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European Competition Law Newsletter

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Introduction

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.

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European Commission enjoys wide discretion in the area of setting fines and is not bound by assessments made in the past

In March 2009 the European Court of Justice ruled in the case Archer Daniels Midland (ADM). The ruling concerned a cartel formed of six manufactures of sodium gluconate. The cartel lasted 8 years and formed a serious breach of competition law. In order to ensure that the fine had a sufficiently deterrent effect and to take into account the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise when their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the European Commission adjusted the starting amounts of the fines. Consequently, taking into account the size and the worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amounts for the biggest members of the cartel, ADM and Akzo. The starting amount was set respectively at € 12.5 million as regards ADM and € 6.25 million as regards Akzo. Taking into account all circumstances the Commission imposed a final fine of € 9.00 million on Akzo and ADM received a final fine of € 10.13 million.

ADM appealed against the judgement of the European Court of First Instance which upheld the Commission's decision. The European Court of Justice ruled that it is clear from the case law that undertakings involved in a procedure in which fines may be imposed must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of the amount of fines by imposing fines in individual decisions but also where that increase takes effect by the application, in particular cases, of rules of conduct of general application. For the determination of the fine it is permissible to take into account both the undertaking's overall turnover, which is an indication, however approximate and imperfect, of the size of the undertaking and its economic strength, and that part of the turnover which derives from the goods which are the subject of the infringement and which therefore is capable of giving an indication of the scale of the infringement. It is important not to confer on one or the other of those figures an importance which is disproportionate in relation to other factors to be assessed and, consequently, the fixing of an appropriate fine cannot be the result of a simple calculation based on the turnover from sales of the product concerned. The Commission's practice in previous decisions does not serve as a legal framework for fines imposed in competition matters.

Principle of legitimate expectations during a concentration procedure

On 18 January 2005 Omya AG (Omya), a company which operates, in particular, on the markets supplying precipitated calcium carbonate ('PCC') and ground calcium carbonate ('GCC'), which is used in particular to fill and coat paper, signed a contract under which it was to acquire certain PCC European production sites from J.M. Huber Corp. This transaction was notified to the Finnish competition authority. At the request of this competition authority the European Commission examined the transaction. This concentration of Omya has resulted in a procedure before the European Court of First Instance.

On 13 January 2006, the Commission informed the applicant that it intended to authorise the concentration without issuing a statement of objections. It also prepared a draft decision to that effect. By decision of 8 March 2006 the Commission stated that the information communicated by Omya with regard to the concentration was, at least in part, incorrect and that, consequently, the assessment timetable was suspended until it received the requisite complete and correct information. Although Omya submitted a revised version of the shipment database the Commission provisionally concluded that the notified concentration was incompatible with the common market.

Omya issued an appeal and stated, amongst other pleas, that the Commission infringed the principle of the protection of legitimate expectations. The European Court of Fist Instance disagreed with this plea. According to the case law, three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

It is apparent that, in the interest of effective review of concentrations and in the light of the Commission's obligation to examine with great care the effects of the concentration concerned on all the markets potentially affected, the Commission must retain the possibility to request the correction of materially incorrect information communicated by the parties which is necessary for its examination, the reasons which prompted it to verify once more its accuracy being irrelevant in this respect. The European Court of First Instance concluded therefore that there has been no breach of the principle of the protection of legitimate expectations here.

European Court of Justice rules on the concept of 'undertaking'

In order for the European competition rules to apply in a certain case, the entity or entities engaged in alleged anti-competitive conduct should qualify as an undertaking. In a judgement of 26 March 2009 the European Court of Justice ruled on this concept of 'undertaking'. It dismissed an appeal by SELEX Sistemi Integrati SpA (SELEX) against the judgement of the European Court of First

Instance about alleged abuse of dominance (Article 82 of the EC Treaty) by the European Organisation for the Safety of Air Navigation (Eurocontrol). The European Court of First Instance earlier dismissed the application by SELEX for annulment of the decision of the European Commission rejecting the complaint of SELEX concerning the aforementioned alleged infringement by Eurocontrol.

