

Belgian Competition Law

NEWSLETTER

BAKER & MCKENZIE

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BELGIAN COMPETITION NEWSLETTER 2015/3

Belgian National Lottery fined 1,2 million EUR for abuse of dominance



In May 2013 a number of sport betting companies lodged a complaint with the BCA for alleged abuse of dominance by the Belgian National Lottery. Dawn raids were conducted at the Belgian National Lottery's premises in July 2013.

Under its 2010 management contract with the Belgian State, the National Lottery has as a legal monopoly for the organisation and offering of public lottery products in Belgium. In that context, the National Lottery built a Interactive Gaming System (IGS) database, containing contact details of individuals that registered on its website for public lottery products. In 2013, the National Lottery launched sports betting under the brand "Scooore". These activities do not fall under its legal monopoly. One year after the launch of "Scooore", the National Lottery's market share for sports betting was still lower than 15%, but this was many times higher than the market shares of the 33 other companies who had obtained a sport betting license.

The BCA ruled that the National Lottery had abused in two ways its position of market dominance. First, the BCA held that the one-off use in January 2013 by the National Lottery of the contact details in the IGS database for a mailing to promote the introduction of its Scoore product gave rise to distortion of competition on the market for sports betting. Second, the BCA considered abusive the request for information about turnover and commissions from competing sports betting providers which the National Lottery addressed to its dealers. The disclosure of this information reduced uncertainty in relation to the future behaviour of these competitors. The BCA imposed a 1,2 million EUR fine on the National Lottery.

This is the second settlement decision adopted by the BCA since the supermarkets case (see Belgian Competition Law Newsletter 2015/2). Unlike the European Commission, the BCA can adopt settlement decisions in any type of investigation (horizontal, vertical, dominance). The case provides an interesting example of how rival companies can use competition law successfully to object to a monopolist's launch of new activities on other markets.

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Brussels Court of Appeal strikes evidence obtained during dawn raids from the investigation file in the cargo handling case



In June 2006, the BCA conducted raids at several cargo companies and their trade associations as it suspected the existence of agreements on price increases and on general conditions for cargo handling services for customers in the ports of Zeebrugge, Ghent and Antwerp. After the issuing of the Statement of Objections, PSA Antwerp NV (PSA) filed an appeal with the Brussels Court of Appeal, alleging that the dawn raids were unlawful. PSA argued that the raids infringed the Belgian Constitution, as well as Articles 6 and 8 of the European Convention on Human Rights (ECHR), as they lacked prior judicial authorisation and there was no (immediate) judicial recourse available against them. PSA argued that, as the raids themselves were unlawful, so were the

investigation measures based on them, including the decision of the BCA to use the documents obtained in the context of the raids in the Statement of Objections (SO).

The Court considered that the Body of Competition Prosecutors, which authorised the raids under the 1999 Competition Act in force at the time of the raids, cannot be equated with an independent and impartial judge and that there was therefore a lack of prior judicial authorisation. In addition, the Court held that, even if the lack of prior judicial authorisation could be balanced by a posteriori judicial control, that would not be the case here as the 1999 Competition Act did not foresee the possibility of an appeal against raids.

PSA argued that the exclusion of the unlawfully obtained evidence was the only form of appropriate redress because the entire investigation was tainted by the unlawful raid. According to the Court, it is necessary to examine which parts of the investigation and the SO were affected by the unlawful raid, and responsibility lies with the claimants to indicate which parts of the SO directly or indirectly arise from these raids. In this respect, the Court stressed that the BCA may prove that the information could have been obtained through other investigation methods or other evidence.

The Court reviewed the file and held that the information obtained on the basis of the illegal search must be taken out of the investigation file, including any reference thereto in the SO. The BCA argued that it did not need the information obtained during the raids in order to prove its case because it was already aware of the infringement in particular as a result of a leniency application. In relation to some of the evidence, the Court agreed with the BCA, but the Court also held that some information should be removed. Nevertheless, there was still information that could only be substantiated on the basis of the raid or on the basis of investigatory measures that would not have yielded the same result without the raid, in which case the information should be removed. The Court instructed the BCA to remove this information from the file, and to reconsider whether it still had sufficient evidence to issue a new SO without this information.

As stated in Belgian Competition Law Newsletter 2015/1, the deficiencies in the old Belgian Act 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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Belgian Competition Authority clears acquisition of Humo, Story, TeVe-Blad and Vitaya by De Persgroep subject to commitments

On 4 August 2015, the BCA cleared the acquisition of Humo, Story, TeVe-Blad and Vitaya by De Persgroep subject to commitments. De Persgroep is a Belgian multi-media company that owns a number of magazines (Dag Allemaal, Joepie, Goed Gevoel and TV Familie/Blik), as well as newspapers (Het Laatste Nieuws and De Morgen). De Persgroep is also active in the areas of television (Medialaan), radio broadcasting (Q-Music) and online services.

Given the parties' overlapping activities in the area of magazines, the BCA assessed the effects of the transaction on the Belgian market for the publication of Dutch-speaking weekly magazines for TV and "infotainment" including TV programming (the readers market), and on the Belgian market for the sale of advertising space in Dutch-speaking magazines (the advertising market).

The BCA concluded that no issues would arise on the advertising market but was concerned that on the readers' market (where the parties' combined market share would amount to 83,7%) there would be a risk that De Persgroep (through TeVe-Blad) could price Primo, the only remaining competitor, out of the market by inter alia implementing focused price decreases. The BCA was also concerned that, given the parties' envisaged editorial synergies, the transaction could lead to reduced supply or adversely affect magazine content. In addition, conglomerate effects were identified to the extent that De Persgroep could block Primo's access to the TV programming of Medialaan TV channels and thereby prevent Primo from offering a complete TV programming overview.

In the end, the BCA cleared the transaction subject to two commitments. First, De Persgroep must maintain the specific content of Humo, Story and TeVe-Blad, and the Medialaan TV channels must not be covered in these magazines in a manner which is disproportionate to the coverage of other TV channels. Second, Medialaan committed to implementing a three year stand-still obligation in relation to the conditions under which the programming of its TV chains is made available to editors.

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Booking.com under scrutiny by Belgian Competition Authority



In July 2015, the Belgian hotel federations asked the BCA to investigate Booking.com's practices on the Belgian market. Booking.com is currently Belgium's most important channel for booking hotel and other accommodation and at least one third of all reservations are made through this platform.

Booking.com, together with other booking sites such as Expedia and HRS, is under scrutiny by competition authorities in multiple EU jurisdictions. Booking.com is accused of allegedly abusing its dominance by applying excessive charges (between 12% and 25%) for hotel room bookings made via its website and by including in its agreements illegal availability parity clauses (whereby the hotel cannot treat Booking.com less favourably than other online travel agencies in relation to room availability) and rate parity clauses (whereby the price of a hotel room offered through Booking.com can never be higher than the price the hotel offers through other online travel agencies, on its own website, via e-mail or telephone or even to walk-in customers).

Earlier this year, Booking.com proposed commitments everywhere in Europe on the same terms as those previously agreed with the Swedish and Italian competition authorities. Under these terms, Booking.com agreed to abolish the parity clause and to significantly amend its rate parity clause so that it would apply only with respect to the hotel's website and not to other online platforms or other reservation methods. In France, Booking.com committed to abolish the rate parity clause.

The chief public prosecutor of the BCA, Véronique Thirion, declared that "*there is an implicit agreement between the different national competition authorities to investigate the French commitments*". She added that the BCA will evaluate whether the rate parity clause, which was removed in France, should also be abolished in Belgium.

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