Ondernemende autoriteiten? Een onderzoek naar de handhaving van het Nederlandse en communautaire kartelrecht

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Summary

The Netherlands and cartels: for a long time they seemed an inextricable two-some. In the past decade, however, this has changed. The Dutch government became aware of the fact that from an economic perspective cartels were to be looked upon less favourably than in the past. In addition, it was increasingly felt undesirable that Dutch competition law differed fundamentally from Community competition law and the competition law of other member states. The informal approach to cartels characterised by consultation and consensus, a system premised on corporate abuse, was replaced by a more formal system of prohibitions based on EC competition rules. Enforcement through criminal law, virtually absent in practice, was (for reasons of effectiveness mainly) exchanged for concentrated enforcement through administrative sanctions. In short: the desire to get rid of the image of 'Holland cartelland' was translated into action: initially by tightening policy pursuant to the Economic Competition Act (Wet economische mededinging) and ultimately by replacing the Act by the Competition Act (Mededingingswet) which provided for an enforcement agency, the National Competition Authority (NMa). Exchanging enforcement through criminal law for enforcement through administrative sanctions is in line with the administration's present policy, which is increasingly characterized by this type of enforcement. Nevertheless, the reasons put forward by the Secretary of Economic Affairs for administrative enforcement of the Competition Act are not convincing. This is the case, for instance, where he stresses the 'last resort' character of the criminal law. This should be borne in mind, of course. However, the argument also holds true for other forms of punitive administrative action and, consequently, for enforcement through administrative sanctions. It also applies to doubts expressed as to the suitability of the criminal law as an enforcement tool for the Competition Act. In spite of the anticipated high prioritisation at the Public Prosecution Department, the existing situation continued under the regime of the Competition Act as a result of, among other things, a lack of expertise at the Dutch Department of Justice and the criminal courts, the complexity of the matter and staffing problems within the criminal system. This does not mean that the choice for administrative sanctioning should be rejected. Anticipated greater effectiveness, in particular, is an advantage of this type of enforcement. Concentration of the entire application of the Competition Act within one authority contributes greatly to effectiveness. However, effectiveness does not exist in a vacuum. There is the other side of the enforcement coin: lawfulness. When improving effectiveness is at issue, overexposure of the effectiveness of a regulation - such as more and more readily manageable investigative powers, more streamlined enforcement without too many obstacles in the form of norms for the protection of citizens and more severe punishment - is not unusual. As a result, the lawfulness aspect - such as the restriction of administrative powers, rights of defence and judicial control - are underexposed. This dissertation examines both aspects. Not only is Dutch law scrutinized, but Community law is also examined because of the close link between the two as a result of the "spontaneous harmonisation" effort of the Dutch government. The core question of the study reads as follows:
Do Dutch and Community law provide sufficient legal protection for companies suspected of violating substantive competition law?

The enforcement powers created for this purpose are also discussed, since the above question must be seen in conjunction with these.

Where effectiveness is concerned, the author concludes that both Community and Dutch competition law provide the preconditions for effective enforcement. Concentrating application of Community and Dutch competition law, running from applications for exemption, via supervision and 'detection', to imposing penalties, within a single agency, the Commission and the NMa respectively, ensures the necessary expertise, guarantees the efficiency of internal communication, that policy and enforcement are properly matched and that competition cases have first priority. There is no shortage of sufficient powers. The Commission has very broad powers of information gathering and verification, backed up by the duty to co-operate imposed on companies. Moreover, in the event of companies not co-operating, the verification power will transform into a power approximating the power to search business premises, in any case where assistance is rendered by national authorities. In addition, pursuant to relevant Dutch implementation legislation, the Wet Uitvoering EG Mededingingsverordeningen, Dutch examining magistrates are empowered to effectively order the search of 'concealed spaces'. The latter power will probably not be much exercised in practice. Thus far, the above powers have served very satisfactorily and, in the author's view, there is no cause for extending them. The Commission does not seem to agree. In its proposed Execution Regulation, it expresses the desire to have a right to enter private homes, be it upon the approval of the national court 'only'. The reason for this is allegedly that in practice increasingly relevant materials are present in the homes of employees, thus frustrating verification. The conclusion must be that, if implemented, the limits of the power of verification would be stretched unreasonably. When is there reason to assume that relevant materials are to be found at the home of an employee? And at the home or homes of which employee or employees? And what is the extent of control by the national courts? Apart from the fact that the Commission rather underestimates ill-willing companies if it is of the opinion that it would make it (virtually) impossible to frustrate the gathering of information, such a power to enter private homes exceeds the limits of what is reasonable. Furthermore, it is not necessary in effect, seeing that the Commission may fine a company for failure to co-operate or impose an astreinte, a fine for each day it continues to be in breach of its duty, to effect that ultimately the information is surrendered.

