Belgian Competition Law NEWSLETTER

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Brussels Court of Appeal finds appeal against investigation measures during dawn raid unfounded

On 26 November 2014, the Brussels Court of Appeal dismissed the proceedings initiated by Distripaints, which alleged various procedural violations during and after the dawn raid at its premises in June 2011. The Belgian Competition Authority (BCA) raided Distripaints as part of its investigation into exclusivity requirements in the supply contracts between Akzo Nobel and its main wholesalers. Distripaints requested the Court to be acquitted in relation to the infringements mentioned in the inspection mandate; to annul, or at least invalidate, the dawn raid or all the documents seized based on procedural grounds, and to rule that the grounds on which certain documents had been qualified as "in scope" were flawed, due to insufficient reasoning by the Competition Prosecutor, or because there was no direct link with the inspection mandate.

First, Distripaints alleged a breach of Article 6 ECHR due to the long time lapse between the dawn raid (June 2011) on the one hand and the unsealing of the documents that had been provisionally categorised as disputed or "out of scope" at the time of the raid (June 2013). The Court ruled that a period of 2 years had indeed lapsed between the dawn raid and the unsealing of the documents and that the unsealing of documents should happen shortly after closing the inspections. It stated that, by unilaterally and without any objective necessity deciding to freeze the

investigation for more than 20 months, the Body of Competition Prosecutors had not acted as a normal, prudent investigator in the same circumstances would have done and that as a result Distripaints had suffered harm as it was kept in the dark about the consequences of the dawn raid. However, the Court did not follow through on this finding, since Distripaints had not filed a motion for compensation of the damage it had suffered.

In relation to the allegations that Distripaints was not able to easily respond with the necessary details and nuances to a request for information that was sent 2 years after the alleged infringement, the Court held that it did not consider this to be an infringement of the rights of defence as it is up to the applicant and its counsel to compile a complete file on the basis of the search warrant and the documents taken by the BCA. Furthermore, the Court found that, since that the undertaking had been made aware of the complaint during the inspection, it should have had a sufficient possibility to take the necessary precautions to preserve potentially exonerating information. The Court did not accept the applicant's argument that, due to the long time period that had elapsed, it could not recall correctly whether a separate unsealed memory stick existed containing potential "out of scope" documents, and ruled that the applicant should not have signed the inspection minutes or should have formulated reservations in this regard.

Distripaints also alleged that the sealing procedures had not been followed correctly and were in breach of the BCA's own inspection guidelines. The Court stated that there was no proof that the investigators took other documents than those which were copied and sealed or that the integrity of the sealing and unsealing procedure had been violated in a manner which affected Distripaints' rights.

Furthermore, Distripaints alleged that it had not received a list of the keywords used by the investigators (contrary to the BCA's own guidelines and the Brussels Court of Appeal decision in Belgacom) and that it was therefore unable to check the in-scope character of the seized documents. The Court ruled that if there are only a limited number of documents to review, the use of key-words is not strictly necessary. However, in case key-words are used, they need to be sufficiently specific and correspond to the scope of the inspection mandate. The Court added that, in order to allow the undertaking to check the legality and the appropriateness of the key-words, it is good practice to reach agreement on this with the undertaking and that, except where legitimate confidentiality grounds exist, the undertaking must be provided with a list of the key-words used, preferably during the inspection and at the very latest after the selection of in-scope documents, to enable it to check their relevance in a swift manner. However, given that there were only a relatively limited amount of documents (200) searched, the Court considered that the plaintiff should in any event have been able to check the in-scope/out-of-scope character of each document within a reasonable period of time.

Finally, Distripaints challenged the reasoning underlying the qualification of the in-or-out-of scope character by the BCA of the seized documents. The Court ruled that the explanations provided by the BCA were indeed too limited and that it should, for those documents which were still contested, have clarified its position in a manner which would have made it possible for the applicant or the Court to decide upon their relevance. The Court therefore found that these documents could not legally be qualified as being in-scope and ordered the BCA to further substantiate why the documents should be considered as such. The documents will be considered out-of-scope in the absence of further reasoning by the BCA.

