Kluwer Competition Law Blog

Digitalisation, online platforms and competition law: an overview of regulatory developments in the Netherlands (2019)

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Introduction

In 2019 several studies have been published and discussions took place about digitalisation, online platforms and competition law. Many of us will probably have read the so-called Crémer, Furman, Stigler, and Lear-reports. The Netherlands did not lag behind.

The Dutch government published amongst others a vision on data sharing between businesses and an updated version of the Dutch Digitisation Strategy, the Dutch State Secretary of Economic Affairs and Climate ("**State Secretary**") proposed some policy changes to reform the competition rules, while the Dutch competition authority ("**ACM**") published together with the Ministry of Economic Affairs and Climate ("**Ministry**") a paper on the introduction of *ex ante* tools, and a joint memorandum with the Belgium and Luxembourg competition authorities ("**Benelux authorities**") on competition law for the digital economy bringing together the main takeaways of the above mentioned reports and providing for concrete next steps.

This blog provides an overview of those developments.

Regulatory developments in the Netherlands

2018 – Dutch Digitalisation Strategy 2018-2021

Already back in June 2018, the Dutch government published its Dutch Digitalisation Strategy 2018-2021. The report examined what is needed to get the Netherlands ready for the digital future.

One of the aims of this strategy is that markets remain competitive. In that context, the government regards sustained dominance by digital platforms as undesirable, inevitably restricting market access and limiting the freedom of choice available to consumers and businesses online. Moreover, keeping markets competitive requires adequate competition rules and supervision.

As a follow-up to this report, the Dutch government published amongst others also a Dutch vision on data sharing between businesses, policy proposals to keep online markets competitive and an updated version of the Dutch Digitalisation Strategy.

Feb 2019 – Dutch vision on data sharing between businesses

In February 2019 the Ministry published the Dutch vision on data sharing between businesses. This document goes into the importance of data in the current economy and society. According to the Dutch government, data sharing between businesses is essential for exploiting the opportunities businesses have. The government has an important role to play in that regard. It is the "vision" of the Dutch government that data sharing must become more standard than it is today in order to keep markets competitive. At the same time, data sharing is not a goal in itself but should serve economic or societal opportunities and must be carried out responsibly.

The Dutch government encourages responsible data sharing and introduces three basic principles:

1. Voluntary data sharing is preferable (in which the government can act as a general facilitator);
2. Data sharing will be made compulsory if necessary (e.g. PSD2, however, the government is reluctant to impose statutory obligations on businesses to share data and only finds this appropriate if there is a clear public interest); and
3. People and businesses will retain control of their data.

One of the steps the Dutch government is taking to implement this, for example, is developing certification instruments for compliance with FAIR (findable, accessible, interoperable and reusable) data principles.

The Dutch government acknowledges that sharing of data between businesses obviously also raises competition concerns. For example, data sharing is not allowed if it is used as a way to make anti-competitive agreements. On the other hand, competition law can possibly also provide a solution. For example, if the data that big online players possess are essential in order to enter the market: the so-called essential facilities doctrine. At the same time, the Dutch government emphasizes that a few points of interpretation of this doctrine may have to be adjusted before it can be applied to data.

May 19 – Policy aims State Secretary

The Dutch Digitalisation Strategy 2018-2021 already announced that an assessment had to take place in order to determine whether the current competition rules suffice to keep online markets competitive. This assessment took place in the form of an internet consultation of a Discussion Paper on competition law and online platforms. See also our blog of January 2019.

As a follow-up to this consultation, the State Secretary sent a letter on 17 May 2019 to the Dutch House of Representatives setting out some policy aims for ensuring competition policy remains future-proof in light of the role of online platforms. Basically, the letter presented three policy aims of the State Secretary:

1. *Ex ante* measures. It should be possible, at least at European level, in specific situations to adopt *ex ante* measures in order to strengthen and safeguard competition. This relates mainly to the situation that a platform becomes so dominant that consumers have little or no alternative to using its services and *ex post* regulation does not suffice;
2. More guidance. The European guidelines need to be amended in order to apply to the realities of the online markets (e.g. the guidance document on the definition of markets or that on the application of Articles 101 and 102 TFEU). The guidelines should, for example, be clarified on how the role of data can be included in the competition analysis. This will enable supervisory

bodies to apply the most effective methods in each case, factoring in the role of data or other relevant aspects where necessary.