The powers of the NMa are as far-reaching as those of the Commission and hardly differ from the powers that would be available to a detection agency if the Competition Act were to be enforced through the criminal law:

- entering places, with the exception of a dwelling, without the permission of the occupant (Art. 5:15, par. 1 General Administrative Law Act (Awb);
- providing access to these places with the aid of the police (Art. 5:15, par. 2 Awb);
- summoning information (Art. 5:16 Awb);
- summoning the examination of business data and documents, with the inclusion of the power to make copies of the data and documents;
- removing data and documents for the purpose of copying these, where this cannot be done on site (Art. 5:17 Awb);
as well as, for investigative purposes:
- the power to seal off, where necessary, business premises and objects from 6 p.m. to 8.00 a.m. (Art. 54 Competition Act); and
- the power to enforce examination of data and documents with the aid of the police (Art. 55 Competition Act).

Companies have also a duty to co-operate in these circumstances, while the NMa is empowered to resort to imposing fines and *astreintes* and call on the police force in cases of non-co-operation. For this reason, the absence of a power to search is not missed.

Nor should the sanctions that may be imposed for breach of competition law, form an impediment to effective enforcement. On the contrary: from the perspective of both repression and prevention a fine of not more than 10% of the turnover world-wide in the year preceding the imposition of the fine would be more than sufficient. The broad discretionary freedom afforded to the Commission and the NMa in meting out punishment, also enables them to respond to any breach by imposing a suitable sanction.

There are therefore few obstacles to effectiveness. But what about lawfulness? Concentrated enforcement has its drawbacks in that, no matter how objectively the authorities deal with the case, there is always a semblance of partiality. Under the criminal law, prosecution (and the investigation preceding it) and adjudication are vested in two separate institutions which are independent from one another: the Public Prosecution Department and the criminal judge. In administrative enforcement of competition law these are pursued by or under the auspices of one and the same institution, namely the Commission or the Director-General of the NMa. It seems hardly likely in any case that, from the moment the 'statement of objections' or, as the case may be, the report has been drawn up, the Commission or the Director-General of the NMa will be susceptible to arguments by the accused or counsel that rules of procedure have been breached; the rights of the accused and counsel have not been respected; guilt cannot be established; and so on. By drawing up the 'statement of objections' and the report, the authority in question already indicates that that there is sufficient evidence of a violation and that a fine is called for. The very authority drawing the above conclusion subsequently assesses the arguments put forward. One cannot expect a company to have much faith that the case will be examined without prejudice, in an independent way, and reach a satisfactory conclusion. This is not altered by the fact that the Competition Act prescribes that the investigative phase and the adversarial phase must be separated at the personal level: a public servant working for the NMa may not be involved in the same case in both the supervision and investigative phase and the final decision phase. The problem remains therefore the same: all acts undertaken fall within the responsibility of the Director-General of the NMa. Nevertheless, concentration of powers is not unacceptable in the author's view, even in the light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention'). The reason for this is that, where the company is of the view that its arguments have not or not sufficiently been considered (which in all fairness will not always be the case), it may lodge an appeal against the decision under both Community and Dutch law. Under EC law, the appeal can be lodged with the Court of First Instance and the European Court of Justice (the 'Luxembourg court'), which have been seen to test the Commission's decisions thoroughly. Dutch competition law provides for the possibility of submitting an objection to the Director-General of the NMa and
subsequently lodge an appeal with the District Court of Rotterdam. Final appeal lies to the Companies Tribunal (College van Beroep voor het Bedrijfsleven). Objection and appeal pursuant to the Competition Act have suspensive effect. And rightly so, in view of the interests at issue, in contradistinction to what is customary in administrative law and operative Community law.

