

Abuse of dominance fine of € 41 million for Dutch railway operator annulled

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Mariska van de Sanden (Bird & Bird, The Netherlands) and Tialda Beetstra (Bird & Bird)

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Introduction

The Authority for Consumers and Markets ("ACM", the Dutch competition authority) was in 2017 - after years of silence - finally able to fine an undertaking for abuse of dominance. A heavy fine of almost € 41 million was imposed on the state-owned Dutch railway operator N.V. Nederlandse Spoorwegen ("NS"). According to ACM, NS abused its dominant position on the Main Railway Network ("MRN") by (a) submitting a loss-making bid (predatory pricing) and (b) a combination of exclusionary practices^[1] in order to secure the award of the contract in a regional tender in the Dutch province of Limburg ("Limburg Tender").

On 27 June 2019 the District Court of Rotterdam ("Court") annulled that decision of ACM, however. According to the Court, ACM did not prove that NS had a dominant position on the MRN nor that there is a sufficient connection between that position on the MRN-market and the Limburg Tender. This judgment is considered a major setback for ACM for at least two reasons: (i) it was the first abuse of dominance fine in years, and (ii) NS is the largest railway operator in the Netherlands and one could thus have expected NS to hold a dominant position on the MRN-market.

Background: why did ACM believe NS had a dominant position?

ACM argued that NS held a dominant position on the MRN-market, because NS holds the exclusive concession for passenger transport on the MRN at least until 2025 with a 100% market share while there are no significant competitive constraints. For example, the conditions attached to the concession, such as quality and tariff requirements, do in this case not lead to disciplinary effects, thus ACM argued.^[2]

The abuse took, however, not place on but outside the MRN-market. According to ACM, NS abused its dominant position on the MRN-market during the Limburg Tender procedure in order to ensure the award of the contract and thus to protect the position of NS on the MRN-market. The connection between the two markets would lie in the fact that the Limburg Tender was used as a pilot by the Minister to examine whether other tracks could also be decentralised - at the expense of NS's position on the MRN, as it would reduce the size of the MRN.

Judgment of the Court: does NS indeed hold a dominant position and is there a sufficient connection between the markets?

During the court proceedings, two main questions were answered: (i) does NS indeed hold a dominant position on the MRN-market? and (ii) is there a sufficient connection with the market on which the abusive behavior took place?

(i) Does NS indeed hold a dominant position on the MRN-market?

- The absence of competition for the MRN-concession might indeed suggest that NS was able to behave independently of its customer and end-users. However, with reference to the *MEQ-case*, the Court considers that the decisive factor is whether NS was actually able to behave independently in practice. The Court believes that ACM has not conclusively proven this. According to the Court, ACM did not thoroughly investigate whether the MRN-concession terms do in fact have a disciplinary effect.^[3] The *economic report* that ACM referred to in its substantiation does also not refer to these concession terms. Moreover, the report was not specifically aimed at addressing the question of a dominant position and only states, for example, that "NS is likely to have significant market power". However, ACM does not need to demonstrate the likelihood of market power, but that this is beyond any reasonable doubt.

(ii) Is there a sufficient connection with the market on which the abusive behavior took place?

- Although the above finding (i) was already sufficient for the Court to annul the fine, the Court also ruled that the causal link between the behaviour of NS in the Limburg Tender and dominant position on the MRN-market was not sufficiently established.
- With reference to EU-case law (e.g. *Commercial Solvents*, *Tetra Pak II*, *AKZO* and *BPB Industries and British Gypsum*), the Court recalls that, although abuse of a dominant position on a market other than that on which the undertaking holds the dominant position may be taken into account, there must be a sufficiently strong connection between those markets and a high probability that the abuse will lead to a strengthening or protection of that dominant position.
- In the opinion of the Court, this required - in this specific case - that the experiences with the Limburg Tender were decisive for the Ministry's decision to decentralise the MRN, which they were not. The experience with the Limburg Tender was just one of the factors that will be taken into account; not a decisive one. Also, unexpected developments could occur between the Limburg Tender (2014) and the retender of the MRN-concession in 2025. Therefore the effects of the Limburg Tender for the MRN-concession are too uncertain to establish a sufficiently strong connection between those markets.

Accordingly, the Court annulled the decision of ACM.

Does this mean that NS is out of the woods?

This judgment shows yet again the high burden of proof for ACM in establishing abuse of a dominant position and that Dutch courts are not afraid of scrutinizing competition law decisions. If ACM decides to appeal the judgment, the final outcome of the case is, however, hard to predict. The District Court of Rotterdam and the Trade and Industry Appeals Tribunal ("CBB", the highest Dutch court in this case) do not always seem to agree with each other. For example, in the recent *taxi cartel*-case, the District Court annulled ACM's decisions because, in short, ACM did not properly define the relevant market. However, the CBB in turn overruled those judgments and held that ACM was right in its assessment.^[4]

Anyhow, even if the CBB would uphold ACM's assessment of NS's dominant position and the causal link between the two markets, the assessment of NS's alleged abusive behavior must also still pass the scrutiny test. That assessment was not part of the current judgment as ACM's decision already stranded because there was no dominant position to abuse in the first place.

Probably to be continued...

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[1] For example, by delaying responses and providing incomplete information to competitors.

[2] Also, according to ACM, there is a lack of buyer power from both the passengers and the State (e.g. other railway operators in the Netherlands are small as a result of which the State is more or less dependent on NS), while some entry barriers exist. Moreover, since NS is a 100% state-owned company, the State does not have an incentive to award the MRN-concession to another party, thus ACM argued.

[3] For example, the manner in which NS fulfills its obligations under the concession is one of the determining factors for the extension of the current concession. This could imply that NS is limited in its ability to act independently.

[4] CBB 23 april 2019, ECLI:NL:CBB:2019:151, CBB 23 april 2019, ECLI:NL:CBB:2019:150.