EUROPEAN MONOGRAPHS

Dealing with Dominance

The Experience of National Competition Authorities

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KLUWER LAW INTERNATIONAL
THE HAGUE – LONDON – NEW YORK

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by
Aspen Publishers, Inc.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Turpin Distribution Services Limited
Blackhorse Road, Letchworth, Herts.,
SG6 1HN, United Kingdom

A C.I.P Catalogue record for this book is available from the Library of Congress.

Cover design: Bert Arts

Printed on acid-free paper

ISBN 90-411-2211-7

Printed in The Netherlands

Dealing with Dominance

EUROPEAN MONOGRAPHS

Editor-in-Chief Prof. Dr. K.J.M. Mortelmans

In the series *European Monographs* this book
Dealing with Dominance
is the forty-seventh title.

The titles published in this series are listed at the end of this volume

Editor's Preface

This book provides a unique overview of the application of national rules in a number of jurisdictions prohibiting the abuse of dominance. In essence, it is the result of a project that was commissioned by the Dutch Competition Authority from NautaDutilh and the University of Utrecht in 2001. Having been established relatively recently, the Dutch Competition Authority was anxious to learn from the experience of other national authorities about the application of their rules on the abuse of dominance.

To this end, 12 jurisdictions within and outside of Europe were singled out on the basis of various criteria. NautaDutilh subsequently selected and instructed an appropriate contributor for each jurisdiction from among its own offices and global network of high-end law firms. The contributors mainly received guidance in the form of 16 questions. The original questionnaire is printed separately below. The Dutch Competition Authority was particularly interested in learning how other national authorities had coped with their own rules in unexpected or creative ways. Therefore, in addition to the questionnaire, the contributors were asked to glean information about the scope of application of the national rules and, where appropriate, the successes and failures of the national authorities to extend or limit a particular rule's scope.

Upon completion of the project in 2001, a number of contributors updated their portions in view of the publication of this volume.[1]

NautaDutilh would like to express its gratitude to the two individuals responsible for managing the project from the outset, Ms Rita Wezenbeek-Geuke, on behalf of NautaDutilh, and Professor Kamiel Mortelmans from the University of Utrecht.

Pablo Amador Sanchez,
NautaDutilh N.V., August 2003

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[1] Those sections that have been updated pertain to Belgium, Italy, the United Kingdom, Australia, New Zealand and the United States.

Preface by The Director General of The Dutch Competition Authority (NMa)

The practical use of having a provision in the Dutch Competition Act prohibiting the abuse of a dominant position is sometimes questioned. Similarly, questions are often raised as to whether a competition authority can effectively enforce such a provision. The answer to such questions is a resounding yes. I will briefly explain why. I say briefly, because I will limit myself to arguing from a single perspective, and moreover I will only touch upon the ultimate dominant position: straightforward monopolies.

One often hears that, in sectors which are characterised by the existence of monopolies, governments should apply regulatory control rather than applying general competition law. Whatever the merits of such arguments, the fact remains that there are various types of monopolies, and sector specific regulation is not always a practically or politically feasible option.

Thus, the flight route from Amsterdam to Paramaribo constitutes a monopoly, but is it desirable to regulate it? And if so, does this mean that we should regulate all monopolies which arise or may arise in the economy? Should we make an effort to identify all monopolies in order to regulate them? I believe this would be practically impossible and in any case by no means an efficient option. In practice, the legislature has recognised this. The problem is not so much the existence of a monopoly or market power, but rather the abuse of such positions. However, the legislature acknowledges that some of those dominant positions are better regulated by specific legislation. Equally, acquiring a dominant position as a result of a concentration is also a matter for specific legislative concern.

There are various complementary methods, which may provide a solution for the particular problems raised by monopoly power in an economy. In this respect, the provision on abuse of dominance plays an autonomous and central role.

Of course, in practice it may be difficult to define the market in which dominance exists, or to determine the behaviour constituting abuse. These may be important practical impediments which could, for example, call for additional solutions of a regulatory nature.

During its brief existence, the NMa has shown that it can effectively cope with its tasks, not least with regard to the provision regarding the abuse of dominance. But this does not mean that we do not like to consider new solutions for the fundamental and practical problems which we encounter. And where could we find a better starting point than abroad, in countries which often have much more experience in these matters than ourselves?

The NMa has commissioned research into the situation in a number of countries in and beyond Europe. Thus, it has obtained a broad overview of the practice in applying the different provisions on abuse of dominance in those countries. Not only does this overview encompass the legal and economic content of the various provisions, it also includes a number of illustrative cases, an investigation into the relationship with Europe's Article 82 EC, and with concentration control and sector specific regulation. This information has been gathered and processed by competition law experts in a number of countries.

In short, this information in its compiled form has, in terms of its significance, a unique character.

P. Kalbfleisch
Director General of the Dutch Competition Authority

Questionnaire Submitted to the Contributors

(1) What is the definition of a dominant position? Is it the same as or similar to the definition of a dominant Position developed by the CoJEC?"
(2) If and to the extent that market definition plays a role in determining whether an undertaking has a dominant position, are there any differences in comparison with market definition under EC law?
(3) Is the Commission Notice with respect to market definition used for this purpose?
(4) Is there a market share threshold above which a company can be considered to have a dominant position?
(5) Is there any difference with regard to such threshold between merger control and abuse of dominant position?
(6) What categories of abuse of dominant position are distinguished?
(7) What cases have the national competition authority dealt with in the area of abuse of dominant position and with what result?
(8) Has an appeal ever been lodged against the respective decisions of the national competition authority? If so, in what cases and with what result ?
(9) What role is played by objective justifications for abusive behaviour?
(10) Is the so-called essential facility doctrine applied in national competition law?
(11) Is the concept of a collective dominant position known in national competition law?
(12) If so, is it known both in relation to merger control and to abuse of dominant position or in relation to only one of these areas?
(13) If so, is the concept applied in a similar way as under EC-law (to the extent that that can be defined)?
(14) If the concept of a collective dominant position is known in national competition law, is *collective abuse* also possible?
(15) Can you mention any examples or particularities with respect to the application of the general concept of abuse of a dominant position in relation to liberalised sectors (i.e. not in the form of specific legislation)?
(16) Do regulatory authorities in liberalised sectors apply the concept of abuse of dominant position other than on the basis of the sector-specific legislation?

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