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Constitutional Court rejects request for annulment of a provision of the 2013 Competition Act in relation to the appeal procedure against decisions to use dawn raid documents

Shortly after the publication of the new Competition Act, the French speaking bar and the Belgian Institute for in-house counsel (IBJ/IJE) initiated proceedings before the Constitutional Court to annul a provision in the Competition Act, which provides that an appeal before the Brussels Court of Appeal against a decision of the Body of Competition Prosecutors to use documents obtained during a dawn raid is possible only to the extent that such documents are referred to in the Statement of Objections.

According to the applicants, this provision gives rise to a discrimination compared to companies subject to criminal proceedings, which are entitled to appeal any irregularities of the investigation immediately, and therefore violates the ECHR and the European Union Charter of fundamental rights. In addition, the Belgian Institute for In-house Counsel argued that the confidentiality of in-house legal advice, as laid down in the Act of 1 March 2000 in relation to the creation of the Institute for in-house legal counsel, would no longer be guaranteed as the Body of Competition Prosecutors would be able to read and use documents that were obtained illegally up until the moment of the Statement of Objections.

On 10 December 2014, the Constitutional Court rejected the requests for annulment. The Court first reiterated the Menarini case law of the European Court of Human Rights which stipulates that administrative procedures can differ

from criminal procedures in the strict sense of the word provided that the guarantees of effective judicial review for criminal procedures as laid down in Article 6 ECHR are complied with. It also stated that the legislator's objective to create a more efficient procedure in the area of the application of competition law justified the creation of an appeal procedure that is different compared to the appeal procedures in criminal cases.

The Court concluded that the appeal procedure against decisions of the Competition Prosecutors to use documents obtained during a dawn raid respects all guarantees laid down in Article 6 ECHR. First, the Court reiterated that the Judicial Code provides the Court of Appeal with the possibility to adopt provisional measures (including the suspension of a decision of the Body of Competition Prosecutors in relation to the documents contained in the procedural file). Second, the Court ruled that the dawn raid documents that were not used in the Statement of Objections would in any event never be accessible to the Competition College which takes the final decision on the case, and can therefore cause no harm to the undertakings involved.

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EU loses lifts cartel damages claim before the Brussels Commercial Court

In 2007 Kone, Otis, Schindler and ThyssenKrupp were fined nearly EUR 1 billion by the European Commission for price fixing, bid rigging, market sharing and exchange of commercially sensitive information in Germany and the Benelux in relation to the installation and maintenance of elevators and escalators. As the EU itself had concluded service contracts covering inter alia the Commission's Berlaymont building and the European Court of Justice buildings with the infringing parties, it claimed that it had suffered damages due to the surcharges, resulting from the cartel. The EU, represented by the European Commission, therefore brought a suit before the Belgian Commercial Court, seeking EUR 6 million in damages. However, on 24 November 2014, the Court ruled that the EU failed to provide sufficient proof that the elevator units had been more expensive as a result of the cartel, and had thus caused the EU institutions damage. The EU had based its claims on reports provided by its own appointed economic expert, which showed that prices applied during the cartel's time span were inflated and had dropped after the cartel had ended. Nevertheless, the EU could not adequately demonstrate the amount of surcharge the cartel had actually caused each EU institution and each service contract applicable to Belgium.

Under Belgian law, a party claiming that a tort has been committed is required to prove the existence of fault, damage and a causal link. The Court established that proof of the tort had already been provided because the infringement had been established by the European Commission and is thus considered a "fault" under Belgian law. However, a party which alleges that it has suffered damages as a result of the "fault", still needs to prove the damage it has suffered and the causal link between the "fault" and the damage.

