

Belgian

Competition Law

NEWSLETTER



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BELGIAN COMPETITION NEWSLETTER 2016/1 (January - March 2016)

Belgian Competition Authority conditionally clears merger between Delhaize and Ahold



On 15 March 2016, the BCA approved the merger between Delhaize Group SA and Royal Ahold NV (active through Albert Heijn supermarkets) subject to conditions. The proposed transaction was initially filed with the European Commission, who referred the review to the BCA on 22 October 2015, since the only significant overlap between the parties' activities in Europe was located in Belgium.

In line with the European Commission's decisional practice, the BCA drew a boundary around the merged firm's location which encloses 80% of its customers, and then considered competition within this boundary. To address the competition concerns raised by the BCA in certain catchment areas where the parties' combined market share would be very high, the approval required the divestment of 13 stores in Belgium (consisting of eight Albert Heijn stores and five Delhaize franchised stores) and a number of Albert Heijn stores that were not yet opened. The transaction is expected to be completed in mid-2016.

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Kinepolis/Utopolis deal conditionally approved by Belgian Competition Authority in Phase II proceedings

On 25 March 2016, the BCA conditionally approved Kinepolis' plans to acquire two Utopolis multiplex cinemas in Turnhout and Lommel. Kinepolis had also planned to acquire two other Utopolis cinema complexes in Aarschot and Mechelen, but was forced to abandon these plans after the BCA raised concerns that Kinepolis would become too dominant in certain regions post-transaction.

Kinepolis' plans to acquire the Utopolis multiplex cinemas would normally not have required notification to the BCA, as the transaction thresholds were not met. However, the BCA had previously imposed conditions as part of the transaction that led to the formation of Kinepolis in 1997. These conditions remain in force today and include the obligation on the part of Kinepolis to obtain the BCA's approval if it intends to acquire one or more cinema complexes. In line with that obligation, Kinepolis notified the BCA of its plans to acquire the four Utopolis multiplex cinemas on 12 October 2015.

The BCA raised serious doubts regarding the admissibility of the transaction on 10 November 2015 and decided to open Phase II proceedings. In particular, the BCA was concerned that the transaction would result in a significant increase in Kinepolis' already high market shares on the national and local markets for film screening. The BCA also raised concerns that competitors would not want to open new complexes in the vicinity of Kinepolis locations, and the fact that Kinepolis would absorb its second most important competitor in Flanders after Euroscop. In addition, the BCA feared non-coordinated effects such as: expected price rises; a narrower film offer; the closure of other establishments; the impediment of competitor growth; and the strengthening of both Kinepolis' economies of scale and buying power on upstream markets for film distribution.

To remedy the BCA's concerns, Kinepolis offered both structural and behavioural commitments. The structural commitments related to the divestment of the two Utopolis cinema complexes in Mechelen and Aarschot, which must be transferred to a purchaser with no direct or indirect link to Kinepolis. As regards the other two Utopolis complexes, Turnhout and Lommel, Kinepolis committed, for three years, to:

- (i) accept vouchers sold by other cinemas pursuant to existing cooperation agreements concluded between the Utopolis complexes at Turnhout and Lommel with other cinemas;
- (ii) not shut down the cinemas; and
- (iii) monitor the degree of customer satisfaction regarding price policy in relation to the quality of the cinematic experience offered by these cinemas.

As a result of these commitments, the BCA finally approved the transaction on 25 March 2016.

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Belgian Competition Authority approves acquisition of Vanden Borre by Fnac

On 17 March 2016, the BCA approved the acquisition by Fnac of Vanden Borre by way of acquisition of Darty's shares in the company. The transaction essentially concerns the electronic products sector.

The French Competition Authority is still examining the planned transaction. It opened an in-depth probe in March 2016 and might require certain stores to be divested or closed, since the concentration could potentially create a dominant position for the merged entity within certain areas of France. This was not the case in Belgium, since both Darty and Fnac's network of shops in France is much denser than in Belgium.

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Belgian Competition Authority clears Medialaan's acquisition of JIM Mobile's customer list and Viking Mobile



In December 2015, Medialaan notified the BCA of its plans to acquire JIM Mobile's customer list and Mobile Vikings. This transaction arose out of the commitments offered to the European Commission by Telenet (Liberty Global) in Phase II proceedings as part of its earlier acquisition of BASE. The European Commission required commitments to remedy the potential anticompetitive impact of the transaction on the Belgian mobile retail and wholesale markets.

