

Investigation Wadi

the criminal investigation into CMK Mammoth Gulf B.V.

Statement of Facts and Conclusions of the Netherlands
Public Prosecution Service

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National Office for Serious Fraud, Environmental Crime and Asset Confiscation
(Functioneel Parket)

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Part I: Statement of facts

1. Introduction

1.1 Purpose and contents

This statement of facts describes the grounds for and the findings of the criminal investigation into Combinatie Mobiele Kranen Mammoth Gulf B.V. (hereinafter referred to as CMK) by the Dutch Fiscal Information and Investigation Service (hereinafter referred to as FIOD), under the auspices of the Netherlands Public Prosecution Service (hereinafter referred to as NPPS).

1.2 Description of the affected legal entity

CMK is a Dutch legal entity with its registered seat in Utrecht. The core activity of CMK is the manufacture, rental and sale of lifting gear and other products for the metal industry, and transport and assembly activities.

CMK is an indirect subsidiary of Mammoet Holding B.V. (hereinafter referred to as Mammoet Holding). Mammoet Holding is in turn an indirect subsidiary of SHV Holdings N.V. (hereinafter referred to as SHV). As from 20 February 2020, the name CMK was altered to Mammoet Middle East B.V.

1.3 Grounds for the criminal investigation

At the start of 2017, the FIOD received information from the Financial Intelligence Unit (FIU) among others about unusual transactions by CMK. The investigation into this information by the FIOD resulted in the reasonable suspicion that CMK was guilty of bribery of an employee of a Korean company.

2 Investigative findings

2.1 Introduction

The criminal investigation revealed that in the period between 29 June 2015 and 11 November 2015, CMK promised a total of USD 100.000 to a project director at a Korean company (hereinafter referred to as the project director). This company was one of the parties responsible for the construction of a power generation plant in Cap Djinet in Algeria. The purpose of the promised reward was to obtain an order relating to the implementation of (part of) the work involved in the construction of this power generation plant.

Further details are provided below of the investigative findings of the FIOD.

2.2 Summary of investigative findings

As part of the construction of the power generation plant in Algeria, the Korean company asked CMK to issue an offer for subcontracting work. In September 2014, CMK submitted its offer. Because the project director requested a further explanation of the submitted offer, on 29 June 2015, a meeting took place in Dubai between the director of CMK and the project director. During this meeting, the project director requested a commission of USD 100.000. He promised - if payment of this commission was agreed upon - that he would ensure that CMK was awarded the order. The member of the board of CMK agreed, subject to the condition that a contract and invoices would be drawn up relating to the payment. The new offer from CMK was raised by USD 100.000.

The investigation by the FIOD revealed that it was clear to the member of the board of CMK that this payment was intended as a private payment to the project director.

On 14 July 2015, CMK received confirmation that it would be awarded the order. The order agreement was signed by the director of CMK and the project director of the Korean company and was worth around USD 3.5 million.

At the end of September 2015, from his private email address, the project director sent several email messages to CMK containing requests to pay out part of the promised amount in cash. In the framework of the promised amount, the project director also submitted a service agreement and three invoices to CMK. This agreement was signed on behalf of CMK, by its director.

Of the promised USD 100.000, USD 75.000 was actually paid to the project director, of which USD 25,000 in cash. As agreed, the remaining USD 25,000 was due to be paid following completion of the work on 30 June 2016. This payment was never made.

During a Compliance Scan by SHV internal audit, SHV became aware of the above. SHV then issued the instruction to make no further payments to this party. In response to these findings, SHV commissioned a forensic investigation into irregularities at CMK (see also section 5.2.2).

Part II: Conclusions of the Netherlands Public Prosecution Service (NPPS)

3 Offences

3.1 Offences

On the basis of the investigative findings of the FIOD, the NPPS concludes that CMK is guilty of the following criminal offences:

1) ***Commercial bribery***

in the period between 29 June 2015 and 11 November 2015, in the Netherlands, the United Arab Emirates and Algeria, made punishable by Article 328ter(2) of the Dutch Criminal Code;

2) ***Falsification of documents***

in the period between 20 September 2015 and 11 November 2015, in the Netherlands, the United Arab Emirates and Algeria, made punishable by Article 225(1 and 2) of the Dutch Criminal Code, committed repeatedly;

3.2 Attribution of offences to legal entity

The NPPS concludes that the criminal behaviour as referred to in 3.1, was effectively committed by employees of CMK, on behalf of CMK. The promise to pay USD 100,000 was made at the board level of CMK. These actions were of benefit to CMK, because, as a consequence, CMK was awarded the order by the Korean company.

The criminal offences were therefore committed in the sphere of influence of the legal entity and can be attributed to CMK.

4 Serious nature of the facts

4.1 Introduction

On the basis of the findings of the FIOD, the NPPS concludes that CMK was guilty of commercial bribery and falsification of documents. The NPPS views this behaviour as particularly objectionable, for a number of reasons.

4.2 Internationally operating company

CMK is an internationally operating company with as its core activities the manufacture, rental and sale of lifting gear. CMK has been active since 1977 in the Middle East, and maintains an office in Dubai. The business activities of CMK are carried out in a sector and in countries susceptible to corruption. CMK can be expected to be aware of and comply with (international) legislation and regulations, including anticorruption laws.