The fact that neither Community law nor the Dutch Competition Act are criminal provisions also raises questions with regard to other issues of legal protection relevant to this study. The guarantees inherent in criminal law do not automatically apply to these areas of law. One of the functions of the law of criminal procedure is precisely protection of the position of the justiciable. For this reason, criminal procedure offers a comprehensive set of rules governing the restrictions on public powers and the (procedural) rights of the accused. This cannot be rightly said of written EC/EU law. It hardly excels in legal protection, with the exception of Article 6 EU and the EU Charter of Fundamental Rights, which has yet to become binding. The Dutch Competition Act does better in this respect. It affords a number of important rights and guarantees derived, to a large extent, from the law on criminal procedure and the European Convention. This is not surprising, since, pursuant to Strasbourg case law, any administrative action of a punitive nature, irrespective of the characterisation given in the national legal order, must meet the standards of the European Convention, providing the state in question is party to the Convention. In the author’s opinion, this also applies in principle, when, as in competition law, proceedings are brought in relation to acts by companies, i.e. juristic persons. The primary importance of the European Convention lies in the restriction of the administrative power which may be exercised against justiciables. It is difficult to see why these guarantees, so fundamental to a state governed by the rule of law, should not apply to companies. It follows that Dutch competition law is subject to the European Convention. The norms ensuing from it must be met, even where codified Dutch competition law does not achieve the Strasbourg level of protection. This does not automatically apply to Community law. Unfortunately, the European Community is not party to the European Convention. The European Court of Justice, however, has played a pioneering role in this respect. As a result of its case law on the general principles of Community law to be observed, i.e. the norms ensuing from the European Convention and the common constitutional traditions of the member states, the European Court of Justice has achieved quite an acceptable level of legal protection. By using the European Convention as a legal source for its case law on rights, the Luxembourg court approximates the minimum standards of legal protection provided for in the Convention. One problem, however, is that the Luxembourg court does not consider the rights of the accused and counsel as the prevailing right, which may result in Community objectives (of effectiveness) thwarting the full realisation in a concrete case of the legal protection required. The author would therefore welcome a development in which Community law fell within the jurisdiction of the European Court of Human Rights.

The guarantees offered prove that companies do not fall outside the law where competition is concerned. In Community law, for instance, the prohibition against being prosecuted and tried twice for the same offence, the ne-bis-in-idem principle, applies in the form of the disposition principle (Erledigungsprinzip) for internal questions and in the form of the 'Anrechnungsprinzip', by which a previous conviction is taken into account in sentencing, for the relation Community/third state. Curiously enough, protection
against double jeopardy does not exist under the Dutch Competition Act. Although the parliamentary history pertaining to the Act contains reassuring words from the minister and generally speaking dual punishment is contrary to the general principles of proper administration, this does not justify the absence of legal rules on the subject. The Competition Act is clearly lacking in this respect. Not so the rules on expiration. As in Community law and criminal law, the Competition Act contains rules on expiration, which allows the case to be discontinued after a certain period of time. There may be a problem of effectiveness in the absence of rules on interruption by any act of prosecution and suspension, which Dutch criminal law and Community competition law do provide. As a result of this, the case must have been dealt with within a period of five years. This is the term of expiration which conforms to the term in Community law and only slightly departs from the term in criminal law as applied to cartels until 1998. This five-year term may prove to be insufficient for cases that are difficult to prove.