According to settled case law the term 'undertaking' covers all entities engaged in an economic activity consisting in offering goods and services on a given market. However, activities which fall within the exercise of public powers are not of an economic nature en should not be considered as economic activities. In the present case the question was whether the activities of assisting the national administration, technical standardisation and research and development activities carried out by Eurocontrol were to be considered as economic activities.

The European Court of Justice referred to an earlier judgement in which it considered that the activities of Eurocontrol taken as a hole are connected with the exercise of powers relating to the control and supervision of air space, which are typically those of a public authority and are not of an economic nature. Eurocontrol's objective is namely to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system. Contrary to the judgement of the European Court of First Instance, the European Court of Justice then held that the activity consisting in assistance to the national administration was connected with Eurocontrol's exercise of public powers and was not an economic activity. Therefore, with regard to the exercise of this activity Eurocontrol was not an undertaking within the meaning of Article 82 of the EC Treaty. The activities of technical standardisation had also been considered to be connected to the aforementioned objective of Eurocontrol and are, since Eurocontrol exercises public powers in this area, as a result not economic activities. Eurocontrol's research and development activities were also held not to be economic in nature. With regard to this consideration the European Court of Justice agreed with the European Court of First Instance. The European Court of First Instance had considered that the acquisition of prototypes in the context of research and development and the related management of intellectual property rights were not capable of making that activity an economic one, since the acquisition did not involve the offer of goods or services on a given market. The fact that Eurocontrol granted licenses relating to the prototypes at no costs indicated that that the management of intellectual property rights was not an economic activity.

Since none of the activities concerned were held to be economic activities, Eurocontrol did not act as an undertaking. Consequently, with regard to this activities Article 82 (and the competition rules in general) of the EC Treaty did not apply to Eurocontrol. Although in most cases it is obvious that an organization is an undertaking within the meaning of the competition rules, the concept of 'undertaking' can still be of crucial importance in certain cases.

Effect on trade between member states

Article 81 of the EC Treaty applies in case the anti-competitive conduct has, among other things, an effect on the trade between member states of the EU. In his Opinion of 26 March 2009 Advocate General Bot of the European Court of Justice discussed this topic in the case brought before the European Court of Justice by several Austrian banks against a judgement of the European Court of First Instance.

In its judgement the European Court of First Instance upheld the decision of the European Commission in which it was held that the Austrian banks had participated in a series of agreements and concerted practices in Austria by setting up what is described as the 'Lombard network', that is to say a series of regular meetings in which the banks concerted at regular intervals their conduct with respect to the main parameters, such prices and charges, affecting competition on the market in banking products and services in Austria. In the proceedings the banks disputed, among other things, the European Court of First Instance's analysis of the condition relating to an effect on trade between member states within the meaning of Article 81 of the EC Treaty.

With respect to the condition 'effect on trade between member states' the European Court of Justice has pointed out in established case law how to interpret this condition. In order to affect trade between member states it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states in such way as to cause concern that they might hinder the attainment of a single market between member states. This may be the case where the agreement partitions the national market, diverts trade patterns from their normal course or alters the structure of competition in the common market. In that regard, the European Court of Justice considers that it is not necessary to prove actual interference with trade and that proof of a potential effect is sufficient.

Regarding the effect on trade between member states of the agreements and concerted practices, the banks argued in essence that that a cartel which covers the territory of one member state is not capable of affecting trade between member states. They also emphasized that the services to which the bank meetings related were provided, almost without exception, at a local level in Austria and that no foreign bank participated in the meetings. In the Advocate General's opinion, a cartel such as that at issue, organized nationally between the main Austrian banks, having as its object collusion on bank prices and charges, is by its very nature capable of affecting trade between member states within the meaning of Article 81 of the EC Treaty considering the special characteristics of the banking sector that, beyond the simple territorial coverage of the cartel, the cartel was likely to result in the partitioning of the Austrian market. This opinion corresponds to the case law of the European Court of Justice in which it was held that the fact that an agreement or concerted practice relates only to the marketing of products in a single member state is not sufficient to preclude the possibility that trade between member states might be affected. An arrangement extending over the whole of the territory of a member state has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about.

