

# Belgian

## Competition Law

### NEWSLETTER



#### Authors



**Kurt Haegeman**  
+322 639 3665  
[Kurt.Haegeman@bakermckenzie.com](mailto:Kurt.Haegeman@bakermckenzie.com)



**Joost Haans**  
+322 639 3766  
[Joost.Haans@bakermckenzie.com](mailto:Joost.Haans@bakermckenzie.com)



**Vincent Mussche**  
+322 639 3741  
[Vincent.Mussche@bakermckenzie.com](mailto:Vincent.Mussche@bakermckenzie.com)



**Hannelore Wiame**  
+322 639 3707  
[Hannelore.Wiame@bakermckenzie.com](mailto:Hannelore.Wiame@bakermckenzie.com)



**Fientje Moerman**  
+322 639 3667  
[Fientje.Moerman@bakermckenzie.com](mailto:Fientje.Moerman@bakermckenzie.com)

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#### BELGIAN COMPETITION NEWSLETTER 2016/2 (April - June 2016)

##### Belgian Competition Authority adopts 2016 note on enforcement priorities

In March 2016, the BCA published its third note on enforcement priorities. As in previous years ([see Belgian Competition Law Newsletter 2014 1/3](#)), the note expands on both the BCA's methodology for selecting cases, and sets out the strategic and sector priorities for the upcoming year.

The BCA's methodology for selection and prioritisation of cases involves four criteria: impact, strategic importance, risks and resources. In assessing the impact of cases, the BCA will consider not only the direct harm caused by the alleged infringement in the relevant sector in terms of prices, product quality and service to consumers, but will also take into account indirect effects such as the dissuasive factor of the enforcement in connected sectors. A case will be considered to have strategic importance when it involves a priority sector, or where the case would enable the BCA to clarify the interpretation of the Competition Act.

The BCA has indicated that in 2016 it will prioritise enforcement in the following sectors:

- liberalised sectors and network industries, in particular postal services and telecoms (market access for operators wanting to offer triple and quadruple play services);
- retail distribution and the relationship with suppliers (in particular in the agro-food industry);
- the media sector and digital economy (access to content);
- the provision of services to companies (and private persons), in particular the activities of trade associations and the legal form available to undertakings; and
- public procurement.

The BCA also states that it will attempt to maintain a good balance between the enforcement of hardcore infringements and more complex or innovative cases. Finally, the BCA concludes that, given its current lack of staff, it will focus on cartel infringements in particular - as these have a direct effect on price increases, reduce innovation, and disincentivise consumers from comparing prices.

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## Belgian Competition Authority publishes its 2015 Annual Report



On 24 June 2016, the BCA published its annual report, summarizing the BCA's activities over the year 2015.

The year 2015 was the "the year of the settlement". The BCA adopted its first two settlements, with record fines of respectively 174 million euros in the supermarkets cartel ([see Belgian Competition Law Newsletter 2015/2](#)) and 1,19 million euros in an antitrust case concerning the National Lottery ([see Belgian Competition Law Newsletter 2015/3](#)).

Further, the report provides some interesting key figures: In 2015, the BCA received 8 leniency applications (e.g. 17 in 2014) and assisted the EC in 2 dawn raids but carried out no raids of its own. It received not less than 32 notifications of concentrations, as opposed to 16 in 2014.

As far as the BCA's participation to the European Competition Network's activities is concerned, the BCA assisted the European Commission in 2 inspections and answered 31 questions of other national competition authorities. Furthermore, the annual report mentions the BCA's involvement in the so called "Neighbours meeting", chaired jointly by the Dutch Competition Authority (the Authority for Consumers & Markets (ACM) and the BCA, and during which issues concerning markets, working methods and ongoing cases are discussed.

Furthermore, the report notes that the President of the BCA provided informal guidance on 8 issues, mainly concerning the agricultural sector. He also issued his opinion on the functioning of iChoosr, a platform for electricity and gas group purchases, on price indicators concerning prices in service stations and on the cost index in the laundries sector.

Finally, the report provides an estimate of the economic impact of the Belgian competition policy on consumer welfare. While making such estimate is fairly complicated and strongly dependent on the benchmark used and the method applied, the BCA concluded that 2015 was an exceptional year. The impact of the Belgian competition policy was estimated to be more than 4 times as big as in 2014 (e.g. 2465,6 million euros when using the OESO method, compared to 609,8 million euros in 2014) and more than twice as big as in 2014 when applying the EU-method (e.g. 770,8 million euros million euros, compared to 365,9 million euros in 2014).

