Competition Newsletter

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Beware of legal privilege?!

The director of the NMa's legal department recently stated[1] that the NMa will not align its legal professional privilege (LPP) practice with the European Court of Justice's *Akzo* ruling.[2] According to the NMa, denying LPP to in-house lawyers would harm their competitive position in regard to external lawyers.

Conflicting LPP regimes

The Dutch rules on LPP differ from the EU rules in the sense that in-house counsel admitted to the Bar – regardless of the country of establishment – enjoy legal privilege. As known in the Ak*zo* ruling the Court of Justice confirmed the 1982 ruling in *AM & S*[3] and clarified that communications between in-house counsel and companies remain unprotected by LPP in European Commission investigations, regardless of whether the in-house counsel is a member of the Bar.

The NMa is of the view that without LPP, an in-house lawyer would no longer qualify as a viable competitor for external lawyers[4] and therefore has retained LPP for in-house lawyers. As a result, conflicting LPP regimes remain after *Akzo* depending on the capacity in which the NMa conducts an investigation. For instance, if NMa officials conduct investigations on the basis of Dutch competition law, Dutch national rules apply and the correspondence with both in-house and external counsel is covered by LPP. The same applies to investigations by the NMa at the request of the Commission or a competition authority of another Member State.[5] However, if NMa inspectors only assist the Commission officials, EU rules apply[6] and correspondence with in-house counsel has no LPP coverage. It is therefore imperative for companies to verify at the very start of a dawn raid which authority and, more importantly, in which capacity the authority is conducting the dawn raid to determine the level of LPP protection. In this context, the NMa provided the following overview:

Overview of LPP – in-house counsel		
Capacity NMa	*Legal base*	*LPP in-house lawyer?*
NMa conducts investigation under Dutch competition rules (Art. 6/24 DCA)	Chapter 6 DCA	Yes
NMa conducts investigation under EU competition rules (Art. 101/102 TFEU)	Art. 88, 89 DCA	Yes
NMa assists European Commission in investigation under EU competition rules	Art. 89b DCA	No
NMa conducts investigation at request Commission/EU competition authority	Art. 89g DCA	Yes

DCA = Dutch Competition Act

TFEU = Treaty on the Functioning of the European Union

LPP in practice

The NMa's policy with regard to LPP protection is laid down in its *Procedure in relation to the Inspection and Copying of Analog and Digital Data and Documents*[7]. Companies can claim LPP for analogue documents during the on-site investigation. The NMa official will want to verify this claim by skimming through the document. However, in case of a dispute on LPP coverage or if the company refuses to allow NMa officials to skim through the document, a "sealed envelope" procedure similar to that known from EU case law[8] applies. The NMa official will place the document in a sealed envelope and hand it to an independent NMa official, the "LPP officer". This procedure also applies to digital data, except if it is technically impossible to separate the privileged digital data from the other data sets.[9] The company subsequently has 10 business days to substantiate its LPP claim to the LPP officer for the analogue and digital data in the sealed envelope. If the LPP officer is not convinced of the validity of the claim, the company has another 5 working days to provide a more detailed explanation. If the LPP officer remains unconvinced, the data and documents in question will be provided to the NMa case team within 5 working days. In these 5 additional working days, the company can bring the matter before a court in interlocutory proceedings.

According to the NMa, the LPP officer appears a more efficient and less time-consuming solution to resolve LPP disputes than the European Commission's procedure, as the latter procedure can take years.[10] However, the big difference with the European Commission's procedure is that the NMa's LPP officer – part of the NMa and not an independent court body – will review the contents of the documents in the envelope before deciding on the LPP claim, whereas the envelope in the European Commission's procedure remains sealed during its decision on the validity of the LPP claim. It is only at the European General Court that the envelope sealed during a Commission dawn raid will be opened to review the actual contents of the documents, unless the company decides not to challenge the Commission's decision or the time period during which an appeal can be lodged expires. It seems the latter procedure at an independent court will likely be preferred by most companies over the NMa's "fast track" option.

Dutch *de minimis* exemption for hardcore infringements in line with EU law

In February 2011, a proposal to amend last year's adopted bill to revise the *de minimis* clause was published.[11] This proposal exempts hardcore infringements up to a market share of 10%. One of the main hang-ups of the bill was whether it would constitute an infringement of EU law, since certain hardcore cartels caught by the cartel prohibition of Article 101 TFEU could be exempted under the revised *de minimis* clause. The proposal to amend the bill intends to smooth this over.

Currently, the *de minimis clause* laid down in the Dutch Competition Act provides for an exemption for restrictive agreements, including hardcore cartels, where no more than eight participants with an aggregate turnover of less than EUR 5.5 million (for companies whose primary business is in the affected markets) or EUR 1.1 million (for other companies) are involved. Also exempt are restrictive agreements where the parties' combined turnover does not exceed EUR 40 million and their aggregate market share remains below 5%. The latter thresholds have been based on the European Commission's guidelines on the effect on trade concept[12], according to which inter-State trade will not

be appreciably restricted when these thresholds are met.

In June 2010, the Dutch parliament adopted a bill to increase the market share threshold of the national *de minimis* clause to provide small and medium-sized companies with more leeway to join forces against buyer power.[13] The bill aimed to amend the latter exemption by abandoning the turnover threshold and raising the market share threshold to 10%. As a result, the national *de minimis* clause would no longer be in line with the thresholds of the European Commission's guidelines. Consequently, hardcore restrictions exempted under the national *de minimis* clause could run counter to the European Commission's *De Minimis* Notice,[14] which does not apply to hardcore restrictions.

