Belgian Competition Law NEWSLETTER

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Brussels Court of Appeal strikes evidence obtained during dawn raids from the investigation file in the Travel Agency Case

On 18 February 2015, the Brussels Court of Appeal rendered its judgment in the "Travel Agency" case. This appeal relates to an investigation conducted by the Belgian Competition Authority (BCA) nearly ten years ago.

In June 2005, the Minister of Economic Affairs requested the BCA to conduct an investigation into the Belgian travel sector and in particular the positions of TUI and Thomas Cook, to determine whether they had engaged in anticompetitive arrangements related to fuel surcharges, service fees, terms of cooperation between tour operators and travel agents, cancellation terms, cancellation compensation, cancellation insurance and the avoidance of price wars.

On 23 February 2006 and 7 March 2006 dawn raids were conducted at the premises of the Association of Belgian Tour Operators, the Association of Flemish Travel Agencies, Thomas Cook Belgium and TUI Belgium. At that time, the old Belgian Competition Act of 1999 (WBEM 1999) was still in force.

The parties challenged the legality of the evidence obtained as a result of these dawn raids. According to the parties, the evidence was illegally obtained because (i) the dawn raids had been carried out without prior judicial authorisation and there was no possibility to challenge the raids before an independent judge; (ii) the investigation itself had no legal basis as there were no serious indications of anti-competitive agreements; and (iii) the dawn raids were mere fishing expeditions.

The Brussels Court of Appeal first referred to the constitutional principle of the "inviolability of the home", enshrined in Article 15 of the Belgian Constitution, which provides that the "home" is inviolable and searches may only take place under the conditions and forms prescribed by law. According to the Court, any exception to the "inviolability of the home" requires a warrant issued by an investigating judge ("juge d'instruction"), regardless of whether the "home" being searched is a private home or company offices. However, under the 1999 Belgian Competition Act, the mere authorisation by the BCA itself was sufficient to be able to carry out inspections. At the time of the dawn raids (2006), the inspection mandate had therefore only been signed by the BCA's Body of Competition Prosecutors and not by a judge.

The Court of Appeal also referred to case law of the European Court of Human Rights, according to which lack of prior judicial authorisation can be remedied ex post by effective judicial control carried out by an independent judge. It took a more strict approach and found that the Belgian constitutional rights and freedoms offer greater protection than the ECHR.

As the evidence taken during the raids was obtained illegally and this evidence had already been included in the Statement of Objections, the Court of Appeal found that there was no appropriate remedy available other than to strike the evidence obtained during and as a result of the dawn raids from the investigation file.

This judgment may have far reaching consequences for other pending cases where raids were conducted under the old Belgian Competition Act, where appeals were also brought before the Brussels Court of Appeal. The deficiencies in the old system have been remedied by the new Belgian Competition Act of 2013, which requires the BCA to obtain a judicial mandate prior to conducting dawn raids and foresees, albeit under strict conditions, the possibility of appeal.

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Brussels Court of Appeal dismisses appeal brought by VAB et al against the Competition College's decision to clear, subject to remedies, Touring's acquisition of NV Autoveiligheid and NV Bureau Technische Controle

On 24 October 2013, the Competition College cleared the acquisition of sole control by Koninklijke Belgische Touringclub vzw (Touring), mainly active in the provision of breakdown and vehicle repair assistance, of NV Autoveiligheid, a body in charge of mandatory periodical technical vehicle inspections and the organisation of driving licence tests. The clearance decision was subject to the commitment that Touring would, to the extent prescribed by law, implement an operational and structural division between its activities of vehicle inspection and driving licence tests activities on the one hand and Touring's commercial activities on the other, in order to avoid that Touring would use data from the driving licence test centres to develop its own commercial services.

Autoveiligheid's main competitors challenged the Competition College's decision before the Brussels Court of Appeal. The applicants claimed i.a that the behavioural remedies imposed were not able to remove the negative effects of the concentration because they were not complete, effective and verifiable, and that the Competition College should have opened Phase II proceedings. The Court of Appeal however ruled that the required operational and structural division of Touring's activities was sufficient to establish a real separation of these activities, in particular since the remedies imposed went further than the applicable legislation. In addition, the Court held that remedies do not necessarily have to be structural to be acceptable and that the appropriateness of the remedies needs to be examined on a case-by-case basis. The Court further referred to the Commission's view that behavioural remedies may in particular be acceptable in circumstances in which there is a risk of conglomerate effects, which was alleged by the applicants. The Brussels Court of Appeal held that it considered the remedies to be complete, effective and verifiable and dismissed the Brussels Court of Appeal dismissed the applicants' appeal in its judgment of 11 March 2015.