Other guarantees of Dutch and Community competition law are mainly based on the European Convention or are similar to the norms ensuing from the Convention. A case in point is the requirement contained in Article 6 ECHR to adjudge the case 'within a reasonable time'. Application of this requirement is similar in Dutch and Community law. In following the European Convention, the reasonableness of the term is assessed on the basis of the following three criteria: the complexity of the case, the defendant’s conduct and the conduct of the competent authorities. Inasmuch as cartel cases are seldom open and shut cases, it is to be expected that in particular the last two criteria will come into play in practice. Transgression of the reasonable period of time does not seem to have too serious a consequence. Safe for very exceptional cases, the fine that would have been appropriate if the reasonable period had been observed, will be reduced. A second guarantee is the principle of the right to silence (nemo tenetur). This right not to have to co-operate in one’s own prosecution and trial comes in two varieties: a broad and a limited right. The broad version, which is to be preferred, offers the accused the right to refuse all co-operation. Crucial here is the freedom of the accused to determine his own trial strategy. The limited variety concerns preventing errors of justice and, in conjunction with this, the reliability of the information (to be) gathered. Inasmuch as reliability is only an issue if the accused is compelled to give an oral statement, the nemo tenetur principle in this sense is limited to a right to silence. Unfortunately, this has been the Strasbourg court’s approach, in any case since Saunders. From the moment at which the suspect is charged with a criminal offence, the – not absolute – right to silence applies; documents enjoy protection under the nemo tenetur principle in exceptional cases only. Until the moment of charge there is no such right, be it that a statement made by the suspect during this phase may not be used in evidence in subsequent criminal proceedings. The protection offered by the Luxembourg court is not much different: the Commission may not oblige a company to give answers which would constitute an acknowledgement of the very violation that it has to prove. The protection also applies prior to the moment of charge. For reasons of harmonisation, this is also provided for in the Dutch Competition Act: the right to silence is linked to the moment at which a reasonable suspicion of guilt has arisen. Other forms of co-operation, for instance the surrender of documents, may not be refused, however. It is unfortunate that the nemo tenetur principle is construed so narrowly in case law. However, the Competition Act and, broadly speaking, Community law do comply with Article 6 ECHR.
Another right discussed is the right to privacy, as protected by the provisions of Article 8 ECHR. This right may also be involved in competition cases: companies are also entitled to non-interference by the administration, although, in the author’s view, the European Court has wrongly concluded that Article 8 ECHR did not protect companies. The requirements of the second paragraph of Article 8 must be met for the interference to be lawful. This is nearly always the case: private homes may not—_for now_—be entered without the permission of the occupant. In the case of business premises, both Community law and Dutch competition law provide for such a power. However, the legal basis for this power, Article 14 Regulation 17 for Community law and Article 5:15 Awb for Dutch competition law, is sufficiently concrete and interference may very well be deemed ‘necessary in a democratic society’ in the interest of economic well-being. Prior judicial control has not been provided for in Community and Dutch competition law. The European Convention does not so prescribe. This made it possible for the legislature to take search of premises governed by criminal law in large part out of the preliminary judicial criminal investigation and place it within the police investigation phase. Whether this is a happy choice is debatable. The privacy of large companies in particular is without a doubt less sensitive than the privacy of the homes of natural persons, rendering prior judicial control perhaps too much of a good thing. It has to be borne in mind, however, that the measure of search, which is similar to the right to enter ensuing from Community law and Dutch competition law, is a very drastic measure. Prior judicial control may therefore _not_ be too much of a good thing.

Both the right to legal assistance, which right is also laid down in Article 6 ECHR, and legal privilege have been well regulated in Community law, although legal privilege is better regulated in Dutch criminal law. Unless the company has an in-house legal advisor or if it refuses full access to Commission officers, the Commission may await—_within reason_—the arrival of an external legal advisor before verification is started. Regrettfully, the Competition Act lacks such a regulation. Here Articles 2:1 and 2:2 Awb may bring relief, because they afford legal assistance to all ‘in dealing with administrative organs’. A regime more based on Community law and more focused on punitive proceedings were to be preferred. Under Community law, correspondence related to the company’s defence between the (external) attorney and the company is protected: if the correspondence is at the offices of the company, the Commission is not empowered to take cognisance of it, or, if this nevertheless occurs, it is barred from being used in evidence. The company must, however, convince the Commission of the protected nature of the correspondence. This usually means that it must allow cursory inspection thereof. If the company fails to convince the Commission, the latter must order the handing over of the documents by separate decision. Against this decision an appeal may be lodged with the Court of First Instance. It is up to this court in that case to decide whether the information must be surrendered to the Commission in full. The Dutch Competition Act is in line with Community rules on the subject. In consequence, it offers less guarantees than Dutch criminal law. The assumption in Dutch criminal law is that it is the privileged party that assesses the confidentiality of the information. Where the information is felt to be a confidential nature, the investigative officers may not take cognisance of the data.

