

De minimis and bid rigging: Tribunal clarifies market share calculation

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According to the Trade and Industry Appeals Tribunal, the ACM was wrong to find that the relevant market should be limited to each individual tender project when applying the national *de minimis* clause to systematic bid rigging cartels. The Tribunal also corrected the Rotterdam District Court's earlier ruling that for continuous infringements, the five-year limitation period prevents the ACM from taking account of the "time-barred" part of the turnover when calculating the fine. As a result of the Tribunal's ruling, a lengthy bid rigging cartel qualifying as a continuous infringement could be faced with a higher fine. Or, it may benefit from the *de minimis* clause. All the more reason to keep an eye on market delimitation in the case of bidding markets.

In a [decision](#) of 13 November 2007, the Dutch Authority for Consumers & Markets (ACM) imposed fines on a number of tree growers for their participation in a cartel during the period 1 January 1998 – 25 February 2004. Those companies consulted each other systematically prior to tendering for contracts for tree nursery products to municipalities. In the appeal against the ACM decision by two tree growers, the Rotterdam District Court remarkably [ruled](#) that, having regard to the five-year limitation period and the fact that the ACM's decision dated from 13 November 2007, the turnover achieved before 13 November 2002 related to the time-barred part of this single and continuous infringement. Consequently, the limitation period prevented the ACM from taking account of the turnover achieved before 13 November 2002 when calculating the fine, and the Court subsequently reduced the respective fines. The Tribunal has now [clarified](#) that the five-year limitation period relates to the ACM's power to impose a fine. For continuous infringements such as in this matter, time starts running on the day the infringement ceases. Consequently, if the ACM's power to impose a fine has not been time-barred, the limitation period cannot affect the amount of the fine. The Tribunal's approach is in line with the approach taken to the European Commission's power to impose fines under Article 25 [Regulation 1/2003](#).

The Tribunal also ruled that the ACM had been wrong in its market share calculation to determine whether the national *de minimis* clause could apply. Unlike the European Commission's [de minimis notice](#), the national *de minimis* clause also applies to hard core cartels. At the time of the cartel, the *de minimis* clause provided for an exemption for restrictive agreements, including hard core cartels, where the parties' combined turnover does not exceed EUR 40 million and their aggregate market share remains below 5%. The ACM found that, because the cartel related to bidding markets, the market shares of the parties amounted to 100% per project. The Tribunal did not agree. Since the infringement consisted of systematic consultation between the parties, the ACM should not have limited itself to a single project, but should have looked at the market shares of the parties on the

relevant market for tree nursery products for the public sector.

The Tribunal's ruling indicates there is certainly reason to keep an alert eye on market delimitation in the case of bidding markets.