The abovementioned opinion shows once again that a cartel can not escape from the application of EC competition rules by simply arguing that an agreement or concerted practice covers only one member state or that the participants are all located in one member state. It should also be pointed out that trade between member state can also be affected by cartel conduct which was adopted outside the territory of the EU, even if the companies involved in this conduct are all located outside the EU. In case such cartel conduct is implemented on EU territory it has, according to the case law, effect on the trade between member states. The companies participating in the cartel can therefore be held liable for infringements of EC competition rules.

European Commission fines marine hose producers € 131 million for market sharing and price-fixing cartel

The European Commission has imposed a total of € 131 510 000 fines on five companies – Bridgestone, Dunlop Oil & Marine/ Continental, Trelleborg, Parker ITR and Manuli – for participating in a cartel for marine hoses between 1986 and 2007. This cartel has infringed the cartel prohibition laid down in the EC Treaty and the EEA Agreement. Yokohama also participated in the cartel but was not fined because it revealed the existence of the cartel to the Commission.

Marine hoses are used to transport crude oil to and from ships for transportation from production sites. The cartel members fixed prices for marine hoses, allocated bids and markets and exchanged commercially sensitive information. The fines for Bridgestone and Parker ITR were increased by 30% because of their leadership of the cartel. Manuli was granted a 30% reduction of its fine for its cooperation with the investigation under the Commission's leniency programme.

The Commission's investigation was prompted by an application for immunity lodged by Yokohama under the 2006 Leniency Notice. It conducted surprise inspections coordinated with several other jurisdictions in May 2007. In this case the Commission, for the first time inspected a private home under Article 21 of Council Regulation No 1/2003.

From 1986 to 2007, the producers of marine hoses operated a worldwide cartel. The European market for this product was worth on average € 32 million per annum between 2004 and 2006. Bridgestone, Yokohama, Dunlop Oil & Marine, Trelleborg, Parker ITR and Manuli regularly met to fix prices and exchange sensitive market information. These meetings took place in several locations in Europe, East Asia and the US. Cartel members referred to some markets as their "private markets" and agreed upon a dozen or so pages of detailed "cartel rules" to limit their conduct on the market.

The European Commission makes updated statistics on cartels available

The European Commission has published an overview of the fines imposed on companies for their involvement in a cartel. The overview concerns the period between 1969 and 2008. The highest cartel fine in history was given in 2008 in the case of Car Glass and amounted € 1.383.896.000. Also in the case of Car Glass the highest cartel fine per undertaking was given. Saint Gobain received namely a fine of € 896.000.000.

Microsoft, the story continues…

In the past, Microsoft has been penalised for abuse of its dominant position as a result of tying Windows Media Player to Windows. Now, Microsoft is accused of tying conduct with respect to Internet Explorer.

In January of this year the European Commission sent a statement of objections to Microsoft outlining the Commission's preliminary view that Microsoft's tying of Internet Explorer to its dominant client operating system Windows infringes the prohibition on abuse of a dominant position. According to the Commission the tying of Internet Explores to Windows harms competition between web browsers, undermines product innovation and ultimately reduces consumer choice.

In the opinion of the Commission the tying of Internet Explorer with Windows, which makes Internet Explorer available on 90% of the world's PCs, distorts competition on the merits between competing web browsers insofar as it provides Internet Explorer with an artificial distribution advantage which other web browsers are unable to match. Due to the tying Microsoft might shield Internet Explorer from head to head competition with other browsers which is harmful to the pace of product innovation and to the quality of products which consumers ultimately obtain. Furthermore, the Commission is concerned that the ubiquity of Internet Explorer creates artificial incentives for content providers and software developers to design websites or software primarily for Internet Explorer which ultimately risks undermining competition and innovation in the provision of services to consumers.

A decision whether Microsoft actually has infringed Article 82 of the EC Treaty will be taken after Microsoft replies to the Commission's statement of objections.

Nysingh European competition and public procurement law team

Nysingh 3 partner and 7 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

This newsletter will appear several times a year. If you don't want to receive this newsletter or if you want to subscribe to this newsletter, please reply to e.vangurp@nysingh.nl. For more information on the subjects in this newsletter and other EU competition law matters, please contact

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