nysingh advocaten-notarissen

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EUROPEAN COMPETITION LAW

With this European Competition Law Newsletter we will inform you of recent developments in competition law at European Union level. We hope that this newsletter contributes to your awareness of pitfalls in overseas business.

GENERAL COURT CONFIRMS COMMISSION'S MASTERCARD DECISION

In December 2007 the Commission declared the multilateral interchange fees (MIFs) applied under the MasterCard card payment system to be contrary to competition law. The companies representing MasterCard (hereinafter: Companies) brought an action before the General Court for annulment of the Commission's decision. In its judgment, the General Court rejected the plea's of those companies.

MIF

The MIF corresponds to a proportion of the price of a payment card transaction that is retained by the card-issuing bank. The cost of the MIF is charged to merchants in the more general context of the costs which they are charged for the use of payment cards by the financial institution which handles their transactions. In its decision, the Commission found that the MIF had the effect of setting a floor under the costs charged to merchants and thus constituted a restriction of price competition that was to their detriment.

Ancillary restriction

The Companies argued, i.a., that the MIF was an ancillary restriction in relation to the MasterCard system and that, therefore, the Commission was not entitled to consider its effects on competition independently, but should have examined it in conjunction with the effects of the MasterCard system to which it related.

The Court repeated the case-law concerning ancillary restraints. According to the Court, the concept of an ancillary restriction covers any restriction which is directly related and necessary to the implementation of a main operation. A restriction 'directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it. The condition that a restriction be necessary implies a twofold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, secondly, whether it is proportionate to it.

As regards the objective necessity, the Companies suggested that the Commission should have to taken into account the advantages that the MIF represents for the MasterCard system in order to determine whether the MIF is objectively necessary for the operation of that system.

The General Court did not agree. It held that the requirement for objective necessity cannot be interpreted as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 101 (3) TFEU. Therefore, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.

That is, the fact that the absence of the MIF may have had adverse consequences for the functioning of the MasterCard system did not, in itself, mean that the MIF had to be regarded as being objectively necessary. This is not the case if it is apparent from an examination of the MasterCard system in its economic and legal context that it was still capable of functioning without it. The Commission did not, therefore, applied the wrong legal criteria.

The General Court noted in particular the importance of revenues and commercial benefits other than MIFs which the financial institutions derive from their payment card issuing business. The General Court considered it unlikely that, without a MIF, an appreciable proportion of banks would cease or significantly reduce their MasterCard card issuing business or would change the terms of issue to such an extent as to be likely to result in holders of those cards favouring other forms of payment or payment cards. Thus, the MIF was not objectively necessary. Since the MIF was not objectively necessary for the operation of the MasterCard system, the Commission was entitled to consider its effects on competition independently rather than in conjunction with the effects of the MasterCard system to which the MIF relates. The General Court also endorsed the effects of the MIF on competition holding that without the MIF, merchants would be able to exert greater competitive pressure on the amount of the costs they are charged for the use of payment cards.

No rule of reason

This judgment confirms the earlier case-law in which it was established that the prohibition of agreements restricting competition as laid down in article 101 (1) TFEU does not leave room for a rule of reason approach as in the case of Sherman Act. The weighing of pro's and con's of an agreement for the competition must take place within the ambit of article 101 (3) TFEU.

FOOD SECTOR REMAINS HIGH PRIORITY OF COMPETITION AUTHORITIES

The European Competition Network (ECN) has published a report concerning the active enforcement of competition law across Europe. According to the report, this enforcement has benefitted farmers, suppliers and consumers.

Cases

In the context of rising food prices, volatile commodity markets and perceived concerns about the functioning of the overall food supply chain, the competition authorities in Europe have enforced the competition rules. Since 2004, competition authorities have concluded 120 investigations with a finding of infringements and are still investigating about 60 cases, leading to a total of 182 antitrust cases in the food sector.

As said, competition authorities have investigated 182 cases. In the table below an overview is given of the decisions finding an infringement and pending proceedings.

Competition authority	Cases	Competition authority	Cases
European Commission	6	Italy	4
Austria	4	Latvia	10
Belgium	4	Lithuania	2
Bulgaria	6	Malta	3
Cyprus	4	Netherlands	5
Czech Rep.	9	Poland	4
Denmark	4	Portugal	13
Estonia	3	Romania	10
Finland	4	Slovakia	4
France	12	Slovenia	2
Germany	14	Spain	18
Greece	18	Sweden	2
Hungary	11	UK	1
Ireland	2	Norway	3

Markets scrutinized

The investigations have covered a wide range of food markets such as multi-products, cereals and cereal products, milk and dairy, fruits and vegetables, coffee, fish and sea food and sugar. Furthermore, all levels of the supply chain have been investigated, form primary production over agricultural wholesale, processing, manufacturing and groceries wholesale down to the retail level.

