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# Hands off beer and cigarettes – or at least do not exchange strategic information with your competitor!

## Recently published decisions issued by the German Federal Court of Justice and the Dutch Competition Authority give occasion to take a closer look into the prerequisites and consequences of anticompetitive exchange of information

**In May 2020, the Netherlands Authority for Consumers and Markets ('ACM') imposed fines totalling more than EUR 82 million on four major cigarette manufacturers for distorting competition by way of an indirect information exchange through wholesalers about future prices for cigarette packs.[1] In Germany, the Federal Court of Justice ('FCJ') issued a ruling in July 2020 with regard to the German *Beer Cartel* assessing in detail the requirements of concerted practices through information exchange and its consequences for the statute of limitation.[2]**

### *ACM – Cigarettes Cartel*

According to the ACM decision, between July 2008 and July 2011 the four major cigarette manufacturers in the Netherlands which produce cigarettes under various brands, such as Marlboro, Lucky Strike, Gauloises, and Camel, illegally exchanged information about future prices for cigarette packs. The manufacturers did not exchange the information among each other, but indirectly via their wholesalers.

It was common practice for the manufacturers to send their new price lists to wholesalers and other buyers several weeks before the retail prices to end customers were adjusted. This allowed the wholesalers to start adjusting their sales systems. However, some wholesalers also passed those price lists straight on to competing manufacturers before the new retail prices came into effect. The cigarette manufacturers knowingly asked for, received, and accepted this information. The ACM found that the manufacturers did in fact make use of the competitor pricing information when determining their own retail prices for a pack of cigarettes in order to increase their profit margins. In some cases, 'trial balloons' with information were sent to wholesalers to see how other competitors would respond. After all, manufacturers knew that their pricing information would be passed on to competitors by these wholesalers.

As this indirect information exchange allowed the cigarette manufacturers to regularly adjust their retail prices on the basis of information about future prices of competing cigarette brands, there was much less uncertainty among manufacturers about the competitors' future pricing. As a consequence, the manufacturers were able to coordinate their pricing strategies and competition among them was distorted.

### *FCJ – Beer Cartel*

In its *Beer Cartel* ruling, the FCJ dismissed a previous ruling of the Dusseldorf Higher Regional Court (the 'Dusseldorf Court') from April 2019[3] closing proceedings against Carlsberg, a participant to the German beer cartel, as the FCJ held that the lower court erred in finding that Carlsberg's anticompetitive conduct was time-barred.

In 2013 and 2014, the German Federal Cartel Office ('FCO') imposed fines of approx. EUR 338 million[4] on several beer brewing companies, *inter alia* Carlsberg, for a price collusion between 2007 and 2009 based on an information exchange. Following the FCO's decision, the Dusseldorf Court found that in March 2007 a representative of Carlsberg took part in a meeting where the brewers exchanged information regarding plans to in-

[1] ACM, decision of 27 May 2020, Case 19/035337.

[2] FCJ, decision of 13 July 2020, KRB 99/19 – *Beer Cartel*.

[3] Dusseldorf Court, decision of 3 April 2019, 4 Kart 2/17 – *Beer Cartel*.

[4] See summary report of FCO, decision of 27 December 2013 and 31 March 2014, B10-105/11 – *Beer Cartel*.

crease the beer price shortly after. According to the ruling, Carlsberg's representative did not actively participate in the discussion but was well aware that his passive behaviour was understood by the other participants as an approval of the information exchange aiming to coordinate future price increase. The meeting was not followed by any immediate price increase. Later on, around July or August 2007, other beer brewers bilaterally discussed – without Carlsberg – price increases and implemented them until mid-2009. Carlsberg, however, individually increased its prices based on an internal decision in June 2007.

The Dusseldorf Court held that the anticompetitive behaviour of Carlsberg ended with the inconclusive meeting in March 2007 and was therefore time-barred in April 2019 after expiration of the 10-year maximum limitation period for antitrust infringements. On the contrary, the FCJ denied the statute of limitation in the case at hand as it found that the distortion of competition in fact did not end before mid-2009.

The FCJ held that, according to established case law of the European Court of Justice, the concept of a concerted practice requires two separate elements with a cause-effect relationship between the two: (1) participating undertakings concerting with each other, and (2) a subsequent conduct on the market. With regard to the first requirement, the *concerting practice*, an exchange of information regarding relevant competition parameters aiming to remove uncertainty about the competitor's future market behaviour is a typical example. Despite the fact that the March 2007 meeting was inconclusive at the end, the identified information exchange regarding the future beer price increase met this condition as commercially sensitive information was exchanged. The question to what extent an information exchange actually had effects resulting in coordinated market behaviour in consequence of the concerting practice rather belongs to the second requirement, the *subsequent conduct on the market* in implementation of the previous coordination.

The FCJ stated that in civil and administrative antitrust proceedings a *factual presumption* exists that coordination by means of information exchange impacts the market behaviour of the companies involved. Based on principles of economic experience, a company regularly takes into account knowledge of the intended or contemplated market behaviour of a competitor when determining its own market behaviour. In the case a hand, the FCJ held that Carlsberg did not refute this presumption and therefore found that its supposedly individual price increase from 2008 until 2009 was in fact influenced by the meeting in March 2007. As the concerting practice and the subsequent causal market behaviour legally constitute one single evaluation unit, the FCJ found that the cartel infringement did not end in 2007 but in mid-2009 and, consequently, was not time-barred when the Dusseldorf Court issued its ruling in April 2019.

### *Comment*

Both decisions show that although information exchange does not qualify as a hardcore-restriction of competition, companies should be well aware that even a *passive* participation in a meeting or giving and receiving sensitive information to/from wholesalers might have far reaching consequences. The FCJ has now reminded lower courts to take into account the strong indicative effect of the factual presumption in the overall appraisal of evidence in antitrust proceedings. Cartelists must thus provide substantial evidence when arguing that an information exchange did not have any immediate subsequent effects. At the end, Carlsberg, for example, should have ideally *distanced itself* clearly and explicitly from the concerted practice, in a way that the other participants of the meeting in March 2007 would have been aware that it no longer adheres to the concreted practice.

**Franziska Lange-Schlüter** **Isabel Oest**

**Commeo LLP**
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

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