3. Adapting merger thresholds. The thresholds for EU merger control should be amended in order for concentrations within the digital domain to be subject to merger control sooner. For example, the introduction of transaction value-based thresholds would ensure effective oversight of any acquisitions where one of the parties is not generating significant turnover.

July 19 – Dutch Digitisation Strategy 2.0

In July 2019 the Ministry published an updated version of the Dutch Digitalisation Strategy, the Dutch Digitisation Strategy 2.0. This updated version includes the above three policy measures proposed by the State Secretary.

Aug 19 – Paper of the ACM re *ex ante* tools

The ACM supports the above proposals of the State Secretary, especially in relation to the *ex ante* tool. To this end, the ACM, in collaboration with the Ministry, issued a paper on 6 August 2019 in which they further explore the ideas behind an *ex ante* tool. For example, they consider adding an extra tool to Regulation 1/2003, to be applied by the Commission and other Member States. Examples of *ex ante* tools would be platform access, data portability, data-sharing and non-discriminatory ranking. Rather than broad-stroked regulation, these remedies will always be proportionate and tailored to specific situations according to the ACM and the Ministry.

Oct 19 – Joint memorandum Benelux authorities

Two months later, on 2 October 2019, the ACM – together with the Belgian and Luxembourg competition authorities (the "**Benelux authorities**") – published a joint memorandum on challenges faced by competition authorities in a digital world. The memorandum starts by referring to the many studies that have been published before (see Introduction, above), but adds that the Benelux authorities would also like to contribute to the debate.

The memorandum focusses on three topics: (i) issues in merger control, (ii) the need for guidance in fast moving digital markets and (iii) the debate on an *ex ante* instrument providing for binding commitments without the establishment of an infringement.

Given the ACM's point of view that had been shared publicly before (see Paper of the ACM re *ex ante* tools, above), it did not come as a surprise that the ACM, together with the Belgian and Luxembourg authorities, believes that further steps should be taken.

The joint memorandum first briefly identifies the concerns that exist regarding the different topics, thereby summarising those that have been expressed in the several studies that have been published before. Subsequently the joint memorandum suggests some concrete actions that should be taken in order to ensure effective enforcement and to keep the markets competitive.

(i) Issues in merger control

The Benelux authorities point out that amongst others the following concerns have been raised:

- Inadequacy of the existing merger control thresholds as so-called killer acquisitions of start-ups currently might escape the screening of the merger by a competition authority.
- Inadequacy of the existing assessment of mergers as it only takes into account the *likelihood* of

harm; not the *scale* of the potential harm.
- Complexity of the current burden of proof for competition authorities, which could potentially be solved by reversing the burden of proof so that the acquirer must show the pro-competitiveness of its acquisition, or the lack of competition harm, rather than the authority to proof that the merger will have a negative impact on competition.

Suggestion: DG COMP to conduct economic study
The Benelux authorities conclude that it would be most useful if DG COMP of the European Commission commissioned an economic study on merger control in the digital sector. This study should include amongst others a review of acquisitions by dominant platforms over the last ten years, thereby trying to identify the competitive potential of start-ups, possible theories of harm and whether a change in the thresholds, balance of harms and/or burden of proof is required.

(ii) The need for guidance in fast-moving digital markets
The Benelux authorities point out that amongst others the following concerns have been raised:

- Fast-moving markets, such as the digital economy, challenge the possibility to have a real impact on market behaviour within the time period that meets the legitimate expectations of stakeholders.
- In case of novel issues, competition authorities need to be able to identify the case early, have enhanced up-front information exchange within the European Competition Network (ECN), an optimisation of accelerated procedures, optimisation of interim measures procedures and the use of the appropriate technique.

Since those measures however are not sufficient according to the Benelux authorities, they propose additional measures.

Suggestion: provide guidance papers and more case-by-case guidance letters
In the first place, competition authorities should be more willing and able to provide *ex ante* guidance on specific issues in the form of guidance papers. Guidance is expected primarily from the European Commission, but Member States may also take that initiative if the issues are country-specific or if the European Commission is of the opinion that guidance is not necessary.

Secondly, competition authorities should be less reluctant to give individualised opinions on the compatibility with competition law of envisaged multilateral or unilateral practices. A much less formal and fast-track commitment procedure should be examined to sidestep the infringement route. This option already exists in the Netherlands through the tool of an *'informele zienswijze'* (informal guidance in an individual case) and could be used more often.

