

Kluwer Competition Law Blog

Cigarette manufacturers fined € 82 million for Hub-and-Spoke cartel in the Netherlands

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Introduction

On 27 May 2020 the Dutch Authority for Consumers and Markets (“ACM”) imposed a **fine** of € 82 million on four cigarette manufacturers for indirect information exchanges in violation of Article 101 TFEU and 6 Dutch Competition Act. It is the first fine ACM has given for indirect information exchanges between competitors.

The manufacturers exchanged information, through wholesalers among other channels, about future prices of cigarette packs over a three-year period (2008-2011). Such a practice is also known as a Hub-and-Spoke cartel and is forbidden. The manufacturers indirectly exchanged information and also used so called ‘trial balloons’.

The decision is noteworthy for at least three reasons:

1. It is one of the few cases in which both a Hub-and-Spoke cartel and trial balloons occur;
2. It clarifies the interplay between sector-specific regulation and competition law; and
3. It provides guidance as to when information qualifies as public information.

In this blog, we discuss those three aspects more in-depth, go briefly into the fines and end with some concluding remarks.

We note that ACM’s decision was only published in late September 2020, because three manufacturers tried to stop its publication on **procedural grounds**. The court sided with ACM, however, and allowed publication.

The infringement: The Hub-and-Spoke cartel

In a Hub-and-Spoke cartel, the “hub” facilitates the coordination of competition between the “spokes” without direct contacts between the spokes.

In this case, the spokes were the cigarette manufacturers, being British American Tobacco International (“**BAT**”), JT International Company Netherlands (“**JTI**”), Philip Morris Benelux (“**PMI**”) and Van Nelle Tabak Nederland (“**ITN**”). These companies own well-known cigarette brands, such as Marlboro, Lucky Strike and Camel. During the infringement, the four cigarette

manufacturers had a total market share of around 95% on the Dutch market for cigarettes, making it an oligopolistic market. The hubs were almost 20 different wholesalers and retailers.

Dutch excise legislation requires cigarette manufacturers to send the new prices of cigarette packs beforehand to their wholesalers and retailers. However, instead of requiring those wholesalers and retailers to treat this information confidentially, they awaited the price lists^[1] of the other cigarette manufacturers and pro-actively asked and steered towards getting this pricing information. They also did not refuse the information that they received from the wholesalers and retailers on competitors. As a result, information exchanges continuously took place between manufactures and the wholesalers and retailers. ACM found that the manufacturers knew or should have known that their price information would end up with competitors.

In addition, the manufacturers also used the Hub-and-Spoke set-up to send so-called ‘trial balloons’. ACM mentions for example a situation in which ITN wished to find out whether the other manufacturers would respond to a planned price increase before setting its own prices:

“ITN needs to see the competition follow in line with ITN’s pricelist. Meaning mainstream and VFM [Value for Money] exact in line with the prices mentioned above. The submitted pricelist is valid till (Needs to be determined ASAP). If the big four do not show a valid pricelist in market ITN will withdraw the intention and keep to the current pricelist.” [2]

In this manner ITN tried to verify how its competitors would respond to a planned price increase.

The fact that the indirect information exchange did not lead to fully parallel behaviour, did not prevent ACM from finding an infringement. This is because the conduct did always lead to the behaviour of competitors being predictable. Actual competition was therefore limited. Internal e-mails that were discovered by ACM confirmed that the price information of competitors was used by manufacturers to set their own (pricing) strategy. An exemplary e-mail included in the decision read:

“BAT, PMI and ITN now confirmed an RSP [Retail Sale Price] increase per mid 2009 of €0.10 on their total portfolio effective as of August/September. We recommend increasing our entire portfolio by €0.10 as of September 2009 improving our profitability.”

