Belgian Competition Law NEWSLETTER

BAKER & MCKENZIE

Authors

Kurt Haegeman
+322 639 3665
Kurt.Haegeman@bakermckenzie.com

Joost Haans
+322 639 3766
Joost.Haans@bakermckenzie.com

Vincent Mussche
+322 639 3741
Vincent.Mussche@bakermckenzie.com

In this issue

Introducing our Belgian competition law team

Our team of Belgian competition law practitioners consists of 5 lawyers based in Brussels:


Kurt Haegeman


Joost Haans


Vincent Mussche


Charles Paillard


Hannelore Wiame

Belgian Competition Authority adopts note on enforcement priorities

In June 2014, the Belgian Competition Authority published its first note on enforcement priorities under the new Competition Act which entered into force in September 2013. According to the new Competition Act, the Direction Committee of the Belgian Competition Authority, consisting of the President, the Competition Prosecutor-General and the Chief Legal and Chief Economist, is in charge of the yearly preparation of a note on enforcement priorities.

The note expands on both the Authority's methodology to select cases and the strategic and sector priorities for the year 2014.

The Authority applies a methodology for selection and prioritisation of cases that is in line with other competition authorities such as the CMA in the UK. It uses four criteria: impact, strategic importance, risks and resources. Impact includes not only an assessment of the direct harm caused by the behaviour in the sector where the alleged infringement took place in terms of prices, product quality and service to consumers, but also takes into account indirect effects such as the dissuasive factor of the enforcement in connected sectors. A case will be considered to have strategic importance when it involves a sector considered as a priority or where the case would enable the Authority to clarify the interpretation of the Competition Act.

The Authority has indicated that it will prioritise enforcement in the following sectors:

- liberalised sectors and network industries, in particular energy and telecom, gambling;
- retail distribution and the relationship with suppliers;
- concentrated logistic and transport markets;
- media sector; and
- liberal professions and their trade associations.

In addition, the Authority explicitly mentions that it could open investigations into sectors in which it has been less active in the past. In that respect, particular attention will be paid to bid rigging in public tendering procedures and to the financial services sector.

Finally, the Authority states that it will attempt to maintain a good balance between the enforcement of hardcore infringements and more complex or innovative cases.

>> Back to top >>

Belgian Competition Authority adopts new fining guidelines

On 26 August 2014, the Belgian Competition Authority adopted new fining guidelines (replacing the guidelines which had been in place since 19 December 2011). The new guidelines basically copy the approach followed by the European Commission in its fining guidelines, and are part of the Authority's objective to enhance the deterrent effect of its fines. The Authority says that this new approach must be seen in a context of harmonization of sanctions for infringement of the competition rules within the European Union. This means that companies active in Belgium will be sanctioned according to the same calculation method, regardless of whether the investigation is led by the Belgian Competition Authority or by the European Commission (DG Competition).

The main change introduced under the Authority’s new fining guidelines is that infringements of a longer duration will be sanctioned much more severely. Like the European Commission, the Belgian Competition Authority will apply a “multiplier” approach to duration, whereby the basic amount of the fine is multiplied by the number of years of the infringement. This “duration multiplier” has an exponential effect on the level of fines imposed on cases where infringements have lasted several years.

A further important change is the removal from the new guidelines of the possibility for the Authority to take into account a company’s compliance efforts when setting the level of a fine.

The new guidelines will enter into force on 1 November 2014 and will apply to all cases for which no draft decision has been submitted to the Competition College on that date.

>> Back to top >>

Consumer class actions come to Belgium

The Belgian Collective Redress Bill entered into force on 1 September 2014. Consumers now have the possibility of obtaining collective redress in business-to-consumer (B2C) relationships including for violations of competition law.

The Belgian legislator consciously chose not to opt for the 'US style' of class actions. The procedure can be instituted by a group of consumers who have individually suffered damages as a result of a common damage cause. However, consumers who want to file a collective damage claim can only do so through a group representative. Only certain associations, such as certain consumer organisations (for example Test-Aankoop) are allowed to act as a group representative.

Rather than having a pure opt-in or opt-out system, the Belgian legislator has chosen for a mixed system, where the judge will decide on a case by case basis on which system to use.

After a claim for collective redress has been found admissible, there are two possible systems the Court could apply. The first one is an 'opt-in system', which means that every consumer who wants to join the group seeking damages, needs to expressly indicate that he wants to be part of that group. This system is mandatory for consumers that are not usually residing in Belgium and/or in cases that concern moral or physical damage. In an 'opt-out system', all consumers who suffered the collective damages automatically belong to the group, unless they indicate otherwise. Although the group representative can suggest which system would be the most suitable one, in the end it is the Court that has a large discretion to decide which one to choose.