In a letter of 9 September 2010, the European Commission's Director-General for Competition indicated that the revised *de minimis* clause would lead to the exemption of hardcore restrictions which could affect inter-State trade and could thus be prohibited under EU law. In this context, he referred to Article 4(3) TEU, according to which Member States should "*refrain from any measure which could jeopardise the attainment of the Union's objectives*".[15] The proposal to amend the bill has taken the European Commission's view to heart and introduces an additional condition to the 10% market share threshold, reading that the restrictive agreement at hand may not have an appreciable effect on inter-State trade.

Before the courts…

Uniform application of EU competition law: the practical solution?

The Rotterdam District Court rejected an interim application to stay the proceedings in a damages claim pending the final judgment by the EU courts on the European Commission's decision in the road bitumen cartel.[16] The court held that staying the proceedings ex Article 16 of Regulation 1/2003[17] was not necessary now that a number of (preliminary) questions can be answered according to national law prior to a final judgment by the EU courts.[18]

MNO Vervat-Wegen (MNO) acquired road construction company Koop Tjuchem in 2006 and initiated the current "follow-on" damages action[19] against Shell to recover the damages claimed to have been suffered by Koop Tjuchem in the period 1994-2002 as a result of the road bitumen cartel. Shell requested a stay of proceedings on the basis of Article 16 of Regulation 1/2003[20] pending Shell's appeal against the Commission's decision before the EU courts on *inter alia* liability issues, the duration of the cartel and its role of leader in the infringements. According to Shell, Article 16 of Regulation 1/2003 compels the court to stay its proceedings until a final judgment by the EU courts in order to avoid conflicting decisions. MNO, however, argued that it is not necessary to await the EU courts' final judgment since Shell acknowledged its participation in the road bitumen cartel and provided the Commission with evidence of the infringement during its investigation.

The court ruled that Shell's arguments were insufficiently compelling to stay the proceedings ex Article 16 of Regulation 1/2003, particularly since MNO could be hampered in its production of evidence due to the period during which the cartel existed and the number of years a final judgment by the EU courts would probably take. The court considered that the questions on (i) the assignment of Koop Tjuchem's damages claim to MNO and (ii) the prescription of the right of action can already be answered according to national law, irrespective of the outcome of the EU court appeal procedure. The court therefore deemed it practical to continue the proceedings and rule on those questions first.

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1 Speech of 20 January 2011 by M.T.J.P. van Oers.

2 Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* / *European*

Commission. See also our *Legal Alert* of 14 September 2010.

3 Case 155/79, *AM&S*, [1982] ECR 1575.

4 Speech of 20 January 2011 by M.T.J.P. van Oers.

5 See Article 22(2) of Regulation 1/2003, OJ 2003, L1/1.

6 See Article 20(5) of Regulation 1/2003, OJ 2003, L1/1.

7 Procedure in relation to the Inspection and Copying of Analog and Digital Data and Documents, 16 August 2010. See also our *Competition Newsletter* of August/September 2010.

8 See cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd.*, [2007] ECR II-03525, in which the General Court ruled that during a dawn raid, a company may refuse to allow European Commission officials to look at documents during dawn raids which the company considers confidential. Disputed documents should be placed in a sealed envelope. The contents of the documents should not be read by the European Commission until (i) it has adopted a decision allowing for the disclosure of the information which the undertaking can appeal to the General Court and (ii) the limitation period for bringing an action against this decision has expired. This procedure is also mentioned in the European Commission's draft *Best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*.

9 The NMa officials use search terms to identify the digital data they will copy. An overview of the search terms used will be provided to the company. In addition, the NMa provides the company with an overview of the digital data sets. The company subsequently has 10 working days to identify the data it considers to be covered by LPP.

10 Speech of 20 January 2011 by M.T.J.P. van Oers. In the European Commission's LPP dispute procedure the Commission's decision allowing for the disclosure of the information can be appealed before the General Court.

11 Second Chamber, 2010-2011 session, 32 664.

12 Cf. para. 52 of the guidelines on the effect of trade concept contained in Articles 101 and 102 TEFU, OJ 2004, C101/81.

13 Second Chamber, 2007-2008 session, 31 531. See also our *Competition Newsletter* of April/May 2010.

14 Commission Notice on agreements of minor importance which do not appreciably restrict competition, OJ 2001, C368/13.

15 Second Chamber, 2010-2011 session, 32 664.

16 Case COMP/38.456 – Bitumen – NL of 13 September 2006.

17 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC (now: Articles 101 and 102 TFEU), OJ 2003, L1/1.

18 Rotterdam District Court 9 February 2011, LJN: BP7518.

19 Follow-on actions are instigated by an existing decision by a competition authority.

20 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC (now: Articles 101 and 102 TFEU), OJ 2003, L1/1. See also case C-344/98, *Masterfoods / HB Ice cream*, [2000] ECR I-11369 (paras 51-53, 55-60): "*Where a national court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the Treaty (now Articles 101(1) and 102 TFEU) is already the subject of a Commission decision, in order not to infringe the principle of legal certainty it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. It is irrelevant in that respect that, in the context of an action for annulment brought against the Commission's decision by its addressee on the basis of the fifth paragraph of Article 173 of the Treaty (now of Article 263 TFEU), the President of the Court of First Instance (now the General Court) suspended operation of the Commission's decision. If such an action for annulment has*

been brought within the period prescribed, it is for the national court to decide whether to stay proceedings pending the final judgment in that action for annulment by the Community Courts or in order to refer a question to the Court of Justice for a preliminary ruling. When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted. It is incumbent on the national court to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment."

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