Interplay sector-specific regulation and competition law

Another interesting aspect in this case is that it regards a heavily regulated market. Excise legislation stipulates that cigarette manufacturers unilaterally decide the retail price of their cigarettes. These prices are depicted on the package. All cigarette packs are sold for the same price in all Dutch stores. The Dutch government also set restrictions for advertising. While these market circumstances increase transparency and limit competition, ACM believes sufficient room for competition remains. Meaning that all cigarette manufacturers still need to comply with the competition rules. Therefore, ACM did not agree with the parties’ argument that the information exchange was the result of excise-tax legislation. Uncertainty should have remained about future

prices.

Information exchanged was *de facto* public

The manufacturers furthermore argued that because many wholesalers and retailers received the price lists, the information became *de facto* public and could thus be freely shared. The ACM finds that the opposite is true, however. According to the ACM, the information only became quasi-public *because* the manufacturers sent the price lists. Without the manufacturers sending the price lists and the *hubs* passing-on the information to the other manufacturers, they would only have known about the (new) prices of their competitors once the cigarette packs were sold in the shops. Normally, undertakings would keep their cards close(r) to their chest and not share such information beforehand with competitors.

Setting of the fines

When setting the amount of the fine ACM considered that:

- It was the first time that it enforced the cartel prohibition in a case of indirect information exchange;
- Sector-specific regulation already increased transparency and narrowed (down-stream) competition possibilities; and
- Indirect information exchanges are less detrimental than direct price agreements between competitors.

These factors led to a lower fine for the manufactures involved, although still totaling € 82 million. None of the parties received immunity. The investigation was initiated by ACM itself.

The Hubs in this case, consisting of almost 20 different wholesalers and retailers, were not fined. ACM refrained from involving the Hub in this procedure. ACM did not consider their participation in the infringement to be sufficiently proven in light of the nature of the concerted practice and the evidence available. According to ACM, there is insufficient evidence that the wholesalers and retailers' involvement was aimed at restricting competition or contributing to the common objectives of parties.[3]

Concluding remarks

There has been increased attention of national competition authorities for Hub-and-Spoke cartels over the last years. These non-traditional cartels are unusual, and each case arguably has its own unique context. Some unclarity remains regarding the applicable legal framework, especially when it comes to the standard of prove and in some cases the fine line between valid information exchanges and a competition infringement.

To prevent getting caught up in a Hub-and-Spoke cartel, companies should be weary of indirect information exchanges with competitors. If a company inadvertently receives information from a competitor, it should explicitly refuse it and not distribute it internally. It is best practice to require distributors to treat the (price) information that you send to them confidentially.

We finally note that all four parties raised [objections](#) against the decision and we will follow the developments closely.

[1] And other materials with commercially sensitive information

[2] ‘Mainstream’ and ‘Value for Money’ are different segments of the cigarette market. These segments are not known to the consumer.

[3] By the way, the hubs do not always get off the hook. In other Hub-and-Spoke cases, such as the Belgian *Supermarkets* case in 2015 and the UK *Dairy* case ([read KCL blog about this here](#)), facilitators were fined heavily for their involvement. In the UK *Tobacco* case retailers and manufacturers were also both fined for anti-competitive practices, although the case collapsed in court.

Written by Tialda Beetstra and Manuela Cox

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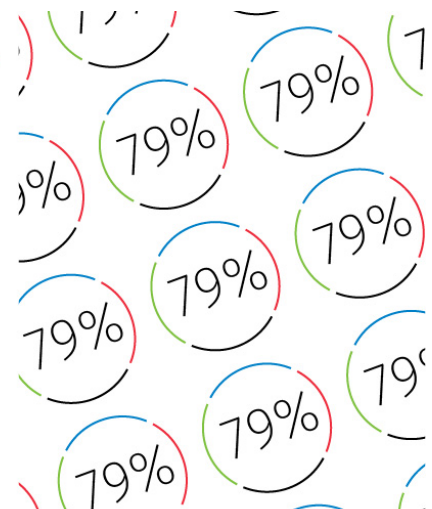
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