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Summary of the infringement decision of the Netherlands Authority for Consumers and Markets (ACM) of 27 May 2020 (Case ACM/19/035337)

Summary

1. With this decision, the Netherlands Authority for Consumers and Markets (ACM) imposes fines on four major cigarette manufacturers, totaling 82.1 million euros. The undertakings concerned have violated the Dutch and European cartel prohibition by coordinating prices of the cigarettes that they sold on the Dutch market. The infringement lasted from mid-July 2008 until late-July 2011.

2. The decision is addressed to Philip Morris Investments B.V. (formerly: Philip Morris Holland B.V.), Philip Morris Benelux BVBA, British American Tobacco International (Holdings) B.V. (formerly: British American Tobacco Nederland B.V.), Van Nelle Tabak Nederland B.V. and JT International Company Netherlands B.V. All four undertakings belong to large international concerns. In the rest of this decision, these undertakings will individually be referred to as PMI, BAT, ITN and JTI; and collectively as the "parties".

3. What makes this case special is that ACM has, for the first time, imposed fines for the *indirect exchange of information* between competing undertakings. The parties gained insight into each other's pricing strategies through their buyers (particularly wholesalers and retail chains). This is an illegal, anticompetitive practice, because it enabled the parties to coordinate their prices in advance with that of their competitors.

The market

4. From an economic point of view, this is an important market, as turnovers on the cigarette market go up, year after year. Each year, consumers spend approximately 3 billion euros on cigarettes. This includes taxes, excise taxes, and margins for intermediaries, so revenues for manufacturers are much lower (according to a rough estimate: a sixth of that figure).

5. The market is a *concentrated market* ("oligopoly"). Combined sales of the four parties represent approximately 95 percent of the market. Their collective market share is very stable. There are several smaller manufacturers, but they do not play any significant role in the competitive landscape. A second characteristic of the market is that there are *no new entrants.* The incumbent parties thus do not need to take any potential competitors into account. A third characteristic is the presence of *government regulation*. What is particularly important in this case is the way in which the government levies the excise taxes. The excise-tax laws stipulate that manufacturers unilaterally set the consumer retail prices of their cigarettes ("resale price maintenance") and that the price must be placed on the cigarette pack with a tax stamp (banderol). A pack of cigarettes of the same brand is the same in all stores across the Netherlands. Furthermore, the government has imposed restrictions on, for example, advertising. However, the regulatory regime still leaves sufficient room for competition. That means that all cigarette manufacturers still need to comply with the competition rules.

6. The cigarette manufacturers predominantly compete on price. In addition, they seek to distinguish themselves from their competitors by putting different brands on the market, which they position in the higher (more expensive) or lower (cheaper) segments of the market.[1] Despite all of these different brands, there is just one, single cigarette market. This fining decision covers the prices of all cigarette brands owned by the four major manufacturers.

7. The manufacturers do not sell their cigarettes to consumers directly, but to wholesalers and retail chains ("buyers"). Wholesalers bear the lion's share of the distribution of cigarettes to retailers.

The infringement: indirect exchange of competitively-sensitive information

8. ACM's investigation has revealed that, in the period from July 2008 through May 2011, the parties accepted competitively-sensitive information concerning the future resale prices of competing cigarettes, and used that information in determining their own pricing strategies, while they knew or could have suspected that their own pricing information would end up with their competitors. During this period, prices were regularly revised, for example because the government announced an excise-tax increase, or if the manufacturers themselves decided to introduce a new brand or reposition an existing brand in their product range.

9. The parties did not receive this information directly from each other, but from buyers with whom they had an existing business relationship. It was very detailed information, often in the form of pricelists, and sometimes also in the form of presentations and technical sheets. As already mentioned, the manufacturers set the resale consumer prices. However, before a pack of cigarettes in a new packaging with its new price lands on the shelf, manufacturers, buyers, and retailers must first make the necessary changes, which takes time. For that reason, it is necessary that manufacturers inform their buyers about planned changes in a timely manner. And that is allowed. However, manufacturers failed to require their buyers to handle the shared information confidentially. Also, the manufacturers did not refuse the information that they received from their buyers about their competitors. In fact, it was generally accepted that buyers passed on the information they received from one manufacturer to other manufacturers with whom they also maintained business relationships. Since the manufacturers continuously received information about the other three in this manner, they must have known that their own competitively-sensitive information would eventually end up with the others. ACM found evidence that the manufacturers were aware of this.

10. The parties set great store by the received information, and disseminated it within their organizations. If an undertaking receives information about the pricing strategies of competitors, you can assume that, according to case law, that undertaking will take the information into account when taking decisions about its own pricing strategy. That is exactly what ACM sees happening in the case of the cigarette manufacturers: they indeed took advantage of the information they had. ACM has established that the manufacturers waited for the information, asked for it, or even made an active effort to obtain the information. However, this does not mean that all manufacturers always implemented exactly the same price adjustments. It does mean that the parties made sure that their market conduct always remained predictable for the others, so that mutual competition was stifled – it was like "putting the brakes on competition."

[1] For example, PMI owns the following brands, among other ones: Marlboro, L&M and Chesterfield; BAT owns Pall Mall, Lucky Strike, Caballero, Stuyvesant and Kent; ITN owns Gauloises, West, Fortuna, JPS and Davidoff; and JTI owns Camel and Winston.

11. When asked about the reason for this practice, one buyer describes how the information was able to put the parties' minds at ease: "*I believe it's just for confirmation purposes, and to keep the market quiet. They use the information on their competitors' price lists for their own peace of mind, to see what the others have done. Just to check that what they are doing with their own new prices is okay, that they don't price themselves out of the market.*" [ACM: please note that the original quote is in Dutch].

