



# VAN STEENDEREN MAINPORTLAWYERS



# International Maritime Law Seminar 2017

## **Do Dutch bunker suppliers play by the rules?**

*Dutch Competition Authority (ACM) investigates possible  
bunker cartel*

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# Introduction

- Port of Rotterdam: Europe's largest bunkering port, top 3 bunkering ports worldwide
- Annually, supply of 11 million m<sup>3</sup> of bunker fuel
- 5 oil refineries, 22 bunkering companies and a wide range of available oil products (HFO to biofuels)
- First port in Europe for bunkering LNG (liquefied natural gas)
- Port of Antwerp has 24 bunkering companies and Amsterdam has some 15 suppliers

# ACM cartel investigation

- Authority for Consumers and Markets (ACM), the Dutch competition watchdog
- Press release 12 July 2017: investigation initiated into a suspected cartel in the ARA region bunker sector
- ACM suspects the existence of forbidden price-fixing agreements and the allocation of potential buyers between the alleged members of the cartel

# ACM cartel investigation

- ACM has been tipped by the police and public prosecutor's office
- Although ACM states that the investigation concerns the ARA region, the focus seems to be on the bunker sector in Rotterdam
- Belgian authorities have been informed by ACM, no active investigation going on

# Legal basis of Dutch competition law

- **European law**

- / Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty

- / Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

- **Dutch law**

- / Public Procurement Act

- / Competition Act

- / Financial Sector Supervision Act

- / Supplementary provisions

# Cartel prohibition

- Situation when in a free market formally independent players are de facto not competing in order to increase their collective profits
- Decisions and concerted practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market
- Price-fixing agreements, production capping, allocation of the market and/or of orders

# Cartel prohibition

- Article 6 Dutch Competition Act / Article 101 Treaty on the Functioning of the EU (TFEU):

*“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: [...]”*

- Dutch provision: absence of the criterion regarding the effect on interstate trade



# Cartel prohibition: exemptions

- Exemptions to the cartel prohibition:

- / If the cartel (agreement between undertakings) contributes to economic or technical improvement of the product which results in benefits for the buyer > exempted under Article 101(3) TFEU

- / If the combined market share of the participants does not exceed 10% and does not affect interstate trade > exempted

- / Article 7 Dutch Competition Act: exemption for small undertakings

- no more than 8 participants in the cartel

- combined annual turnover max EUR 5,5 million euro (supply of goods) or max EUR 1,1 million (all other undertakings)

## Enforcement: ACM

- In general, competition law in the Netherlands is enforced by the ACM under administrative law
- ACM falls under the Ministry of Economic Affairs, but has independent status
- ACM is entrusted with the application of European competition law, on its own behalf or at instigation of the European Commission
- ACM may enforce the Dutch Competition Act in all cases of behaviour that affects competition on the Dutch market

# Enforcement

- Place of establishment of the undertaking is not relevant; neither is the place where the infringement is agreed
- Decisive factor is the place where the agreement, decision or concerted practice is implemented
- ACM can start an investigation on its own initiative, on the basis of third-party complaints or on the basis of requests for leniency

# Enforcement: private actions

- With respect to cartel infringements, private enforcement actions are available
- Claimants may seek damages, restitution, injunctions and declaratory judgments
- Courts can impose a periodic penalty or award damages to claimants that suffered prejudice as a result of anti-competitive practice

# Enforcement: private actions

- Injured parties can request ACM to conduct an investigation
- ACM encourages the use of civil law tools by third parties and has discretion to prioritise
- ACM's prioritisation policy: 3 criteria to determine which requests will be given priority:
  - / to what extent does the identified behaviour harm consumer welfare;
  - / what is the magnitude of the public interest;
  - / to what extent will the ACM be able to act effectively and efficiently?

# Enforcement: appeal process

- Decisions of the ACM are subject to a three-stage appeal process:

/ addressee can file for administrative review which is carried out by an independent advisory committee with the ACM

/ appeal against the administrative review decision can be lodged with the administrative law chamber of the Rotterdam District Court

/ final stage of appeal is at the Trade and Industry Appeals Tribunal

# Sanctions

- Once infringement of competition law is established, ACM can:

/ impose a fine or order under threat of an periodic penalty payment.

