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Dutch Court of Appeal Allows the Use of Wiretaps by Competition Authority

On July 9 2015, the Dutch Court of Appeal (*het College van Beroep voor het bedrijfsleven*) overturned two judgments of the Rotterdam District Court. The Dutch Court of Appeal ruled that the Dutch competition authority (*Autoriteit Consument en Markt* hereafter referred to as ACM) is allowed to use wiretaps provided by the Dutch Public Prosecution Service (*Openbaar Ministerie*) in the context of criminal investigations.

The Court of Appeal decided that while the ACM does not have the right to place wiretaps themselves, other authorities like the intelligence and investigation service of the Ministry of Housing, Spatial Planning and Environment (VROM-IOD), and the National Police Internal Investigations Department (*Rijksrecherche*) have the right to provide the ACM with wiretap reports if they suspect competition law is being breached by companies. The Court of Appeal ultimately concluded that wiretaps provided to the ACM qualify as criminal-law information and that no legal ground requiring an assessment of the public prosecutor is necessary prior to the issuance of data to the ACM. The only requirement for the issuance of wiretaps is the necessity to preserve substantial general interest, with cartel prohibition qualifying as a substantial general interest. The Court of Appeal noted that it is necessary for the ACM to have these wiretap reports, as these anti-competitive agreements are often not put down on paper. The wiretap reports may therefore be the primary evidence of anti-competitive conduct. The judgment essentially means that, if the wiretaps were conducted legally, the authorities have free reign to provide the wiretap reports to the ACM, as evidence for competition law infringement.

The judgment clarifies that while the ACM's powers of information gathering are limited, it is capable of obtaining information via the investigative powers of other authorities. This means that if the wiretaps of other authorities were conducted legally, there is nothing in the law that precludes them from providing the wiretap reports to the ACM. The judgment therefore largely expands the ACM's ability to gather evidence on anti-competitive information exchanges and competition law infringement. The threshold for information gathering further seems to be lower than ever, as no justification, other than referral competition law concerns, is required.

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