The Court held that the claimant needed to make it plausible, and not merely hypothetical, that it had suffered damage. The Court considered it "plausible" that a cartel leads to higher prices but added that prices are rarely determined as a result of only one factor. The Court held that the applicant failed to deliver any (quantified) proof of the surcharges it claimed to have suffered as a result of the service contracts applicable to the EU institutions. Consequently, it rejected the applicant's plea, as well as its request to appoint an expert to quantify the damage, as there were serious doubts that the claim could be successful.

As the proceedings were initiated in 2008, the case was tried under the Belgian principles of law in force at that date. Consequently, the legal presumption that a cartel causes damages, now embedded in the EU Damages Directive (adopted in November 2014), did not yet apply.

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Ghent Commercial Court refers preliminary ruling request to the Belgian Constitutional Court in relation to the statute of limitations for damage claims based on competition law infringements

This case goes back to a complaint lodged with the Competition Council in November 1995 by several plaintiffs who alleged that NV Honda Motor Europe Logistics ("Honda") had abused its dominant position. On 21 January 1999, the Belgian Competition Council imposed a fine of EUR 743.680 on Honda for abusing its dominant position on the market of issuing of conformity certificates for Honda motorcycles. The Council found that Honda had abused its dominant position by taking measures in relation to the intervention of official dealers in the homologation procedure, aimed at slowing down the delivery of conformity certificates or in other ways penalising parallel importers. The Competition Council's decision was confirmed on appeal by the Brussels Court of

Appeal, and by the Supreme Court.

In the meantime, the plaintiffs had, on 28 December 2006, served a summons on Honda before the Ghent Commercial Court to obtain compensation for damages suffered due to Honda's abuse of its dominant position. However, Honda alleged that the claim was time-barred. The plaintiffs argued that the claims were still valid, using a Belgian criminal procedure analogy, because damages arising from a criminal offence cannot be time-barred before the criminal proceedings themselves have been time-barred.

The Court first analysed to which extent an infringement of the competition rules can be qualified as comparable to a "criminal offence". Given the public policy nature of the competition rules, the similarity between the investigations conducted by the Body of Competition Prosecutors and investigations in criminal cases and the deterrent nature of the fines imposed in competition cases, the Court concluded that a victim of a competition law infringement finds itself in a very similar situation to that of the victim of a crime.

The Court then reiterated that, under Belgian Law, all civil damage claims are subject to civil law statute of limitations (i.e. 5 years after the victim has become aware of the identity of the perpetrator and of the damage). This rule also applies to those civil claims which arise out of a criminal offence. However, damages arising from a criminal offence cannot be time-barred before the criminal proceedings themselves have been barred. This is not the case for claims arising from competition law infringements, where the time-limit is not extended during the competition law procedure. Therefore, the Court referred a question to the Constitutional Court asking whether the fact that a damages claim arising from a competition law infringement can be time-barred before there has been a final decision on the existence of the competition law infringement, violates the principle of equality as established in Articles 10 and 11 of the Constitution.

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President Antwerp Commercial Court orders action for cessation against loyalty rebate scheme on the basis of unfair commercial practices

On 17 June 2014, the president of the Antwerp Commercial Court issued an action for cessation against the loyalty rebates scheme applied by Xella, a manufacturer of aerated concrete and sand lime.

The injunction proceedings against Xella for alleged unfair commercial practices were initiated by Cellumat, a manufacturer of aerated concrete. More specifically, Cellumat argued that Xella was abusing its dominant position and engaged in unfair commercial practices by granting loyalty rebates with a penalty mechanism in case any products were purchased from competitors, and by making misleading and denigrating statements in relation to the quality of Cellumat's products as well as Cellumat's solvability.

The President dismissed Cellumat's argument that Xella abused its dominance on the markets for building materials for constructive walls or non-constructive walls given that Xella did not have a dominant position on these markets in light of its low market shares. However, the President ruled that the sanction mechanism contained in Xella's loyalty rebates scheme should be considered as an unfair commercial practice because a loyalty rebate which is denied in case a customer makes any purchases from a competitor unfairly blocks access to the market. Xella has appealed the judgment.