(iii) *Ex ante* measures: providing remedies without infringement
The main concern the Benelux authorities point out is that *ex post* enforcement could be too late to keep the fast-moving digital markets competitive.

Suggestion: introduce a non-punitive ex ante tool
The Benelux authorities therefore conclude that it would be most useful if a non-punitive *ex ante* tool is introduced that allows the European Commission and the Member States to impose proportionate remedies on dominant companies in order to prevent competition problems. Possible remedies will be behavioural in nature and for example could relate to platform access, data portability, data-sharing and non-discriminatory ranking.

An effective punitive mechanism should however be in place if companies do not comply with the imposed remedies.

The Benelux authorities explain that the proposed *ex ante* tool differs from existing instruments, such as laid down in Articles 7 to 9 of Regulation (EC) No 1/2003, since it is not required to establish (a prima facie finding of) an infringement or an intention of the European Commission to adopt a decision requiring an infringement to be brought to an end. This *ex ante* tool would therefore fill a currently existing gap according to the Benelux authorities.

Oct 19 – Strategic Action Plan for Artificial Intelligence

In the context of digitalisation and competition law, we also briefly point out the Strategic Action Plan for Artificial Intelligence. This plan describes the actions that need to be taken in order to accelerate the development and application of Artificial Intelligence ("**AI**") in the Netherlands by seizing societal and economic opportunities, putting in place the required conditions for a fruitful AI climate and strengthening the foundations. The report also goes into the three proposed measures as set out above (see Letter of State Secretary and Joint Memorandum Benelux Authorities) and identifies the difficulties that AI might bring in competition law assessments. For example, the use of AI can potentially lead to new forms of abuse of a dominant position and cases might take longer due to a lack of precedents etc.

Next steps: Dutch legislative proposal?

In addition to the above developments, Verhoeven, a member of the Dutch House of Representatives, submitted an initiative ("*initiatiefnota"*) to introduce a legislative proposal regarding competition law in the digital economy.[1] The initiative of Verhoeven contains quite far stretching proposals. Amongst others, Verhoeven suggests that:

- Data sharing should be made mandatory both *ex ante* and *ex post* to counter market dominance,
- An additional threshold should be introduced in merger control in relation to data, analysis techniques and data applications,
- Competition authorities should investigate if an undertaking has a market share of 50% or more whether this market share is acquired fairly,
- The Dutch threshold in merger control should be lowered, and
- The level of the fine to be imposed in case of a breach of the competition rules should be increased to 25% of the annual turnover, 50% of the annual turnover in case of a repeated breach and a 'three-strikes-out'-principle should be introduced.

The State Secretary responded on 17 May 2019 by means of a letter[2] stating that she welcomed the fact that Verhoeven acknowledges the urgency of this topic. The State Secretary does however not agree with all proposals of Verhoeven thereby referring to her own proposals as mentioned above. It thus remains to be seen whether Verhoeven's proposals will indeed be captured in a legislative proposal and in the end become law.

The initiative of Verhoeven will be discussed on 16 December 2019 within the Dutch House of Representatives.

Closing remarks

The above developments, and comparable developments at national levels in other Member States,

show that there is a broad call for action to ensure that the online markets remain competitive. Clearly, policy makers and competition authorities are eagerly awaiting any action by the Commission. In our view, the ball is now in the court of the European Commission to take the lead and ensure a uniform approach.

Thereby, the Commission could use the joint memorandum of the Benelux authorities as a stepping stone to take action. After all, the joint memorandum gives a good overview of the concerns raised by many throughout 2019 and provides for concrete action points. As has been suggested within the competition community before: if 2019 was the year of reports, 2020 should become the year of actions!

This does not mean that the national authorities cannot take action in the meantime. They can and maybe they should. Taking initiative in informal guidance by the competition authorities, as suggested in the joint memorandum of the Benelux authorities, does, for example, not per definition require EU approval. For example, the ACM already has such a possibility in its toolbox. Although a uniform approach, also in that regard, is of course desirable.

[1] Members of the House of Representatives have a right of initiative. This basically means that they have the right to submit a legislative proposal to the House of Representatives (instead of this coming from the government).

[2] Please note that this is a different letter than the letter of the State Secretary mentioned above, although they closely relate to each other as regards the topic.

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