Published on *The National Law Review* https://natlawreview.com

# Dutch Competition Authority Fines Cold-Storage Companies for Exchange of Information in Context of Merger Talks

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On 23 March 2016, the ***Netherlands Authority for Consumers and Markets (ACM)*** announced that it had fined four cold-storage firms for having put in place anticompetitive arrangements while in extended merger talks with one another. (case number: 13.0698.31|15.0710.31|15.0327.31|15.0328.31). In addition, ACM fined five individuals for their personal involvement in these anticompetitive arrangements. The case at hand serves as a reminder that gun jumping, which is seen as an infringement of the merger control rules, is not the only antitrust risk associated with an M&A transaction.

While in discussions about a possible merger between them, the cold-storage firms frequently exchanged commercially sensitive information such as the price for food storage, current utilization rates of their storage facilities and whether or not they were looking for work. This information exchange, which took place between 2006 and 2009, sometimes resulted in price fixing, customer allocation or bid rigging.

Cold-storage facilities are primarily found in logistical hubs such as ports. Since logistics are central to the Dutch economy, ACM has identified it as a priority in its enforcement efforts. As a result, ACM decided to impose fines between €450,000 and €9.6 million, totalling almost €12.5 million, on the four companies. It also fined five executives, with the highest fine imposed on a particular individual amounting to €144,000.

In the context of an M&A transaction, information exchange is crucial in each step of the transaction from early stage discussions to completion. For the purposes of the efficient exchange of information, parties therefore usually sign a non-disclosure agreement (NDA) to protect confidential information. However, an NDA is not sufficient from a competition point of view because information exchange between competitors itself may be considered as a competition law violation under Article 101 of the Treaty on the Functioning of the European Union (TFEU) or under the corresponding legal provision in national law. In certain circumstances, information exchange may amount to a breach of the suspension obligation (gun jumping), which applies if a transaction is subject to a merger clearance obligation.

In the present case, since the merger was not consummated, there was no gun jumping under the merger control regime. However, the exchange of information was considered independently as a

cartel infringement.

It remains important for parties to merger transactions to remain vigilant and have in place appropriate safeguards, including clean teams consisting of people who are not involved in strategic decision making. In addition, they should limit information exchange to what is strictly necessary and should consider whether confidential information to be transmitted to the other party can be substituted by aggregated, historic or public information in order to achieve the intended aims. Lastly and most importantly, parties should keep in mind that they remain competitors until the transaction is completed.

The Dutch cold-storage firms apparently not only overlooked their obligations in this context, but even acted upon the information exchanged by aligning their prices and allocating business amongst themselves.



National Law Review, Volume VI, Number 92