Types of infringements

Competition authorities have focused on horizontal agreements among competitors, which account for about half of all cases investigated. According to the report, competition authorities have detected horizontal infringements in the form of price fixing, market and customer sharing and exchanges of confidential information at most levels and for most products investigated.

Competition authorities have also investigated a number of cases dealing with vertical anti-competitive agreements. Examples are price-related anti-competitive agreements, in particular resale price maintenance, and exclusive purchasing agreements that restrict the freedom of the immediate customer to deal with other suppliers. Competition authorities found vertical restraints mainly in coffee, sugar and multi-produces markets.

High priority

The food sector will remain a high priority for European competition authorities. As said, they are currently investigating about 60 further antitrust cases and are still carrying out further monitoring actions in order to identify competition problems. Undertakings that are active in the food sector should be aware of this ongoing attention, since future investigation may lead to substantial fines. Furthermore, in the Netherlands the Dutch Competition Authority may also impose fines on natural persons with regard to a violation of the antitrust rules, which may amount to a total of EUR 450,000.

COMMISSION WILLING TO SETTLE WITH GOOGLE

In November 2010, the Commission launched an antitrust investigation into allegations that Google had abused a dominant market position, which was followed by a number of complaints. In his speech on 21 May 2012, the Commissioner Joachim Almunia expressed the Commission's willingness to settle the case with Google. According to Almunia, in the fast-moving markets on which Google is active, restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings. In that regard, the Commission offered Google to come up with remedies which could address the competition concerns identified by the Commission.

Concerns

Those concerns are the following. First, in its general search results on the web, Google displays links to its own vertical search services. Vertical search services are specialised search engines which focus on specific topics, such as for example restaurants, news or products. Alongside its general search service, Google also operates several vertical search services of this kind in competition with other players. In its general search results, Google displays links to its own vertical search services differently than it does for links to competitors. The Commission is concerned that this may result in preferential treatment compared to those of competing services, which may be hurt as a consequence.

The second concern relates to the way Google copies content from competing vertical search services and uses it in its own offerings. Google may be copying original material from the websites of its competitors such as user reviews and using that material on its own sites without their prior authorisation. This could reduce competitors' incentives to invest in the creation of original content for the benefit of internet users. This practice may impact for instance travel sites or sites providing restaurant guides.

The third concern relates to agreements between Google and partners on the websites of which Google delivers search advertisements. Search advertisements are advertisements that are displayed alongside search results when a user types a query in a website's search box. The agreements result in de facto exclusivity requiring them to obtain all or most of their requirements of search advertisements from Google, thus shutting out competing providers of search advertising intermediation services. This potentially impacts advertising services purchased for example by online stores, online magazines or broadcasters.

The final concern of the Commission relates to restrictions that Google puts to the portability of online search advertising campaigns from its platform AdWords to the platforms of competitors. AdWords is Google's auction-based advertising platform on which advertisers can bid for the placement of search ads on search result pages provided by Google. The Commission is concerned that Google imposes contractual restrictions on software developers which prevent them from offering tools that allow the seamless transfer of search advertising campaigns across AdWords and other platforms for search advertising.

Remedies

If Google comes up with an outline of remedies which are capable of addressing the Commission's concerns, the Commission wil commence discussions with Google in order to finalise a remedies package. This would allow to solve the matter by means of a commitment decision – pursuant to Article 9 of the EU Antitrust Regulation – as was recently done in the IBM case.

Proactive

The foregoing shows that a proactive attitude by the undertakings who are subject to an ongoing investigation of the Commission may be rewarding. They may avoid being fined or receive a fine reduction if they come up with solutions that can address the concerns of the Commission.

COMMISSION APPROVES MERGERS SUBJECT TO CONDITIONS

Acquisition of SCA Packaging by DS Smith approved subject to several commitments

The commission has approved the acquisition of SCA Packaging, a subsidiary of the Swedish SCA group, by DS Smith of the UK. Both undertakings are active in the production of corrugated packaging used to transport a wide range of industrial and consumer goods. In the course of the preliminary investigation the Commission concluded that the proposed transaction might endanger competition for some types of

packaging in the UK and France. In the UK the merged entity would gain a strong market position with regard to the production of heavy duty and off-set litho laminated packaging without sufficient constraint from competitors. In the Brittany region of France concerns were identified for corrugated packaging, as the merged entity would control all three production sites in the region and competitors supplying into that region face higher transport costs. The merging parties offered commitments in order to address these concerns. In the UK the parties offered to divest one of their two UK plants producing heavy duty corrugated packaging and one plant producing litho-laminated corrugated packaging, so as to entirely remove the increment resulting from the merger in these product areas. In France the parties committed to divest one of their three plants in Brittany, thereby eliminating any overlap. According to the Commission the divested businesses world be viable and the commitments would resolve all concerns. The acquisition was therefore cleared subject to the conditions.