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## Brussels Court of Appeal annuls Belgian Competition Authority's decision imposing fine for abuse of standard setting process

On 30 August 2013, the BCA imposed a EUR 14.7 million fine on Holcim, Cimenteries CBR S.A. (CBR), Compagnie des Ciments Belges S.A. (CCB), the industry association Febelcem; and the research institute CRIC/OCCN for co-ordinating their actions in and towards standard-setting and certification bodies to delay the acceptance in law and in fact of ground granulated blast-furnace slag (GGBS) as a partial substitute of cement for the production of concrete during the period May 2000 - October 2003. The BCA found that, in that way, access to the market to new entrants (using GGBS) such as ORCEM would be delayed and the position of the cement producers involved protected. In particular, the BCA ruled that anti-competitive coordination took place, intended to restrict competition (by object) by delaying the normalisation and certification of GGBS and its use in concrete by the implementation of delaying tactics in relation to the national technical approval of GGBS as a construction material, the granting of the Benor label for concrete produced with GGBS; and the approval of the National Application Document, through which a new European norm for concrete which allowed for the use of GGBS would be implemented in Belgium.

Holcim, FEBELCEM, CCB, Cimenteries CBR and CRIC appealed the BCA's decision before the Brussels Court of Appeal. Even though the BCA had found in its Decision the existence of an agreement and/or concerted practice, the Court of Appeal held that the BCA had not proven the existence of an agreement. The Court went on to examine whether the BCA had proven the existence of a concerted practice and stated, in light of the European Court of Justice's case law, that to be able to categorise behaviour as a concerted practice, there has to be (i) a concertation between undertakings (ii) behaviour of these undertakings on the market and finally (iii) a causal link between (i) and (ii).

The appealing parties argued, inter alia, that the BCA had not taken into account the context of the disputed behaviour, i.e. the fact that it was carried out as a lobbying activity. Holcim added that even if there had been a concerted practice, it took place "outside" the market and not "on" the market.

The Court ruled that lobbying, at least a priori, indeed constitutes an activity "outside the market". It explained that when undertakings collaborate to defend a common position vis-à-vis a public decision making body, the undertakings are in fact not acting on the market - which is their natural terrain, and upon which they are capable of deciding their own behaviour - but on the political or normative terrain, in order to influence a decision making process.

The Court then went on to disagree with the BCA's finding that the undertakings overstepped the admissible framework of a lobbying activity, as this finding was not apparent from the file or the elements cited in the BCA's Decision. The Court added that the parties had expressly been invited to convey their views, as undertakings of the sector, under the umbrella and within the IBN (Institut belge de la normalisation) and UBAtc (Union belge pour l'Agrément technique de la construction), both under the Ministry of Economy's watch. Both bodies were not controlled by the parties, nor did the parties have any decision making powers over them. The Court then held that the presence of market actors within certification and normalisation bodies is beneficial because these actors have the necessary technical and helpful competences for the process even if their participation in these organizations can be difficult as they participate in a standardisation and normalisation process which concerns their activities and own interests on the market. That is why public authorities are expected to put systems in place which make it possible to benefit from the market actors' technical knowledge without giving these actors decision making powers.

The Court found that even though Holcim, CCB, CBR and FEBELCEM took part in some of the normalisation and standardisation processes, they did not have, even together, any decision making power. Furthermore, the Court found that the fact that the parties were invited by public bodies to participate in advisory, and even decision making, bodies, meant that the lobbying practices took place in an open, objective, transparent and non-discriminatory framework (as required by the European Commission's Guidelines). It added that the parties had collaborated within the certification and normalisation framework to defend their interests as cement-manufacturers without taking control of the procedure or vitiating it.

Considering the fact that the alleged behaviour did not take place on the market and it in any case remained intrinsically linked to the certification and normalisation process, which complied with the requirements of openness, objectivity, transparency and non-discrimination, the Court found that there had not been any concerted practice restricting competition. It therefore annulled the BCA's Decision.

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## Brussels Court of Appeal upholds Belgian Competition Authority's decision to suspend exclusivity clause included in Fédération Equestre Internationale's general terms and conditions



On 27 July 2015, the BCA instructed the Fédération Equestre Internationale ('FEI') to partially suspend an exclusivity clause in its general terms and conditions which prevented horse-riding athletes and horses from participating in FEI-approved show-jumping competitions if they had participated in non-FEI approved events within the previous six months ([see Belgian Competition Law Newsletter 2015/4](#)).

The FEI sought to have the BCA's suspension decision overturned on appeal, but on 28 April 2016 the Brussels Court of Appeal (the 'Court') upheld the BCA's decision.

