

Port towing joint venture dissolved after investigation by the Dutch Competition Authority: full-functionality questioned

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Background

On 20 December 2019, the Dutch Authority for Consumers & Markets (ACM) published a decision in which the commitment to dissolve the joint venture Port Towing Amsterdam (PTA) by two port towing undertakings was confirmed. This joint venture was created by the undertakings Svitzer and Iskes. ACM believed that the cooperation between the two undertakings possibly violated competition law as it did not seem to be a full-function joint venture, and hence, competition law issues were identified.

Interesting question in this regard is of course why ACM was of the preliminary opinion that the joint venture was not a full-function joint venture and the undertakings eventually had to decide to dissolve PTA. In this blog we discuss this aspect of the commitment decision.

Full-functionality of PTA

For many years, Svitzer carried out port towage services in the ports of Amsterdam and IJmuiden.^[1] Iskes entered this market in 2007. The entry of Iskes created competition between these two undertakings and lowered towage rates for contractors and clients. In 2014 Svitzer and Iskes set up a joint venture, PTA, which took over all towage services in the Amsterdam region from Svitzer and Iskes.

Following the outcome of information requests from ACM regarding the full functionality of the joint venture PTA, ACM started an investigation into the conduct of Svitzer and Iskes in February 2019. This was an investigation under Article 6 of the Dutch Competition Act (DCA) (the Dutch equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU)).

According to Svitzer and Iskes, PTA was a new, independent business (i.e. a full-function joint venture). Amongst others, because:

- PTA set its own tariffs for the offered services;
- PTA had a managing director who was not an employee of one of the parent undertakings;
- PTA had a commercial and operational director;
- PTA had approx. five employees; and
- PTA had financial resources and software at its disposal.

However, ACM raised doubts as to whether PTA, seen in its legal and economic context, was truly a full-function joint venture, because, amongst others:

- PTA did not own any towboats itself but almost exclusively hired towboats from Svitzer and Iskes, resulting in the fact that PTA was almost completely dependent on its parents for hiring towboats. In practice it hardly ever happened that PTA hired towboats from third parties;
- The parent undertakings did not have the intention to transfer the tugboats into the possession of PTA. The purpose seemed to be that PTA would permanently hire from the parent undertakings;
- PTA did not employ the crew of the towboats as the crew was generally on the payroll of the towboat owner, which was nearly always Svitzer and Iskes. The costs of (hiring) towboats including crew are 80 - 90% of the total costs of PTA;
- PTA hired the towboats including crew and complementary facilities and as such PTA's role was limited to coordinating the physical towing activities.
- Combining the most important assets (i.e. the towboats and crew) was not a task of PTA, but of its parents. Many times, towboats were switched at the parents' initiative.

As a result, PTA did not appear to have enough assets to qualify as a full-function joint venture and did not seem to be economically autonomous from an operational point of view.^[2] Instead, PTA was almost entirely dependent on its parent companies and seemed to add little value.

Commitment decision

In the commitment decision, ACM states that it sees clear competition law risks if it would turn out that the joint venture does not qualify as a full-function joint venture. After all, a non-full-function joint venture does not fall within the scope of the merger control rules and must be assessed under Article 6 of the DCA (and/or Article 101 TFEU).

In that regard it is of importance that in this case, the former competitors Svitzer and Iskes both withdrew as providers of port towage services in and around the ports of the *Noordzeekanaal*. Instead, they set up the joint venture PTA, which was to sell port towage services to customers. This fully eliminated competition between Svitzer and Iskes in and around the ports of the *Noordzeekanaal*. As a result, the choice of clients and customers was limited to PTA or they had the option to attract other port towage undertakings (which are active in other regions) to expand their activities to the ports in and around the *Noordzeekanaal*.

In order to remove the competition risks identified by ACM, Svitzer and Iskes investigated several options including changing their cooperation in such a manner that it would qualify as a full-function joint venture. However, parties could not reach an agreement in this respect and instead decided to dissolve PTA. As a result, this means amongst other commitments that Svitzer will take over PTA including the towboats and crew members that PTA hired from Iskes and Svitzer will not increase the rates for the port towage services more than the rate of inflation for the next four years. In exchange for these commitments, ACM decided not to (and following the decision no longer has the power to) impose a fine or use any other administrative instrument.

Please note that ACM did not establish any infringement in the decision.

Lessons to be learned: benefits for the market?

ACM warns that undertakings cannot circumvent the competition rules by setting up a joint venture that is intended to function as a full-function joint venture, but in practice does not. Especially if the turnover thresholds of the merger control rules are not met and the joint venture thus escapes the review by a competition authority. According to ACM this may provide an incentive for undertakings to test the boundaries by assuming too easily that a joint venture is full-function. This decision is therefore an important signal to undertakings that are considering establishing a full-functioning joint venture. ACM emphasizes that undertakings that agree to set up a joint venture should make sure it operates truly independently of the parent companies.

The consequence of the decision is, however, that Svitzer is again the only undertaking left on the market. One could raise the question whether this is the desired outcome. When deciding upon the effectiveness of the commitments, ACM considered that it is indeed limited in its ability to achieve effective competition between players in a market and cannot force a party to stay active on a market. ACM considered it more important that after the acquisition of PTA by Svitzer, there will no longer be a possible anti-competitive cooperation. Moreover, the commitment to not increase the tariffs for the next four years might give an incentive for other undertakings to enter the market after all. We conclude that it is yet to be seen what the net benefits for competition on the market will be.

[1] Towing undertakings help sea-going vessels navigate safely into and out of ports.

[2] Please see the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) for the criteria of full-functionality, i.e. (i) sufficient resources to operate independently on a market, (ii) the activities go beyond one specific function for the parent undertakings, (iii) the joint venture is intended to operate on a lasting basis, while (iv) (strong) presence of the parent undertakings in upstream or downstream markets is another factor to be taken into consideration.