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Brussels Court of Appeal dismisses abuse of dominance case against AXA

On 27 February 2014, the Brussels Court of Appeal ruled that AXA had not abused its dominance by limiting the brokerage powers of insurance broker Bureau Desert.

The Court first made reference to the European Commission's decisional practice in relation to market definition in the insurance sector, where a distinction is made between reinsurance activities, life insurance activities and non-life insurance business. Referring to the European Court of Justice's case law in United Brands, the Court then assessed whether AXA enjoyed an alleged dominant position on the insurance markets. The Court noted that AXA's market share on these markets is significantly below 40% and had even decreased over the past years. The Court also added that a considerable number of competitors are active on these markets, and that AXA was not able to behave

independently from these competitors. Finally, the Court took note of the fact that Bureau Desert had advised clients to subscribe insurance contracts with competing insurance companies which offered lower prices, which it took as an indication that AXA was not in a position to increase its tariffs independently from its customers. Based on these findings, the Court concluded that Bureau Desert did not demonstrate, to the requisite legal standard, that AXA had a dominant position and the Court therefore dismissed the plea in law based on the alleged abuse of dominance.

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Ghent Court of Appeal confirms abuse of dominance by BV Ducati North Europe BV for refusal to supply spare parts

The judgment of the Ghent Court of Appeal, dated 1 October 2014, is the result of Ducati North Europe BV's ('Ducati') appeal against a decision of the President of the Commercial Court of Dendermonde ruling that Ducati had engaged in unfair trade practices and abused its dominant position by refusing access to its selective distribution network of recognised repairers (and the advantages linked to such a network) on the basis of qualitative criteria.

The Court first stated that DD Bikes did not prove that Ducati's refusal to recognise it as a repairer constituted an infringement of Article 101 TFEU or its Belgian equivalent, as it was not established that this course of action flowed from a restrictive agreement between Ducati and its dealers, but was actually due to a pure unilateral action by Ducati.

With regard to the alleged abuse of Ducati's dominant position, the Court agreed with the judge in first instance, who found, based on consumer preferences, that a separate market for repair and maintenance of Ducati motorbikes should be defined. The relevant product market therefore consists of "Ducati dealers" (which also do repairs) as well as "independent repairers" of Ducati motorbikes. The Court first established that Ducati was dominant on the relevant market, based on its 50% market share, the absence of the independent repairers' countervailing market power and the fact that Ducati has access to extensive technical information, strong financial power and a large degree of brand awareness.

The Court of Appeal then found that DD Bikes would not be able to be competitive on the relevant market if it could not purchase spare parts from Ducati under the same conditions as the Ducati dealers and receive access to the required information. In addition, the Court found that effective competition on the market of repair and maintenance of Ducati motorbikes would be eliminated if no equal access to the necessary tools, under the same conditions as those applicable to dealers, would be granted. Furthermore, Ducati did not show that it would have caused any disadvantage in case the court were to impose an obligation to supply on it. Therefore, the Court of Appeal concluded that Ducati abused its dominant position by refusing to make available, at competitive conditions, the necessary tools and information to DD Bikes which would allow DD Bikes to repair and service Ducati motorbikes. The Court therefore imposed several obligations on Ducati to remedy the situation.

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The Belgian Competition Authority responds to questions raised in Biomet Belgium BVBA v AGX Group BVBA by the Antwerp Court of Appeal in relation to exclusivity clauses

By interlocutory judgment, delivered on 23 June 2014, the Antwerp Court of Appeal referred 4 questions to the Belgian Competition Authority (BCA). The case pending before the Antwerp Court of Appeal was brought in relation to an alleged restrictive agreement concluded for an indefinite period of time between Biomet and AGX for the transport and delivery by AGX of Biomet's surgical loaner sets to and from hospitals. The agreement included an exclusivity clause in AGX's favour.

The questions posed by the Court of Appeal sought to clarify how to assess the agreement in light of the applicable competition law principles in relation to market definition and restrictive practices.