The FEI alleged that the BCA had infringed Article 11(3) of Council Regulation No. 1/2003, according to which national competition authorities, when acting under Article 101 or 102 TFEU, must inform the European Commission in writing before or without delay after commencing the first formal investigative measures. The FEI claimed that the BCA had infringed this provision, as the Auditeur Général opened the investigation on 2 June but only notified the Commission of the investigation on 9 June. The Court simply held that Article 11 does not impose a strict deadline, which when exceeded, would result in the decision becoming null and void, and thus rejected the FEI's argument.

Furthermore, the FEI argued that the BCA infringed international law and principles of good administration. The FEI claimed that, under Belgian law, the BCA lacked the authority to impose preliminary measures whose scope extended to five third countries and eight EU Member States. Nevertheless, this argument also failed. The Court dismissed this plea by holding that Article 5 of Regulation No. 1/2003 gives national competition authorities the power, when applying Articles 101 and 102 TFEU to individual cases, to order preliminary measures. In addition, the Court also referred to the Commission Notice on cooperation within the Network of Competition Authorities (the "Cooperation Notice"), according to which either one national authority, several national authorities in parallel, or the European Commission will investigate a case - and may do so by applying Article 101 and/or Article 102 TFEU. The Court considered the case at hand to be sufficiently linked to the Belgian territory, enabling the BCA to be considered as a "well placed" authority (within the meaning of the Cooperation Notice) and therefore entitled to investigate the case under Article 101 and/or Article 102 TFEU and take preliminary measures.

The Court equally dismissed the FEI's arguments alleging an infringement of the FEI's rights of defence, stating that Article 6 of the European Convention on Human Rights did not apply to the case as no administrative sanction of a criminal nature had been imposed by the BCA.

The BCA had imposed preliminary measures after having established (i) that it was not unreasonable to consider, *prima facie*, that the clause may violate Article 101 and/or 102 TFEU and their Belgian equivalents, and (ii) that it was urgent to order preliminary measures to avoid a situation that might otherwise give rise to serious, imminent and irreparable harm to the complainants. In that respect, the Court considered whether it was indeed not "manifestly" unreasonable to consider that the facts of the case may constitute an infringement of competition law, adding that the judicial review only extends to verifying whether the BCA made errors of law or manifest errors of appreciation of the facts. In that respect, the Court found that the exclusivity clause indeed has a restrictive effect on competition, by preventing horse-riding athletes and horses from participating in FEI-approved show-jumping competitions if they had participated in non-FEI approved events. Although the duration of the exclusion is in principle six months, the effects thereof may last much longer in practice. Furthermore, even though the Court accepted that the well-being of the participants, the integrity of sport competitions, and the "calendar" objective underlined by the FEI may indeed constitute legitimate objectives, it remarked that the FEI already had adopted regulations to achieve these objectives and that the restrictive effects of the exclusivity clause could only be lifted under exceptional circumstances.

The Court therefore held that the BCA was correct in considering, without committing a manifest error of appreciation, that the exclusivity clause may give rise to a violation of Article 101 TFEU and its Belgian equivalent - without considering it necessary to look into whether Article 102 TFEU and its Belgian equivalent had also been infringed. Finally, the Court found that the BCA's decision to suspend the exclusivity clause also met the requirements to order preliminary measures.

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## Ghent Court of Appeal applies European Commission de minimis notice to beverage supply agreement

On 3 February 2016, the Ghent Court of Appeal (the 'Court') ruled that Article 101 TFEU was not applicable to a beverage supply agreement between Clarysse and Chico by virtue of the application of the de minimis rule.

Under the terms of the beverage supply agreement, Chico had undertaken, for a period of five years, to exclusively purchase the beverages covered by the contract from Clarysse. In the appeal proceedings, Chico argued that the beverage supply agreement should be declared null and void because it infringed Article 101 TFEU.

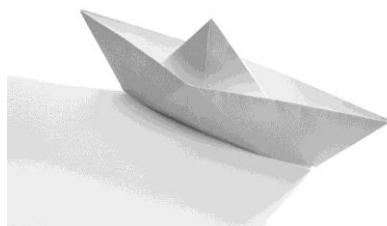
The Court applied the Commission's Notice on Agreements with minor importance (the 'de minimis notice') under which vertical agreements are deemed not to have an appreciable effect on competition if the parties' market share is below 15%, or below 5% if competition could be restricted by the cumulative foreclosure effect of parallel agreements by different suppliers or distributors having similar effects on the market.

On the basis that Clarysse's market share on the Belgian market was below 5% and the duration of the agreement did not exceed five years, the Court concluded that Article 101 TFEU was not applicable to the beverage supply agreement between Clarysse and Chico.