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Belgian Competition Authority opens investigation into real estate sector

Further to an undercover documentary shown on TV last year which alleged potentially problematic conduct in the real estate sector, the BCA has reportedly opened an investigation into the Professional Institute of Real Estate Agents (BIV) for allegedly and deliberately increasing the prices in the real estate sector by requiring real estate agents to apply a 3 percent fee.

This is not the first time the real estate sector is targeted by the BCA. In 2010, the BIV was found to have infringed competition law by recommending minimum prices to its members. At that time, the BCA did not consider it appropriate to impose a fine, but instead required the BIV to notify all of its members of the decision by publication on its website.

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Belgian Competition Authority closes two investigations into cargo ground handling services at Brussels Airport

In April 2010, the Body of Competition Prosecutors initiated an ex officio investigation against Swissport Handling Services (Flightcare) and Aviapartner, two companies active in airside (on tarmac) and landside (off tarmac) cargo ground handling services. Raids were conducted at Swissport Handling Services and Aviapartner in June 2010.

Ground handling services on Brussels National Airport are regulated by a Royal Decree implementing EU legislation, which distinguishes between reserved (non liberalised) services and non-reserved (liberalised) services. Landside services are liberalised services, whereas airside ground handling services are considered as reserved services. A temporary license to provide airside services was granted by Brussels Airport Company to Flightcare and Swissport Handling Services, thereby creating a legal duopoly for these two companies.

The Body of Competition Prosecutors mainly alleged that Flightcare and Aviapartner could abuse their market power on the reserved airside cargo ground handling services market to obtain a larger market share on the downstream liberalised landside cargo ground handling services market or even to hinder entry or exclude competitors from the latter market. Such abuse would consist of bundling practices by making the provision of reserved airside services dependent on the provision of liberalised landside services or by offering better prices if both services were purchased.

However, the evidence obtained during the dawn raids and the responses to the requests for information did not enable the BCA to sufficiently establish the existence of a competition law infringement and the BCA decided to close its ex-officio investigations on 17 February 2015.

A similar reasoning was used by the Body of Competition Prosecutors to close on the same day its second ex officio investigation into the ground handling services sector which it had initiated after the raids in June 2010. That investigation concerned alleged cartel infringements within the context of meetings of the trade association Contactgroep Cargo Afhandelaars Brucargo (CCAB).

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Electrabel did not abuse its dominant position says Brussels Court of Appeal

The Belgian Railway Company (NMBS) claimed that its subsidiary, Infrabel, suffered damages as a result of Electrabel's abuse of dominant position between 2005 and 2012 when Electrabel had charged costs related to CO2 emission rights, which it had itself obtained free of charge to its customers. The NMBS sought EUR 88 million in damages.

In first instance, the NMBS' claim was dismissed and the NMBS appealed the judgment before the Brussels Court of Appeal. The Brussels Court of Appeal upheld the judgment rendered in first instance and held that Electrabel had correctly set its prices and that it was justifiable to at least partially integrate the CO2 rights into the electricity price for large customers.

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Belgian Competition Authority publishes Notice on informal opinions of the President

On 27 January 2015, the BCA published a Notice on informal opinions of the President of the BCA.

The President of the BCA is given the responsibility to deal with questions and issues about the application of competition law rules to potentially anticompetitive agreements and behaviour in cases where no formal investigation has been initiated.

The Notice provides that companies can seek guidance from the President in specific circumstances. Notably, for a request for clarification to be considered, the question should:

(i) relate to an agreement or practice that is being considered by the parties but has not yet been concluded or implemented. That said, a mere hypothetical question will not be considered;
(ii) not relate to an identical, similar or related question which is the object of a case before the European Commission, the Belgian Body of Competition Prosecutors or the Competition College, or subject to a procedure before a Belgian or European judge;
(iii) not have been answered previously by the BCA or by the Belgian or European legislation, case law or decisional practice;
(iv) make it possible for the President of the BCA to respond to it on the grounds of the information provided by the parties; and
(v) be of significant importance for the economy or society.

The Notice offers companies an interesting opportunity to obtain informal guidance from the BCA when they are contemplating a particular arrangement for which no precedent or guidance is available, or the available guidance or precedents are unclear.

Companies who want to make use of this possibility should be aware that the President's informal opinion will be expressed in a letter, which may be published on the BCA's website (unless the President agrees to decide against such publication, presumably at the request of the parties).

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