In relation to the Court's first question on market definition, the BCA found that the relevant geographic and product market seemed to be the Belgian market for the express delivery of small packages and that a more narrow product market definition (on the basis of the type of product being delivered or the type of customer served) would not be supported by the European Commission's decisional practice.

With regard to the Court's question concerning the market shares of the parties on the relevant markets, the BCA stated that it had found that Biomet's market share, as recipient of the services provided on the Belgian market of

express delivery of small packages, was significantly below 15 %. Furthermore, the BCA stated that it seemed highly likely that AGX's market share, as provider of services in relation to express delivery of small packages on the Belgian market, would be below 15 %.

In relation to the Court's question whether the agreement caused a significant distortion of competition, the BCA stated that three facts were important: the agreement in question was a vertical agreement concluded between non-competitors, the agreement contained an exclusivity clause (for an indefinite period of time) and the agreement applied to the entire territory of Belgium.

The BCA ultimately concluded that the exclusivity clause fell under the De Minimis Notice and outside the scope of Article 101(1) TFEU and its Belgian equivalent given that the parties had a market share below 15 % on the relevant market.

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Belgium Competition Authority files a brief as *amicus curiae* in US Court of Appeal procedure in *Motorola Mobility LLC* vs. AU *Optronics Corporation*, et al.

On 9 October 2014, the Belgian Competition Authority (BCA) filed a brief as amicus curiae in proceedings before the US Seventh Circuit Court of Appeal (Motorola Mobility LLC vs AU Optronics Corporation, et al).

Motorola Mobility had previously brought a suit before the US District Court for the Northern District of Illinois against LCD manufacturers which it considered to have engaged in price fixing of LCD panels used in its mobile phones. However, as only one percent of these panels were purchased by, and delivered directly to, Motorola in the US, the District Court found that Motorola's claims regarding the other 99 percent of LCD panels were barred by the Foreign Trade Antitrust Improvements Act (FTAIA) which sets limits to the application of US antitrust law to conduct involving trade or commerce with foreign nations. The District Court's judgment was then appealed by Motorola before the US Seventh Circuit Court of Appeal.

In its brief, the BCA essentially referred to the US Supreme Court case 'Empagran' (in which Belgium, along with several other countries, had submitted a brief in 2004 as amicus curiae to protest against the interference of US law with its own antitrust enforcement). The US Supreme Court's judgment in that case was used by the BCA as a basis for its request to support the Appellee's position that the District Court's order should be affirmed. The BCA stated that the US Supreme Court, by ruling in its Empagran decision that the FTAIA precluded the application of the US Sherman Act to a price-fixing claim based on adverse foreign effects, acknowledged that the FTAIA should be interpreted to avoid unreasonable interference with the sovereign authority of other countries. In Empagran, the US Supreme Court held that foreign nations' own antitrust enforcement policies would be undermined if independently injured foreign plaintiffs, whose injuries are independent of any adverse domestic effect, would be allowed to seek private treble-damages in the US as foreign firms' incentives to cooperative with antitrust authorities in return for leniency would be diminished.

According to the BCA, the manufacture and sale of LCDs to Belgian purchasers calls, under Belgian competition laws, as well as the FTAIA, for the application of Belgian competition law. Allowing Belgian purchasers to sue for damages in US courts (where there is a possibility of obtaining "treble" damages) would, according to the BCA, upset the balance calibrated by the Belgian government, which had, in 2014, enacted rules permitting collective redress in relation to consumer damages claims arising from Belgian antitrust law violations.

The BCA concluded that there would be little incentive for companies to seek leniency and acknowledge their infringement (in Belgium or the EU) if they would then be exposed to the consequences of civil suits in the US, which would consequently affect the leniency programme put in place by the Belgian legislator. The BCA therefore requested the Court of Appeal to affirm the US District Court's order.

The Seventh Circuit Court of Appeal delivered its judgment on 26 November 2014 and affirmed the District Court's judgment.