12. An internal email of JTI reveals that this manufacturer does indeed take into account the received information: *"BAT, PMI and ITN now confirmed an RSP 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."*

13. BAT, too, takes advantage of the information it received from a buyer: "*Based on the public known prices of JTI, we decided to adapt our prices as follows (…).*" It should be noted that this concerned prices that were not yet displayed in stores.

14. In some cases, the manufacturers even went a step further, and actively (and proactively) asked buyers for pricing information, coming from their competitors. In an email to one of its buyers, JTI wrote: *"Attached is BAT's price list. As soon as you receive ITN and PMI, please forward them to me immediately"* [ACM: please note that the original quote is in Dutch]. And PMI asks a buyer: "*I was wondering whether you have seen any responses or fluctuations with regard to pricing? So far, we haven't seen any new pricelists or anything from JTI, which is still supposed to send its pricelist*." [ACM: please note the original quote is in Dutch].

15. Manufacturers sometimes took advantage of the situation (which they created themselves) to feel out how their competitors would react to a planned price increase ("a trial balloon"). For example, ITN wishes to find out whether the other manufacturers will respond to a planned price increase before setting its prices: "*ITN needs to see the competition follow in line with ITN pricelist. Meaning mainstream and VFM 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.*"

16. Before ACM issues a fining decision, the undertakings involved are given the opportunity first to submit their views in writing and orally. In their observations, they argued, among other things, that the information in question was, in fact, *public* information, because a large number of buyers had received the lists. ACM does not share this interpretation of events – nothing could be farther from the truth. It is not like the information could be freely shared because it was public (or already public anyway). No, according to ACM, the information only became *quasi*-public because the manufacturers themselves *allowed* it to be shared. Under normal market circumstances, no undertaking would show their hand so easily.

17. The parties further argued that the exchange of information between manufacturers and buyers is the result of the excise-tax legislation. ACM does believe that, because of that legislation, the cigarette market has indeed already become very transparent. However, by exchanging information about future prices, the manufacturers went one step further (and an unnecessary and illegal step for that matter). It is a step that takes the edge off the competitive pressure exerted by competitors.

18. The parties also argued that buyers passed on the information because it was in their own commercial interest. The parties alleged that buyers played manufacturers off against each

other in order to improve their margins on a pack of cigarettes. However, ACM did not find any indication that buyers used the information in negotiations about supply conditions to exert pressure on manufacturers. Buyers were thus not able to exert much influence on consumer prices in that manner. What is important to buyers is the price at which they are able to purchase the cigarettes – *that* determines their margins. In any case, the manufacturers had the option of *not* accepting and *not* using the provided information coming from their competitors. And they also had the option of ensuring that the provided information would not end up with their competitors, before it became visible to everyone when packs hit the shelves.

19. Not only do agreements between undertakings and decisions of associations of undertakings fall under the scope of the cartel prohibition, but also 'concerted practices' that have as their object or effect the restriction or distortion of competition. Undertakings must take all decisions about their market conduct independently without knowing what plans their competitors have. In that way, they are always stimulated to do their best to make consumers the best possible offer at the best possible price, while outdoing their competitors.

20. Undertakings are obviously able and allowed to keep a close watch on each other's market conduct, and to react to such conduct. However, for a market to function properly, undertakings on that market must face a certain degree of uncertainty. They cannot avoid the rivalry with others nor avoid the risks that come with them. The latter is what ACM essentially blames the parties: that they avoided intense competition by allowing each other 'a glimpse behind the scenes,' if you will, prior to each price adjustment.

21. In a nutshell: ACM's investigation has revealed that it was a common and generally accepted practice among the parties that information about future prices ended up with competitors, passed on by buyers. And it was an equally accepted practice to accept this competitively-sensitive information from others, time and time again. This did not happen "by accident" or occasionally, but deliberately and consistently. Information did not go in one direction, but in all directions, back and forth. None of the undertakings involved offered any resistance to this practice or took any action to stop it. No one told the other parties or buyers that this practice was unseemly, and that such information was not welcome. That is why ACM considers the practice of parties between July 2008 and July 2011 to be a single and continuous infringement, which had as its object the reduction of the existing uncertainty between parties about each other's pricing strategies, thereby reducing price competition among each other.

The fines

22. In ACM's opinion, the four major cigarette manufacturers involved have committed a serious infringement. The exchange of information, even though it happened indirectly, through buyers, reduced the uncertainty about each other's pricing strategies (planned or otherwise). Instead of preventing this from happening, the parties cleverly took advantage of it. In the absence of this exchange of information, competition on this market could have been fiercer. Furthermore, the cigarette manufacturers could have known that they had gone too far with this practice. Internal documents reveal that the parties were aware of the anticompetitive risks associated with their conduct. On the other hand, ACM does consider this infringement to be less serious than a situation where undertakings practically eliminate all price competition by concluding price-fixing agreements.

23. In its assessment, ACM does take into account several factors that are favorable to the parties: this marks the first time that ACM enforces the cartel prohibition in a case involving the indirect exchange of information, as well as the fact that special rules apply to this sector, such as

excise-tax laws, which produces a different kind of competitive dynamics on the market. ACM sets the fines at a level sufficient to ensure deterrence and makes sure that they are proportional. The fines are based on the undertakings' turnovers, namely cigarette sales in the Netherlands during the period of the infringement.

24. Philip Morris Benelux BVBA (PMI) is fined €27,503,000, British American Tobacco International (Holdings) B.V. (BAT) is fined €31,179,000, Van Nelle Tabak Nederland B.V. (ITN) is fined €10,410,000 and JT International Company Netherlands B.V. (JTI) is fined €13,021,000. ACM can no longer impose a fine on another infringer, Philip Morris Investments B.V. (PMI), because its infringement ended over ten years ago.