The final right discussed in this study is the right to non-disclosure of the information gathered in the course of the cartel proceedings. The European Court has unmistakably attempted to find a balance between the interests of the company and third parties to examine the data and their interests in having the information kept confidential. In princi-
Summary

- The duty of non-disclosure covers all data which has come to light during cartel proceedings.
- The Commission is empowered to put aside the right to non-disclosure in the context of its duty to hear the parties at their request, or in disclosing its decision, in favour of the right to examine the data. In that case, it will have to weigh the interests involved against one another. In particular, it will have to take into account business secrets: disclosure is only justified under very specific circumstances.
- Under the Competition Act—and for that matter under Community law—final administrative decisions may be based only on documents which the interested parties have been able to examine and about which they had been given the opportunity to express their opinion. This does not entail full internal disclosure, since commercial and industrial data which has been communicated to the administration in confidence, cannot be disclosed. Insofar as such data is not relevant to the assessment of the (seriousness of) the violation, this does not constitute a problem. If relevant, the information may not be used to underpin the administrative decision. In all instances should documents discharging the company not be left out for reasons of confidentiality.

Where punishment is concerned, there is maximum correspondence between EC law and the Competition Act. Both the NMa and the Commission possess extremely broad discretionary powers in this area. In effect, they need only observe the principle of proportionality—in this case the seriousness and the length of the violation—and go by their own policy. This creates quite a few uncertainties for companies. This effect has been considerably counteracted by an extensive list of, often remarkably well-reasoned, punitive decisions and by the publication of the Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation 17. The Director-General of the NMa can and must take advantage of this tailor-made first move by the European Commission. In other words, he must conform to Community policy for reasons of harmonisation and clarity towards companies. This means that he must consider all factors and, where verifiable, their weight as taken into account by the Commission in its decision. This is not to say that fines must be nominally equal. In Community law, the affected market is usually considerably larger. This is reflected in the amount of the fine. The first punitive decisions by the Director-General of the NMa show that he is prepared to follow Community sanctioning policy to a certain degree. However, for the moment, he pursues the policy conducted by the Commission up to 1998. It is to be preferred if he conformed to the most recent Community sanctioning policy.

It must be concluded that the protection offered in competition law is adequate. In both the Competition Act and Community competition law, an attempt has been made and is being made to meet the requirements set by the European Convention. This is reassuring insofar as there is no serious overexposure of the effectiveness aspect. In some respects, the two legal areas offer more than is required by the Convention, although this is clearly more the exception than the rule. This is to be regretted, because the European Convention sets only minimum standards. The fact that neither the Dutch legislature nor the Luxembourg court is seen to be prepared to take the matter further, comes about as a result of the view that effectiveness must not be hampered by too many obstacles. In comparison to criminal law, the two legal areas show deficiencies. The Dutch Code of Criminal Procedure (DCCP) does not contain a duty for the defendant to co-operate; pursuant to Article 29 DCCP his right to silence is absolute; a far-reaching ne-bis-in-ident rule has.
Summary

been laid down in Article 68 Dutch Penal Code; the right to examine documents is formulated stricter and there must be a means test on each occasion. In many of these areas, Community law offers some degree of protection. The most important difference lies in the duty to co-operate. However, it is not fair to compare Community law with ordinary codified Dutch criminal law, since the punitive provisions in Dutch economic law also provide for a duty of co-operation. In effect, it may be concluded that there is little difference between Dutch administrative and economic punitive law. In a few areas, Community enforcement offers even more protection to the justiciable, and, one should hope, so does administrative enforcement. This is particularly the case where the reasons for the sanction are given, which should be edifying to the Dutch criminal courts. Standardised statements of reasons are still used, but usually the Commission clearly points out the factors taken into account and the role they played, also with regard to the various parties involved in the violation. Rather than creating a less flexible and predictable sanctioning policy, it pursues a policy that is controllable and relatively transparent. This is not always the case in Dutch criminal law. In order to realise controllability and transparency in Dutch competition law, but also for reasons of harmonisation and legal certainty for companies, it is to be preferred that the Director-General of the NMa takes the course outlined by the Commission.

In essence, the legal position of companies has not deteriorated as a result of the C-change in enforcing Dutch competition law. The most crucial guarantees are also observed in administrative punitive law and Community law. There is, however, room for improvement. In particular with regard to the duty of co-operation, the protection offered is insufficient in the author's view. This is not so much caused by administrative enforcement as by the restrictive interpretation of the nemo-tenetur principle.

That the protection provided for in competition law has turned out relatively well is particularly significant in view of the preparedness and resolve to make competition law really work. Companies must therefore be well aware of the fact that they may not only have to deal with the Commission, but with the NMa as well: two enterprising authorities.

Translated by L. Rayar