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Body of Competition Prosecutors closes investigation into green certificates invoicing to end-consumers by electricity suppliers

As part of the EU climate and energy package adopted in 2008, a target was set for the share of Belgian energy consumption produced from renewable resources to attain 13% in 2020. Several mechanisms to support the achievement of this target were put into place in Belgium, including the introduction of green certificates. Energy suppliers are granted green certificates, which can be exchanged on the market or purchased by transmission system operators at a minimum price. These green certificates are subsequently sold to electricity suppliers, who are bound to meet certain quota under threat of a fine by the energy regulator. The price for the purchase of these certificates is passed on to end-consumers.

The investigation of the Belgian Competition Authority was opened ex officio in October 2011 and was triggered by a report of the Flemish Energy Regulator (VREG) in relation to the transparency of the cost transmission mechanisms for green certificates. The report found that certain electricity producers in Flanders appeared to have engaged in parallel conduct by invoicing the cost of the green certificates, inclusive of the fine that might be imposed in case the quota was not achieved, raising prices for end-consumers without justification. In addition, the VREG had pointed out that on the actual electricity supply invoices, these costs should have been included in the global cost of electricity delivery (and should not be mentioned as a separate item on the invoice) in order to increase competition between electricity suppliers.

After a thorough investigation, which included dawn raids at the premises of the relevant suppliers, the Body of Competition Prosecutors found, on 12 December 2014, that there had been no infringement on the regional markets for green certificates. The dawn raids had not revealed any existence of direct anticompetitive contacts in relation to the invoicing of the green certificate obligations or any concerted practices. As to the allegations in relation to the exchange of commercially sensitive information, the Body of competition prosecutors found a very significant degree of transparency on the market for electricity supply to end consumers, in particular via price comparison tools available on the energy regulators' websites and the free availability of terms and conditions of electricity suppliers on the internet. The Body of Competition Prosecutors concluded that there had been no infringement of the competition rules, and reiterated that in order to prove, in the absence of any documentary or material evidence, that parallel conduct amounts to a restrictive practice, it should be demonstrated that the parallel conduct can only be explained by concertation between competitors, which was not the case here.

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The Body of Competition Prosecutors dismisses a complaint against several film studios in relation to refusal to grant a virtual print fee

In this case, Handling Co, a movie theatre operator based in Antwerp, lodged a complaint against large film studios who refused to grant a virtual print fee to Handling Co.

In 2006, the film studios had decided, in order to speed up the switch from traditional projection to digital projection, to contribute to the costs of the digitalisation of the movie theatres. To this end, the film studios cooperated with so called integrators that finance, install and service this digital projection equipment in movie theatres. In return, the film studios pay, for every movie that is projected by using a projection system installed by an integrator, a virtual print fee to the integrators until they have earned back the investment.

Handling Co had financed the digitalisation investment of its 4 movie theatres itself without turning to an integrator. The film studios refused to pay a virtual print fee to Handling Co because it did not cooperate with an integrator.

According to Handling Co, the film studios engaged in a concerted practice and abused their dominance by refusing the virtual print fee to Handling Co, particularly because Kinepolis, which had also auto financed the digitalisation of its movie theatres, had received a virtual print fee.

The Body of Competition Prosecutors took into account the Belgian market for the screening of films in movie theatres. As to the allegation of concerted practices, it indicated that there was no evidence of any direct contact or exchange of commercially sensitive information between the film studios. Also, the BCA found that the film studios had provided logical and acceptable arguments to explain the origin of their parallel conduct. As to the alleged abuse of dominance, the Body of Competition Prosecutors ruled that none of the film studios involved had a market share above 25% and that the conditions for a finding of collective dominance were not fulfilled. Finally, the Body of Competition Prosecutors indicated that the virtual print fee agreements had already been subjected to an

investigation by the European Commission and that the European Commission had closed its investigation after the film studios had agreed to amend their contracts. On the basis of the above, the Body of Competition Prosecutors dismissed Handling Co's complaint.

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