The Act offers two alternative paths to end the dispute: either parties can ask the Court to validate an “agreement for collective redress”, i.e. a negotiated settlement, or a “claim for collective redress” can be introduced before the Court, which will then hear the case and render a final judgment. If the parties are able to reach a settlement, a simplified procedure allows for the settlement to be validated by the Court. By agreeing to a settlement, the defendant does not concede its liability or fault. If the parties are not able to reach a settlement, the case can be brought before the Court. This will lead to a judgment, at least if the mandatory settlement period set by the court turned out not to be successful. In case there is a settlement or when the Court decides to grant compensation, a liquidator will be appointed. The liquidator will supervise the payment of the compensation to the relevant consumers, included on the list of consumers that can benefit from the compensation agreed to or awarded by the Court.
The courts of Brussels have exclusive jurisdiction to handle collective redress cases.

It is important to stress that these new collective redress procedures will only be available for cases in which the cause of the damage occurred after September 1, 2014. In other words, currently pending litigation cases will not be affected by the new legislation.

>> Back to top >>

Competition College fines Electrabel for abuse of dominance

On 18 July 2014, the Competition College fined Electrabel EUR 2 million for abuse of dominance on the Belgian market for electricity production, wholesale and trade during the period 2007-2010.

In its decision, the Competition College disagreed with the Competition Prosecutor who found that Electrabel had adopted a real strategy to systematically withdraw electricity capacity in order to increase prices by the constitution of a reserve. It ruled that the creation of an additional electricity reserve in order to satisfy balancing requirements to avoid contractual penalties does not in itself constitute a manifest abuse of dominance.

However, the College considered that Electrabel had abused its dominance by charging unfair prices in the context of the sale of parts of the reserved capacity on Belpex Dam given that the margin for such sales was excessively disproportionate compared to the marginal production cost and was not justifiable.

>> Back to top >>

Competition College imposes provisional measures on BMW

Feltz, a BMW and Mini dealer based in Marche-en-Famenne filed a complaint on 11 April 2014 with the Belgian Competition Authority alleging that BMW had engaged in restrictive practices in order to prevent Feltz to continue its activities as an independent repairer after BMW had unilaterally terminated the dealership agreement in the Autumn of 2013. More specifically, Feltz accused BMW of abusing its dominance on the Belgian market for the provision of repair and maintenance services for BMW and Mini in particular by the unjustified refusal to recognise Feltz as a recognised repairer and to provide Feltz with certain technical and client related information required for the provision of repair services as an independent repairer. Feltz also argued that BMW had engaged in several other anti-competitive practices with other BMW/Mini dealers such as resale price maintenance and sales restrictions for spare parts.

The College considered that the conditions to adopt provisional measures were fulfilled as there was a prima facie infringement and an urgent need to avert a situation that could cause serious, imminent and irreparable harm to the claimant. As a result, on 11 July 2014 it imposed a number of measures on BMW including the obligation to help Feltz during a six month period to become an authorised repairer, recognised by insurance and leasing companies in a similar manner as BMW's authorised dealers and repairers, to inform its customers in writing that they are free to chose independent repairers without losing their guarantee (bearing in mind that reparations under guarantee can only be carried out by recognised repairers), to grant Feltz access to technical and other client related information required for the provision of repair services and to inform its recognised Belgian and German dealers and repairers that they

are free to sell spare parts to independent repairers within the EU.

>> Back to top >>

Competition College clears acquisition of Club by Standaard Boekhandel

On 10 June 2014, the Competition College cleared the acquisition of Club by Standaard Boekhandel and its mother company ZuidNederlandse Uitgeverij.

In its decision, the College considered the market for the sale of books to consumers to be the only affected market for the purpose of merger control (a further possible distinction between sales over the internet and through bricks & mortar stores was identified, but ultimately left open in the decision). The College followed the Competition Prosecutor's analysis that the transaction would not give rise to any competition concerns (despite some objections received from a number of competitors and other market players) given the minor increase in market share as a result of the acquisition and the strong existing competitive pressure in that market exercised by internet sales and general retailers such as supermarkets or toy stores also selling books.

>> Back to top >>

Competition College confirms closing of the file in Villo! concession complaint

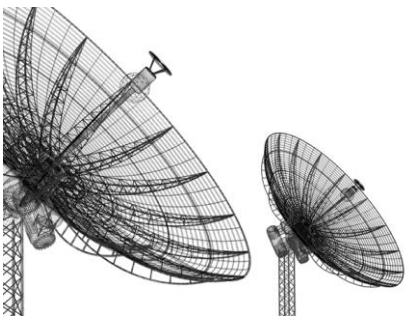
In October 2013, the Competition Prosecutors decided to close the file concerning a complaint lodged by ClearChannel Belgium and Belgian Posters in 2008 against JCDecaux in connection with the award by the City of Brussels of a concession to JCDecaux, which mainly related to publicity on the furniture of a bicycle renting system called Villo!. Clear Channel decided to appeal this decision in November 2013.

