NMCC

The European Law Students' Association
THE NETHERLANDS

Case of the 6th Edition

Written by Prof. Giorgio Monti

National Moot Court Competition

competitions@nl.elsa.org

Fijne Reizen and Spannede Evarigen v Autoriteit Consument en Markt

1. Fijne Reizen operates a platform that connects tour guides and tourists. The platform is operated in part by a team of engineers who require training offered by the company before they are allowed to operate on the platform. This training is very expensive, in large part because much of this training is provided by law firms about how to comply with EU digital laws. On the other hand, the engineering skills that these employees have can be utilized in executing several other jobs.

2. At a trade fair, Dave, the CEO of Fijne Reizen meets Gerry who operates a competing platform, Spannede Evaringen. They both complain about the high costs of onboarding new engineers and the high costs of legal training due to excessive EU regulations. They agree to cooperate with a view to reducing these costs by buying legal training services jointly. The result of this cooperation is that approximately 60% of the training is now offered to all new engineers of the two firms together. The remainder is still provided by Dave and Gerry separately because this is specific to the platform and there would be competition risks in this part of the training were to be organized jointly.

3. One element of this contract between Fijne Reizen and Spannede Evarigen contains a no poach agreement: "The parties agree that they will not solicit employees from each other who have been trained under this joint program until at least five years have elapsed since the employee has obtained their training." It is clear from the evidence gathered that employees are free to change employment if they wish to and this no poach agreement is limited to preventing the two firms from actively soliciting engineers from their rival.

4. The Dutch competition authority has issued a decision finding that while the joint purchasing of training services is fully compliant with EU and Dutch Law, the no poach agreement is a restriction of competition by object, contrary to Article 101(1) TFEU and Article 6(1) of the Mededingingswet (Dutch Competition Act). The two undertakings (Fijne Reizen and Spannede Evaringen) appeal against this decision to the Rechtbank Rotterdam.

5. Dave and Gerry think this decision fails to understand the realities of the business. The engineers affected by this clause have multiple exit options, including other digital platform operators and other businesses outside the platform market. In addition, Dave and Gerry believe that by reducing training costs, this allows their firms to put more resources into improving the platform so that both tour guides and consumers benefit. According to them, the ACM cannot make a finding that these agreements are restrictive by object but must show their anticompetitive effects. In the alternative, Dave and Gerry claim that for an object analysis, it is essential that the ACM defines the relevant market. Finally, even assuming that the no poach agreement restricts competition, this is either an ancillary restraint, or it may be exempted for its efficiencies.

6. Uncertain about the application of certain elements of EU competition law, the judge sends the following questions to the Court of Justice seeking a preliminary ruling on the basis of Article 267 TFEU.

7. First question: Are no poach agreements to be treated as restrictions by object or by effect? If an object assessment is carried out, must the competition authority define the relevant market?

8. Second question: can a no poach agreement be characterized as an ancillary restraint? If so under what circumstances?

9. Third: when applying Article 101(3) TFEU to evaluate no poach agreements, is it relevant, when determining if the agreement contributes to technical and economic progress, to analyze the positive impact which this agreement has in the development of platforms which improve user experiences for tourists and tour operators on the platform?