These commitments involved the divestment to Medialaan of the following: (i) JIM Mobile's customer list, which would give Medialaan sole control over JIM Mobile (a mobile virtual network operator, "MVNO") as Medialaan already owned the JIM Mobile trademark as a branded reseller of BASE; and (ii) all of BASE's shares in Mobile Vikings (another MVNO using BASE's network). In addition, Telenet committed to conclude an MVNO agreement with Medialaan so that Medialaan would obtain full MVNO status through JIM Mobile and Mobile Vikings.

Both Mobile Vikings and JIM Mobile are active on the Belgian retail market for mobile telecommunication services to end users. Although Medialaan is not active on this market, it is active on, inter alia, the markets for offering advertising space on television and radio. Users of such advertising space are for example, JIM Mobile and Mobile Vikings. The BCA considered that the markets concerned by the transaction were: (i) the market for the sale of advertising space on national television channels in the Flemish Community; and (ii) the sale of advertising space on national radio channels in the Flemish Community. It considered these markets to be in a vertical relationship vis-à-vis the market for delivery of communication services, as television and radio advertising can be considered an input for mobile operators that purchase advertising space to advertise and promote their products and services.

The BCA investigated whether, as a result of the transaction, Medialaan could foreclose the advertising markets for downstream competitors of JIM Mobile and Mobile Vikings by refusing access altogether or raising prices. The BCA found that Medialaan would not be able to develop a foreclosure strategy, since all mobile players have a contractually guaranteed access to advertising space on the basis of a distribution agreement signed with Medialaan. Furthermore, even without such an agreement, Medialaan would have no financial incentive to foreclose the market. The BCA also found that Medialaan, as an MVNO, has an interest in keeping good relations with mobile network operators. Finally, the BCA found that there is growing pressure from other players on the advertising markets and that Medialaan has never in the past tried to foreclose the advertising markets (even for smaller mobile operators where there may have been a limited incentive for Medialaan to do so, since it had become a branded reseller of JIM Mobile). Finally, the BCA ruled that the current internal and contractually enforceable procedures guarantee that by obtaining commercially sensitive information for advertising campaigns on the radio and television channels owned by Medialaan, Medialaan would not get any competitive advantage.

Third parties, such as Mobistar and Proximus, voiced their concerns in relation to possible coordinated effects resulting from the transaction. The concerns related to, inter alia, the possible coordination between Telenet and Medialaan on the retail market for mobile telephony and the market for offering of television services. Further concerns related to the possibility that Medialaan would be more dependent on Telenet because of the exclusive MVNO agreement, and the fact that Telenet is the most important provider of television services - which would lead to Medialaan feeling pressured to coordinate with Telenet. However, the BCA did not agree with any of these points and did not find reason to believe that the transaction would give rise to coordinated effects.

Based on the underlying rationale of the transaction (i.e. to establish Medialaan as a relevant competitor on the Belgian mobile phone retail market) and the absence of any competition law concerns, the BCA cleared the transaction on 28 January 2016.

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Belgian Competition Authority imposes 3,857,000 EUR fine on industrial batteries cartel



Following a leniency application by Exide Technologies, the BCA raided the premises of several industrial battery manufacturers in April 2014. Shortly after the raids, three other companies (Battery Supplies, Enersys, and Hoppecke) applied for a reduction in fines.

The cartel involved six participants and concerned the agreement to apply a lead surcharge for the sales of motive power batteries, which are leaded batteries that supply power for rolling stock such as forklifts and floor cleaning machines. Further to a spike in the lead price towards the end of 2003, the industrial battery manufacturers initiated multilateral quarterly meetings in pubs and hotels during the period from 2004 until 2011, in order to agree on the applicable lead surcharge in their dealings with customers. Up to 2014, the applicable lead surcharge for the next quarter was also exchanged by e-mail.

The BCA did not apply its 2014 Fining Guidelines which entered into force on 1 November 2014 ([see Belgian Competition Law Newsletter 2014/1](#)), since all parties had already expressed their willingness to settle the case after the Statement of Objections was issued in September 2015.