Commitments clear way for acquisition of ED&F MAN by Südzucker

Europe's largest sugar producer Südzucker, has been granted permission to acquire control over ED&F MAN, the second largest sugar trader worldwide and a company also active in sugar production. The merger is approved subject to the condition that the ED&F MAN's interests in the Brindisi refinery, which is the biggest and most modern production facility in Italy, will be divested. During the investigation, the Commission identified concerns for competition on the Italian market. The proposed transaction would bring the participation in the Brindisi refinery under the control of the current market leader, which would create a dominant market position with market shares above 50% and eliminate current and potential competition between the parties.

In order to address these competition concerns the parties offered to fully divest ED&F MAN's shareholding in the Brindisi refinery. Additionally the parties also committed to transfer to the purchaser the long-term contracts through which Brindisi obtains sufficient raw cane sugar input from providers at competitive prices. The markets for preferential raw cane sugar (not subject to import duties or quotas) are experiencing a period of high prices and sugar scarcity. The Commission found that the commitments would ensure that the Brindisi refinery remains a viable and competitive force in Italy.

FINES ON FOUR PRODUCERS OF HOUSEHOLD AND COMMERCIAL COMPRESSORS

In December 2011 the Commission imposed fines on four undertakings active in the production and sales of household and commercial compressors for participating in a cartel. According to the Commission five parties participated in an infringement of the TFEU and the EEA-Agreement between 13 April 2004 en 9 October 2007. The concerned undertakings are ACC, Danfoss, Embraco, Tecumseh en Panasonic.

Infringements

According to the Commission the infringement existed in the participation in an EEA-wide cartel, which was aimed at coordination European pricing policies and keeping market shares stable in an attempt to recover cost increases. Between the parties bilateral, trilateral and multilateral meetings were organised. Tecumseh, Embraco, ACC and Danfoss took part in multilateral meetings which these parties convened in turn (Panasonic participated in only one of these meetings). Mostly the meetings were held in hotels at the airports of Frankfurt en Munich and on several occasions they were operated under a fictitious name. In the course of these meetings the participating undertakings discussed the necessity to increase prices of their compressor products in Europe and agreed to implement such increases in order to compensate for cost increases. The cartel members also discussed general ranges of prices increases recently achieved for companies in Europe and agreed on the timing and general ranges of target price increases in Europe. Furthermore, between the parties contract terms with European customers were discussed, while the parties additionally agreed not to enter into fixed term contracts, nor to compromise price levels for the purpose of increasing sales volumes. Also sensitive commercial information on capacity, production and sales trends on the European market has been exchanged.

Fines

Four undertakings were fined for participating in this cartel. The basic amount for the fine was set at 17% of the undertaking's sales of household and commercial compressors in the EEA, multiplied by the number of years of participation in the infringement. This resulted in a less high fine for Panasonic, which undertaking participated in the cartel two years and seven months, as opposed to the other undertakings, which took part in the cartel for three years and five months. Tecumseh was granted full immunity in the course of the Leniency procedure. The other companies also filed a request for leniency. As they were not the first to request leniency, they were granted a reduction of their fines (Panasonic received a 40% reduction, ACC 25%, Embraco 20%, Danfoss 15%).

Panasonic received an additional reduction as it had contributed to a lesser extent maintaining the cartel and its involvement in the infringement was limited. On the other hand an increase of the fine was applied to Panasonic for deterrence in view of its world-wide turnover. Embraco was granted a reduction of the fine for cooperation out of

Leniency, as it provided the Commission with evidence for a substantial period of the infringement, upon which this period could be taken into account in the calculations of the fines. The total amount of the fines was reduced with 10% for participation in the settlement procedure. One of the undertakings was granted a reduction of the fine for its inability to pay. In the end, this resulted in the imposition of fines between EUR 7.668 million (Panasonic) to EUR 90 million (Danfoss).

ABUSE OF DOMINANT POSITION TOMRA

The fines that have been imposed by the Commission to the Tomra-concern for having made abuse of a dominant position have been confirmed by the Court of Justice.

Abuse of a dominant position

In 2006 the Commission imposed fines to undertakings from the Tomra-group (Tomra), which is active in the sales and distribution of reverse vending machines for the collection of empty beverage containers, for abuse of a dominant market position in breach of article 102 TFEU. According to the Commission this abuse held that the undertakings had implemented an exclusionary strategy in the national markets in Germany, the Netherland, Austria, Sweden and Norway, through the use of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes, thus foreclosing competition.