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## Belgian Competition Authority adopts fourth settlement decision in the river cruise sector



The BCA's investigation into the sector of regular cruise services on the upper Meuse and the navigable part of the Lesse started with an application for immunity filed in 2014 by the undertaking controlling SPRL Dinant Croisières, SPRL Compagnie des Bateaux de Dinant and SA Dinant Evasion. In addition, four individuals also applied for immunity. After the first information request issued by the BCA in 2015, the undertaking controlling SPRL Les Sarcelles and SPRL Les Bateaux Mouche Belgique also filed a leniency application.

In its decision of 27 May 2016, the BCA established that the two cruise operators had infringed the cartel prohibition by having entered into two anticompetitive agreements aimed at allocating the market for regular cruises on the upper Meuse and the navigable part of the Lesse between 1983 and 2014. The first agreement lasted from 1983 until the end of 2013 and involved price fixing and collusion on staff remuneration, maintenance works, publicity, and the determination of the companies' commercial and accounting policies. The second agreement, which lasted from the end of 2013 until the end of 2014, concerned arrangements on the exclusive exploitation of forebays and the related boat allocation.

Whilst the BCA held that the infringement lasted from 1983 until the end of 2014, it decided to take October 2006 as the starting date of the infringement - since the BCA only gained the ability to sanction SMEs from this date.

No fine was imposed on the undertaking and the individuals which had applied for immunity. After a 45% fine reduction, the undertaking controlling SPRL Les Sarcelles and SPRL Les Bateaux Mouche Belgique was fined 64,100 EUR.

This is the fourth settlement decision adopted by the BCA, following the supermarkets case ([see Belgian Competition Law Newsletter 2015/2](#)), the Belgian National Lottery case ([see Belgian Competition Law Newsletter 2015/3](#)), and the industrial batteries cartel ([see Belgian Competition Law Newsletter 2016/1](#)).

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## Belgian Competition Authority ends its investigation into the Professional Institute for real estate agents

On 29 June 2015, the BCA announced that it had ended its investigation against the Professional Institute for real estate agents ("BIV").

The BCA held that extensive research has shown that the real estate agents are completely free in setting their tariffs when selling real estate. However, the sector remains characterized by limited differentiation with regard to the tariffs charged. A commission of 3 % of the sale value is still the point of reference for a large majority of real estate agents, in spite of a previous decision of the Competition Council of 2010 sanctioning the BIV because of its circulation of recommended minimum tariff scales (related to the services of real estate agents for the period of 1996 to 2004).

Early 2015, BCA opened an investigation against the BIV. Real estate agents registered with the BIV were asked to fill in an online survey about the tariffs and tariff structure of their real estate office and about possible disciplinary proceedings by the BIV in this respect.

The BCA-investigation found that the BIV did not circulate recommended minimum tariff scales. While real estate agents are free to set their own tariff, there is still very little differentiation between the tariffs of different agents. The BCA studied the applied tariff structures, and concluded that a significant majority of the surveyed real estate agents applies a similar price structure. The survey indicated that the applied commission is not an important competitive driver that allows agents to stand out from their competitors.

The BCA stressed that it would like to see more diversity in the tariff structure, as should be expected in a healthy competitive market environment. It will continue to monitor the sector closely and reserves itself the right to open a new investigation.

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## Belgian Competition Authority imposes fine on Nethys for non-compliance with remedies imposed in Tecteo/L'Avenir clearance decision



On 26 March 2014, the BCA conditionally cleared the acquisition by Tecteo, a company mainly active in the telecom and audio-visual sector under the brand VOO in the Brussels and Walloon region, of L'Avenir Advertising and Editions de l'Avenir, a publisher of newspapers and magazines such as l'Avenir and Proximag ([see Belgian Competition Law Newsletter 2014/1-3](#)).

Under the imposed commitments, Tecteo agreed, for a period of five years, not to shorten its deadline for submission of information in connection with planned advertising, and to install appropriate Chinese Walls within the Tecteo Group to avoid the spill over of commercially sensitive competitor information in the area of cable distribution or telephony, when such competitors book advertising space in the press publications of Editions de l'Avenir. In addition, an independent third party must monitor compliance with these commitments and submit a report to the BCA on an annual basis.

In its decision of 13 June 2016, the BCA imposed a fine of EUR 63,296 on Nethys (part of the Tecteo Group) for non-compliance with the commitments in respect of confidentiality and annual monitoring.

This sanction proves the high alertness of the BCA and the importance of compliance with the conditions imposed on companies in merger cases.

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## **Belgian Competition Authority raids pharmaceutical suppliers of non-prescription products**

On 27 May 2016, the BCA announced that inspections had been carried out at several pharmaceutical suppliers of non-prescription products such as cream, vitamins, and painkillers (often referred to as over-the-counter medications).

The BCA has indicated that it has information about possible infringements of Article IV.1 of the Code of Economic Law and Article 101 TFEU. No further information is publically available at this stage.

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