/ issue a binding instruction on the undertaking to comply with competition law

# Sanctions: administrative fine

- Article 57 Dutch Competition Act: both legal and natural persons
- Before 1 July 2016
  - / EUR 450,000 or, if higher, 10% of the global annual turnover
  - / EUR 450,000 for members of the board and de facto managers
- Studies showed the fines were inadequate as a deterrent and bill was passed to increase the fines



# Sanctions: administrative fine

- Since 1 July 2016

- / EUR 900.000 or, if higher, 10% of the global annual turnover

- / Repeated and ongoing violations: fine multiplied by the number of years of the violation, maximum of four years

- / Fine of EUR 3,6 million or 40% of their global annual group turnover

- / If undertaking has been sanctioned in the 5 years prior to the new sanction, fines can be doubled

- / Fine of EUR 7,2 million or 80% of their global annual group turnover

# Sanctions: administrative fine

- ACM publishes that a fine has been imposed.  
Not intended to be a punishment, but to sort a deterring effect for other possible violators and to raise awareness with potentially injured buyers
- Aggravating factors
  - Lack of cooperation
- Mitigating factors
  - undertaking identified infringement itself, terminated infringement and notified the ACM
  - Admission of involvement and liability

# Sanctions: leniency programme

- Full immunity is possible, when requesting undertaking or individual:

- / is the first to disclose the cartel

- / reports a cartel that has not been investigated yet

- / enables the ACM to start targeted inspections

- / has not compelled any other undertaking to participate in the cartel

- / cooperates fully on a continuous basis throughout the procedure

# Sanctions: leniency programme

- To parties being second to cooperate, full immunity is off the table
- They can, however, be granted a reduction of the fine for 30-50%. The third cooperating party can get a reduction of 20-30% and every subsequent party up to 20%

# ACM cartel investigation: possible impact?

- Investigation not invasive (yet). No dawn raids have been performed nor has any documentation been subpoenaed by the ACM
- Port and transport sector has been on ACM's radar for years:

/ ACM visited 6500 LinkedIn profiles of persons employed in the port sector to raise awareness of their presence

/ large investigation of the cooled storage sector conducted in 2016, 4 companies were fined for an amount of EUR 12,5 million

# ACM cartel investigation: possible impact?

- December 2016: results of research study into knowledge of and compliance with competition law by University of Amsterdam December 2016

- Based on interviews with 400 PR-officers of companies in the Port of Rotterdam

- / 70% comply with competition law

- / 30% knowingly violated competition law or is willing to do so

- / 20% unaware that price-fixing is forbidden

- / 55% unaware that market allocation is forbidden

# ACM cartel investigation: possible impact?

- Dutch bunker sector has been marked since 2013, when report concerning the environmental aspects of bunkering showed that the Dutch sector lacks transparency and government supervision

# ACM cartel investigation: responses from the sector

- Dutch Organisation for the Energy sector (NOVE)
- Code of Conduct applicable to members, containing provisions on how to safeguard competition
- Breach of the Code leads to exclusion from membership
- Points to the damage already done to the sector by the report of the University of Amsterdam
- NOVE does not expect a negative outcome since pricing is very competitive and transparent both in Rotterdam and Amsterdam



# ACM cartel investigation: responses from the sector

- Association of the Dutch Petroleum Industry (VNPI)
- No Code of Conduct, but strict rules apply during meetings. ‘Red’ and ‘green’ cards to distinguish topics which can be discussed freely and topics which cannot be discussed. Marketing and pricing are forbidden topics
- VNPI: Dutch bunker sector is a competitive sector with transparent pricing due to the use of trading platforms and publicly available price indexes such as Platts

# Conclusion

- Although the exact impact and effect of the cartel investigation remains unclear for the moment, we expect that given the results of the study of the University of Amsterdam that the investigation will reveal at least some irregularities in the compliance of the Dutch bunker sector with the applicable competition law



Thank you for your attention