In Europe Tomra's market shares had mounted to 70% in the period before 1997, afterwards it had been over 95%. On all relevant markets (e.g. the national markets for empty beverages containers collection machines) the market shares concerned were many times larger then those of their competitors. The Commission therefore concluded that Tomra has a dominant position. For the abuse of that position, Tomra was fined € 24 million. Tomra challenged this fine before the General Court unsuccessfully and brought the case before the Court of Justice. Hereafter the first three grounds of appeal will be discussed.

Intention to compete on merits

Firstly Tomra argued failure to take into account internal documents providing that the Tomra group was intent on competing on the merits. Even though abuse of a dominant position is an objective concept, it is according to the Court perfectly legitimate for the Commission to revert to subjective factors, as in this case the motives underlying the business strategy, as the Commission is necessarily required to assess this business strategy. The existence of any anti-competitive intent institutes only one of a number of facts which may be taken into account in order to determine abuse of a dominant position. However the existence of an intent to compete on merits cannot in itself prove the absence of abuse. Given the fact that the Commission did not rely exclusively on the intention or policy, but on the practices of Tomra together with additional elements, the Commission had emphasised the objective character of the infringement.

Percentage on the market above which practice constitutes abuse

The second argument challenged the lawfulness of the assessment with regard to the part of the total demand that had to be covered so as to be capable of restricting competition. The Court judged that article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position. Where an undertaking has an economic strength such as required by that article, its conduct must be assessed in the light of that provision. The degree of market strength is as a general rule significant to the extent of the effects of the conduct.

The Commission had not established a precise threshold beyond which the conduct of Tomra would be capable of excluding competitors from the market. According to the Court it had been legitimately established though that, through foreclosing a significant part of the market, Tomra had restricted entry to one or a few competitors and had thus diminished the intensity of competition. This could not be justified by showing that the market is still sufficient to accommodate a limited number of competitors. Customers should be able to benefit from any possible degree of competition on the merits, not just part of it, while it is also not the role of the dominant undertaking to dictate the number of viable competitors allowed on the market. Additionally it would be artificial to establish the portion of the market beyond which practices may have exclusionary effect on competitors. As there is no threshold beyond which the practices at issue had to be regarded abusive, the argument that the Commission should have applied the "minimum viable scale" test fails.

Invoicing of negative prices

Thirdly, Tomra argued an error of law as the Commission had failed to establish that the retroactive rebates led to prices which were lower than costs. In this case Tomra granted discounts for individualised quantities corresponding to (almost) the entire demand, having the same effect as exclusivity clauses. In order to determine whether a system of rebates constitutes an abuse of a dominant position, it must be established whether the undertaking applies, without tying the purchasers by formal obligation, a system of loyalty rebates conditional on the consumer's obtaining – regardless the quantity of its purchases – all or most of its requirements from the dominant undertaking. A rebate system must be regarded to infringe Article 102 TFEU if it tends to prevent customers from obtaining their supplies from competing producers. However,

the invoicing of negative prices is not a prerequisite of a finding that a rebates schema is abusive. Also this could not be considered one of the fundamental bases of the contested decision.

Furthermore, an exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits. The cost of the rebate is spread across a large number of products, so that the average price obtained may well be far above costs and ensure a high average profit margin.

Conclusions

This judgment of the Court confirms that, in order to establish that a dominant position has been abused, the exact market share is irrelevant. The market share of the undertaking represented by a percentage of total turnover on the market is merely relevant for the determination of a possible dominant position. Whenever such a position is established, all practices must be tested against article 102 TFEU. The size of the market share may nevertheless be relevant in the determination of the size of the effects. Also it shows from this judgment that the mere fact that negative prices were not invoiced or that no abstention of profits was made, does not suffice to prove the absence of abuse. All circumstances of the factual situation will in the end define whether certain conduct is abusive. It is to be seen from this judgment that, in order for a complaint regarding abuse of a dominant position to succeed, a great deal of attention must be awarded to properly substantiate the potential abusive character of the conduct, in other words the capability of the conduct to exclude competitors to the market.

NYSINGH EUROPEAN COMPETITION AND PUBLIC PROCUREMENT LAW TEAM

Nysingh 2 partner and 6 associates dedicated European competition and public procurement law team has many years of experience in competition law – in European competition law and, since the Dutch Competition Act took effect in 1998, in Dutch competition law as well. We advise companies and national and international trade associations in many sectors of the economy, such as the agro, chemical, cleaning, bicycle, fishing, care, transport, insurance, building and installation industries on competition law and regulatory matters. We advise on the application of competition law to a wide range of trade practices and agreements. In recent years we defended companies and trade associations in over 25 investigations by the Netherlands Competition Authority and the European Commission and defended clients before both national and EU Courts. The competition law team has got high rankings by Chambers during the last 4 years.

COLOPHON

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