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

Hannelore Wiame
+322 639 3707
Hannelore.Wiame@bakermckenzie.com

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Belgian Competition Authority adopts first settlement decision in the supermarkets case

On 22 June 2015, the Belgian Competition Authority (BCA) imposed a total fine of EUR 174 million on 17 companies for coordinating resale price increases of home and personal care (HPC) products. The BCA's investigation was triggered by a leniency application by a HPC supplier in 2006 followed by surprise inspections at the premises of the main retailers in April 2007.

The infringement is described as the repeated organisation at the retail level of coordinated resale price increases of HPC products during the period 2002-2007. No direct contacts took place between the distributors, who used the respective suppliers as an intermediary to facilitate price increases at retail level. The decision shows that the core of the infringement was at the retail level.

This is the first settlement decision adopted by the BCA since the settlement mechanism was introduced in the new Belgian Competition Act. Settlement decisions are made at the level of the Competition Prosecutor, without any involvement of the Competition College. Like in EU settlement proceedings, the companies involved in the investigation can benefit from a 10 per cent reduction in fines for admitting their involvement in the infringement.

This settlement decision also marks the end of the proceedings before the Brussels Court of Appeal on the legality of the inspections that were conducted in April 2007.

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Belgian Competition Authority closes abuse of dominance probe into Electrabel

In January 2009, Lampiris lodged a complaint alleging that Electrabel was abusing its dominance by passing on the opportunity cost of greenhouse gas emission allowances in its electricity price on the wholesale market during the period 2007-2009. More specifically, Lampiris alleged that, by doing so, Electrabel had engaged in excessive pricing, price squeezing and discriminatory pricing. In September 2009 the BCA raided the premises of Electrabel.

In the decision, the Competition Prosecutor did not accept the allegation that Electrabel had charged excessive prices and concluded that incorporating all or part of the opportunity cost of greenhouse gas emission allowances, which Electrabel receives at no cost from the Belgian energy regulator in the context of the implementation of the emission allowance trading scheme, in the electricity prices was economically justified and therefore did not in itself suffice to qualify the prices as excessive. In relation to the allegation that Electrabel had engaged in price discrimination by only incorporating the cost of the emission allowance quota in its price on the electricity wholesale market, the Competition Prosecutor held that the services provided by Electrabel on the wholesale market are not equivalent to those offered by its subsidiary Electrabel Customer Solutions on the electricity supply market, in particular in the segment of electricity supply to households. Finally, the Competition Prosecutor dismissed the price squeeze allegation, on grounds that the investigation had demonstrated that the profit margins of Electrabel Customer Solutions would have remained positive even if it would have been subject to the costs charged by Electrabel to Lampiris and that the increase of Lampiris' market share during the investigation period had demonstrated the absence of market foreclosure.

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Belgian Competition Authority is looking into Belgian brewers

The BCA has decided to open an informal investigation into simultaneous planned price increase announcements by AB InBev and Alken-Maes. Questionnaires were sent out, seeking to understand the companies' motivation for the price increases and whether or not these price increases were the result of a unilateral decision or the result of an agreement between the parties.

The BCA already undertook an informal investigation of a simultaneous price increase by AB InBev and Alken Maes back in 2012, but concluded that there had been no illegal exchange of information between the companies. The new investigation is still on-going.

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Competition College softens conditions imposed in Belgacom/The Phone House merger

In 2011, the Belgian Competition Council cleared the acquisition of The Phone House by Belgacom (now known as Proximus) after a phase II investigation and subject to a series of commitments consisting of the divestiture of the Phone House outlets in important catchment areas, the adoption of a multi-operator model for the outlets that would not be divested in order to preserve the existence of sufficient multi-operator distribution networks on the Belgian market and a Chinese Wall policy to avoid the access to commercially sensitive information concerning Belgacom’s competitors.

However, due to changed market circumstances (most notably the fact that telecom operators nowadays have their own outlet network), the Competition College, on 23 June 2015, accepted Proximus' request to lift the obligation to preserve the multi-operator model in The Phone House outlets. The Chinese Wall Policy will remain in force for a period of 3 years after the termination of the last agency agreement between The Phone House and a Proximus competitor. A Monitoring Trustee remains in place to oversee compliance with the conditions.

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Brussels Court of Appeal finds action for cessation in motor vehicle sector unfounded

On 11 March 2015, the Brussels Court of Appeal (the Court) dismissed an action for cessation against Man Truck & Bus N.V. (Man) lodged by Sanders Parts B.V.B.A. (Sanders), an independent wholesaler for the supply of spare parts. The judgment of the Court overruled an order by the President of the Commercial Court of Dendermonde (of 26 June 2013), holding that Man had engaged in unfair trade practices by not granting Sanders access to its selective distribution network and by refusing to supply Sanders with Man spare parts.

The Court of Appeal ruled that Man was entitled not to admit Sanders to its selective distribution network because Sanders did not fulfil the conditions to be accepted as an authorised dealer in Man's selective distribution system in Belgium, which is only open to distributors who offer the entire range of after sales services including maintenance and repair services, and not to wholesalers that merely sell spare parts (such as Sanders.)

The Court held that the selective distribution agreements in question were exempted by the Vertical Block Exemption Regulation and the Motor Vehicle Block Exemption because Man's market share on the market including motor vehicles and spare parts did not exceed the 30% threshold and did not contain any hardcore restrictions. In addition, the Court stated that, even assuming that the agreements would not benefit from the Block Exemptions, the obligation imposed by Man that its distributors of spare parts also need to offer repair and maintenance services to be allowed to the selective distribution system would not infringe Article 101(1) TFEU.

The Court reiterated long-standing case law of the ECJ, stating that purely qualitative selective distribution is in general considered to fall outside Article 101(1) TFEU for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Second, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Third, the criteria laid down must not go beyond what is necessary.

The Court decided that all three conditions were fulfilled, and added that, in any case, Man had sufficiently demonstrated that its selective distribution may also benefit from an individual exemption under Article 101(3) TFEU.

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