In its fine calculation, the BCA also took into account other factors on top of the 10% settlement reduction for certain undertakings, to further decrease the fines. These factors included: the non-consistent application of the lead surcharge by a number of companies; the proportionality principle for smaller undertakings not belonging to a larger international group; and even the fact that the 10% Belgian turnover thresholds had been exceeded. The fine was also mitigated for cooperation outside the leniency notice because the companies consented to a simplified IT search of the data copied during the raids.

This is the third settlement decision adopted by the BCA since the supermarkets case ([see Belgian Competition Law Newsletter 2015/2](#)) and the Belgian National Lottery case ([see Belgian Competition Law Newsletter 2015/3](#)).

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Gun jumping fine imposed on Cordeel

On 23 December 2015, the BCA imposed a 5,000 EUR fine on Cordeel for having acquired Imtech before obtaining approval from the BCA.

The acquisition, which was triggered by the bankruptcy of Imtech, took place in August 2015, and was driven by a need to limit the impact of Imtech's insolvency and to ensure business continuity. In September 2015, the BCA contacted Cordeel to request an explanation as to why the transaction had not been notified, given that the Belgian merger control thresholds were met based on publicly available information. In response to this request, Cordeel started the notification procedure and formally notified the transaction on 10 November 2015. The transaction was unconditionally cleared as no competition concerns arose

However, the BCA fined Cordeel a symbolic fine of 5,000 EUR for "gun jumping" (i.e. implementing a notifiable transaction without prior approval from the BCA). In determining the rather modest level of the imposed fine, the BCA considered the lack of negative impact of the transaction on competition, the limited duration of the infringement (one month), and the value of the transaction. The BCA also took into account mitigating circumstances such as Cordeel's lack of intent, its active cooperation with the BCA, the urgent character of the transaction, and the fact that the transaction qualified for the simplified procedure. In addition, it should be noted that the Minister of Economic Affairs made use of his right to be heard in merger control procedures, and, in the light of the above circumstances, asked the BCA not to impose a fine, or only a symbolic one. This case illustrates that the BCA is willing and able to take action when a notifiable transaction is not filed, even where the transaction is deemed admissible from a substantive point of view.

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Belgian Competition Authority adopts new Leniency Notice



Further to the closure at the end of January of the public consultation regarding the revision of the 2007 Leniency Notice ([see Belgian Competition Law Newsletter 2015/4](#)), the BCA adopted a new Leniency Notice on 1 March 2016. The new Leniency Notice entered into force on 22 March 2016 and will apply to all leniency applications submitted after that date. Whilst the new Leniency Notice does not cover vertical practices or horizontal practices other than cartels, any cartels having a vertical dimension (such as hub-and-spoke cases) fall within its scope.

Based on the BCA's practical experience gained since 2007, the procedure and obligations applicable to undertakings requesting full immunity or a reduction from fines has been further fine-tuned. Leniency applications need to be filed with the Auditor-General and are understood to be filed on the date of the first meeting with the Auditor-General. In line with the European Model Leniency Program, summary applications can be introduced for all type of leniency application, irrespective of type or place in the queue. In order to enable undertakings that were not raided to blow the whistle, the BCA will issue a press release after each dawn raid indicating the sector which was raided. The new Leniency Notice also reinforces the rules on confidentiality to ensure the effectiveness of the leniency program.

Furthermore, the bands for reduction in fines were revised. Whilst the fine reduction for the first applicant (between 30% and 50%) and the third applicant in line (between 10 and 30%) remain unchanged, the second applicant in line is now entitled to a reduction of between 20% and 40% (previously 10-30%).

Finally, the new Leniency Notice also reflects the introduction of sanctions for private persons (fines of up to 10,000 EUR) in the Code of Economic Law in September 2013. Under the 2016 Leniency Notice, private persons involved in hard core competition law infringements can apply for leniency individually or together with the company. Each private person applying for immunity will be rewarded immunity from fines (irrespective of the rank of the application), and private persons who cooperate with the preparation of their company's leniency application always qualify for immunity from fines.

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Belgian Constitutional Court rules on limitation period for civil damage claims

On 10 March 2016, the Belgian constitutional court ruled that civil damage claims following a cartel decision cannot be time-barred, as long as the decision of the competition authority remains subject to an appeal.

Article 2262bis of the Belgian Civil Code only allows claimants to initiate civil damage claims within five years from the day following the day on which the injured person becomes aware of the loss or the aggravation therefore, and the person responsible. The Belgian constitutional court ruled that this violates the principle of equal treatment and restricts the plaintiff's ability to bring an action for damages.

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