In its decision on appeal of 31 March 2014, the Competition College first clarified that, whilst the award of a concession inherently impacts competition for the duration of the concession, the College has no competence to assess the legality of public tendering procedures under the competition law rules. Such procedures are governed by specific rules such as transparency and non-discrimination obligations. The power to supervise the respect of these rules belongs to the exclusive competence of the administrative courts. However, the College specified that it remains competent to assess companies' behaviour in the context of the submission of their offers in response to public tenders or after the award of a concession.

The Competition College rejected all pleas advanced by ClearChannel. First, it held that the Competition Prosecutor could, as far as the facts and arguments that can be analysed under the competition rules are concerned, reasonably conclude that no sufficient elements had been brought forward in relation to the allegation that JCDecaux would have abused its dominance by benefiting from an anti-competitive leverage effect from earlier contracts in 1999 and 2006 with the City of Brussels relating to the publicity on public furniture, including that of Villo's predecessor Cyclocity. Second, the College ruled that it was not competent to rule on ClearChannel's allegations that the Villo! public tendering procedure had not been organised in a transparent manner. Finally, the College rejected ClearChannel's argumentation that the Competition Prosecutors had not completely or correctly analysed JC Decaux's alleged abusive behaviour on the Brussels public furniture publicity market.

>> Back to top >>

Competition College clears merger in media sector subject to commitments



On 26 March 2014, the Competition College cleared the acquisition by Tecteo, a company mainly active in the telecom and audio-visual sector under the brand VOO in the Brussels and Walloon region, of L'Avenir Advertising and Editions de l'Avenir (L'Avenir), a publisher of newspapers and magazines such as l'Avenir and Proximag.

Despite the fact that the notifying parties had requested the application of the simplified procedure, the Competition Prosecutor decided to review the transaction under the normal merger review procedure. It did so because an extensive market survey involving 49 market players had demonstrated that the proposed market definitions were contested. The survey had also revealed a number of potential vertical competition concerns related to the fact that Tecteo would become the only market player active both in editing and distribution of radio, television, press and internet content.

In its decision, the Competition College agreed with the Competition Prosecutor's analysis of the vertical and conglomerate effects of the acquisition. In particular it agreed with the reasoning that there only existed a risk that Tecteo would have access to commercially sensitive information from its competitors in the area of cable distribution or telephony when they book advertising space in the press publications of Editions de l'Avenir. The effect would be to strengthen Tecteo's existing dominance on the retail market for the diffusion of audio-visual services in the zone covered by VOO.

Nevertheless, the Competition College held that the commitments presented by Tecteo, as further completed upon request of the Competition Prosecutor during the investigation, were sufficient to remedy this risk and cleared the transaction. More specifically, Tecteo committed, for a period of five years, not to shorten the deadline for submission of information in connection to planned advertising, to install appropriate Chinese Walls within the Tecteo Group and to submit to the Competition Authority the list of employees involved in advertising planning as well as a copy of the signed confidentiality agreements.

>> Back to top >>

Brussels Court of Appeals annuls cartel fine imposed in flour cartel

On 28 February 2013, the Competition Council fined five flour producers EUR 370,000 for price coordination and exchange of commercially sensitive information aiming at stabilising the market. This decision followed earlier decisions of other national competition authorities also sanctioning a cartel in the flour market in their jurisdictions, including a decision of the Dutch Competition Authority (ACM).

Brabomills, fined EUR 100,000 by the Competition Council, appealed the Council's decision before the Brussels Court of Appeal on the basis that the probative value of the evidence did not meet the requisite legal standard required in competition cases to prove its participation in the cartel. It also argued that the Council had discriminated Brabomills compared to flour producers which had not been fined and that the Council had violated the ne bis in idem principle.

All pleas of law, save for the applicant's plea relating to the violation of the ne bis in idem principle, were dismissed by the Brussels Court of Appeal. With regard to the alleged violation of the non bis in idem principle, Brabomills claimed that the ACM's decision had already covered one continuous and single infringement on the entire Benelux flour market.

In its reasoning, the Court first reiterated the case law of the European Court of Justice in relation to the application of the ne bis in idem principle and stated that the establishment of identity of facts requires a territorial delimitation of the consequences of a competition law infringement. Such territorial delimitation can be deduced from the explicit reference to a given territory in a cartel decision, the limitation of the sanction to that territory and the calculation of the fine on the basis of turnover generated within that territory.

The Court then ruled that, although the contested decision was limited to the sanctioning of the infringements relating to the Belgian market, the Council had calculated the fine on a fixed basis without specifically referring to the relevant turnover on the Belgian territory. As a result, the Court held that a violation of the ne bis in idem principle could not be excluded, because the Court was unable to determine whether and to what extent the Council had taken into account the consequences of the infringement on Dutch territory in the setting of the fine. On that basis, the Brussels Court of appeal annulled the Council's decision.

>> Back to top >>