District Court reasoned that if the psychologists did not or need not to compete with one another within this specific economic context, there was no competition to be restricted either. Hence, the advice of the trade associations would not have had any effect. Although the District Court considered all this to belong to an investigation into the economic context, this decision comes quite close to requiring an investigation into anticompetitive effects of the advice on tariffs (i.e. a ‘counterfactual’ analyses), before the NMa can conclude they have as their object the restriction of competition.

The NMa appealed this decision at the CBb, and argued that psychologists are free to advertise, charge any price, determine working hours etc., hence are free to compete, generally speaking. Consumers may choose any psychologist they want. Even if consumers choose on the advice given by a general practitioner or health insurer, psychologists are still able to compete with respect to consumers, general practitioners and health insurers. In its judgment of 6 October 2008, the CBb however, concluded that the District Court had been right in requiring the NMa to establish that the possibility for psychologists to compete on tariffs was not just a theoretical possibility because this healthcare market was contestable (and not regulated), but also a real possibility when looking at the concrete circumstances in which this market was functioning. In that respect, the NMa should have investigated if, and to what extent, the trade associations’ advice on tariffs were applied in practice, and what

circumstances determine a patient's choice for a certain psychologist. Luckily, the CBb did expressly state that its judgment in the *Modint* case, concerning the extent of the investigation into the legal and economic context, should not be interpreted as requiring the NMa to always do a *de facto* counterfactual analysis. In that respect, it seems that the fact that the NIP case concerned an *advice* on tariffs, in a *health care* market, influenced the conclusion of both the District Court and CBb that the NMa had not sufficiently investigated the concrete economic context of this case. Nevertheless, the message they gave us was clear, and can be summarized as: don't label, but prove! In practice, it is fair to say that the courts require the NMa to elaborate on the theory of harm in any case, before concluding that certain behaviour constitutes an infringement by object.

The interlocutory judgment of the CBb in the *Mobile Operators* case,[19] in which it referred the case for a preliminary ruling to the ECJ, is also illustrative of how far the courts want us to take our investigation into the economic and legal context, before the NMa is allowed to reach the conclusion that an investigation of the effects is not necessary because the behaviour has a anticompetitive object. As mentioned above, this case concerned a meeting between the incumbent mobile telecom operators in the Netherlands, at which they discussed significantly lowering their dealer commissions, including the amounts and date on which this lowering would take place. These dealer commissions were paid by the operators to independent dealers, on whom the mobile operators were still (at the time, in 2001) largely dependent for selling new mobile phone plans to consumers. Since the file contained strong indications - including statements of the mobile operators themselves that acknowledged this - on the relevance of (the level of) their dealer commissions for competition on the retail market, the NMa concluded this was a concerted practice with the object of restricting competition. The District Court agreed with the NMa on this point. However, in its referral decision of 31 December 2007 for a preliminary ruling by the ECJ, the CBb questioned whether the concerted practice could have an anticompetitive object, since it did not concern the retail or consumer price itself, but a dealer commission. In addition, the CBb considered that there was no direct relationship between the level of the dealer commission and the level of retail prices, so it could not be established that the concerted practice distorted competition to the detriment of consumer welfare. Also, it could be possible that the independent dealers who received these commissions for each sold plan, were able to negotiate with the mobile operators about the level of these commissions, which might have diluted the effect of the concerted practice.

In this referral decision, the CBb therefore posed a preliminary question to the ECJ on how to determine the anticompetitive object of a concerted practice such as the one in this case. In its recent judgment of 4 June 2009, the ECJ had remarkably less trouble with considering a concerted practice, in which commercially sensitive information on dealer commissions was exchanged, as a possible case of a restriction by object. The fact that the retail prices themselves were not part of the concerted practice and might only be indirectly influenced, was not of relevance in that respect, since "concerted practices may have an

[19] 31 December 2007, AWB 06/657.

anticompetitive object if they directly or indirectly fix purchase or selling prices or any other trading conditions". Nevertheless the ECJ considered that in the present case, as the Dutch government and the NMa had submitted in their (joint) written observations, the remuneration paid to dealers for selling postpaid plans is "evidently a decisive factor in fixing the price to be paid by the end user."[20]

In addition, the ECJ expressly stated that:

> "30. Accordingly, *contrary to what the referring court claims*, there is no need to consider the effects of a concerted practice where its anti-competitive object is established."