4.3 Bribery of project direction of (potential) client

In the opinion of the NPPS, CMK is guilty of commercial bribery and falsification of documents. The aim of CMK was financial gain and since the order was indeed awarded, the company actually profited from its actions. This gives grounds for the confiscation of these gains obtained by CMK.

By acting in this manner, CMK is guilty of practicing business in a manner that is socially disruptive and which seriously harms fair (international) competition between parties operating in the same sector. By using falsified documents, CMK was also guilty of damaging the confidence placed according to generally accepted standards in the accuracy of such documents.

5 Considerations for offering a settlement

5.1 Legal framework

Criminal cases can be settled in various ways. One of the options is for the public prosecutor to offer the suspect a settlement, to avoid criminal prosecution. The public prosecutor may set out one or more conditions as described in Article 74(2) of the Dutch Criminal Code. If these conditions are met, the right to criminal prosecution is waived. The settlement is an option provided for by law to settle criminal cases outside the courts.

5.2 Statement of reasons

The NPPS considers a transaction to be an appropriate settlement in the criminal investigation Wadi, for the following reasons:

- 1) Mammoet Holding and CMK cooperated in the criminal investigation, had the matter thoroughly investigated and provided relevant information to the FIOD and the NPPS;
- 2) Both Mammoet Holding and CMK took remediation measures and compliance measures to prevent the committing of criminal offences in the future;
- 3) CMK acknowledged the facts;
- 4) CMK has paid the unlawfully obtained gains to the Dutch State;
- 5) CMK has not been previously convicted for criminal offences (first offender).

5.2.1 Cooperation with the investigation

After being informed of the criminal investigation, CMK cooperated fully with this investigation. On its own initiative, the company supplied information relevant to the investigation to the NPPS and the FIOD, and supplied all documents requested by the FIOD. In addition, on the instructions of SHV, a detailed forensic investigation was carried out, the investigative findings and all underlying documents for which, including interview reports, were shared with the NPPS in their entirety and without reservation.

5.2.2 Remediation and compliance measures

In response to the findings of the investigation carried out on behalf of SHV with regard to the Vanguard investigation, SHV rolled out a series of projects to improve compliance with legislation and regulations within its groups and to strengthen its control over compliance (for a detailed explanation of the measures taken by SHV, see section 6.2.2 of the statement of facts with regard to the Vanguard investigation). One of the first initiatives, which was launched in November 2015, involved a Compliance Scan of the Mammoet group by SHV internal audit. On the basis of the Compliance Scan of the Mammoet group, SHV internal audit selected among others the offices of Mammoet in Dubai for a further on-site visit. During this visit, it was discovered that employees of CMK may have made payments to a representative of a Korean company. SHV subsequently issued the instruction to make no further payments to this party. A series of remediation measures were subsequently taken, including disciplinary measures against the employees involved.

Furthermore, supported by SHV, over the past few years, Mammoet Holding has implemented a robust compliance policy that is executed and monitored throughout the entire group. Part of this policy includes a compulsory periodic validation of an action plan with improvement points in respect of compliance, and the relevant reporting to the Board of Directors of Mammoet Holding and SHV. Within Mammoet Holding, an Ethics & Compliance Committee was also appointed, that has introduced strict internal compliance schemes within Mammoet Holding and its subsidiary companies, including the screening of clients and suppliers, and that is responsible for monitoring compliance.

5.2.3 Acknowledgement of facts

CMK acknowledged the facts as outlined in part I to the NPPS, and expressed its regret.

6 Settlement agreement

6.1 Fine and unlawfully obtained gains

As part of this settlement, CMK paid a total of EUR 535.000 to the Dutch State. This amount consists of a fine of EUR 182.000 and the confiscation of unlawfully obtained gains in the amount of EUR 353.000.

6.1.1 Fine

Given all the facts and circumstances, the NPPS considers a fine of EUR 182.000 to be appropriate. In determining the amount of the fine, the number of criminal offences, the serious nature of the facts and the involvement of the management of CMK were taken into account by the NPPS.

In calculating the fine, the NPPS has decided to apply fine category 5, as contained in the law at the time when the criminal offences were committed.

In calculating the amount of the fine, the NPPS assesses whether, and if yes to what extent the suspect cooperated in the criminal investigation. The extent of cooperation is assessed according to a variety of aspects, including the scope, quantity, quality and timing of the cooperation in the given circumstances. One important relevant aspect is whether the defence cooperated proactively or reactively. Also relevant is the extent to which the FIOD and the NPPS are able to use the documents and information provided to verify the information.

CMK cooperated fully with the investigation by the FIOD (see section 5.2.1). For this reason, in determining the amount of the fine, the NPPS applied a discount of 25%.

6.1.2 Unlawfully obtained gains

As a result of the bribery, CMK was awarded the order by the Korean company, and as such received unlawfully obtained gains. As part of the settlement, the NPPS therefore confiscated a total amount of EUR 353.000.

6.2 Publication of settlement agreement

The settlement agreement between the NPPS and CMK has been published in its entirety on the website of the NPPS.