And:

> "31. With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the *potential* to have a negative impact on competition. In other words, the concerted practice must simply *be capable* in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result *can only be of relevance* for determining the amount of any fine and assessing any claim for damages." (emphasis added)

Of course, it is up to the CBb, as the highest Dutch appeal court in competition cases, to rule on the facts of the case in its final decision. Nevertheless, it is safe to say the ECJ is critical of the high demands the CBb seems to be posing as to the evidence regarding the economic context, before the NMa may conclude the arrangement at hand has as its object the restriction of competition. It stated expressly that an exchange of information that is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anticompetitive object, including situations, such as that in the present case, in which the modification relates to the reduction in the standard commission paid to dealers. I think it is an understatement to say that all parties involved in this case are now awaiting the final decision of the CBb with great interest.

In merger control, the landmark decision in the Nuon-Reliant merger forms a clear illustration of how the CBb evaluates economic assessments and economic evidence in merger cases. In this case, concerning the merger of two energy companies in the Netherlands, the NMa applied a complex econometric model and relied heavily on the results

[20] See para. 37 of the judgment.

as evidence for a conditional approval of the merger. The results of this model showed that as a result of the merger, a significant impediment of competition could arise during so-called "peak hours". The CBb annulled this decision because it did not consider the results of the econometric model sufficiently robust. The most important reason was the finding by the CBb that the econometric model showed a mere possibility of dominance during peak hours, but there was no factual evidence that showed this was a real – and not just a hypothetical – possibility. In other words, the prospective analysis that we undertook in this case was considered as being too hypothetical to be relied upon as evidence.

An important lesson to be drawn from this decision is that economic evidence should contain all the relevant data and should not 'stand on its own', i.e. requires corroboration. An economic analysis has to be sufficiently linked to the facts of the case and other (not necessarily economic) evidence. In addition, rather then using complex econometric models, economic evidence should be limited to rather simple calculations or empirical data, if possible.

III. Conclusion

The aforementioned decisions of the CBb have had their impact on the organisation of the NMa. First of all, the NMa established the Office of the Chief Economist in 2006. This Office forms the economic expert centre in the NMa and is designed to assist the organisation in complex specific cases, to review them on their economic evidential merits and to advise the Board on economic competition issues.

In addition, in 2008, the merger control department of the NMa merged with the antitrust department with the goal of concentrating all available knowledge and expertise on markets. Furthermore, a Competition Expertise Centre (MEC) was established within the organisation, with the specific task of testing and reviewing cases on their evidential merits from a legal point of view. In particular, it pays attention to the question of whether the investigation sufficiently covered the legal and economic context in which the possible anticompetitive behaviour took place. A clear disadvantage is that investigations take longer before a statement of objections or decision can be reached.

In conclusion, to date, the courts in the Netherlands review the NMa's penalty and merger decisions very intensively. This applies to both legal and economic assessments. In doing so, the courts are willing to substitute the NMa's decision with their own. The NMa is well aware of the importance of getting a full and realistic picture of the concrete (market)circumstances in each case, and the demands the courts impose on the investigations of the NMa in that respect. In some cases however, the author feels the NMa should be granted more room for the assessment of those circumstances than is currently the case. In deciding on the appropriate standard of review, the courts should strike a balance between effective legal protection on the one hand and effective competition enforcement on the other. The ECJ's judgment of 4 June 2009 in the *T-Mobile* case could serve as an inspiration in that respect.

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