Belgian Competition Law NEWSLETTER

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Belgian Competition Authority refuses White Star's request for interim measures

Last season, ASBL White Star Woluwe Football Club ("White Star"), a football club based in Molenbeek, won the second division football competition. This would have allowed the club to be promoted to Belgium's first division ("division 1A"). However, in April 2016, the Belgian football association ("BFA") refused a licence to White Star to play in the highest 1A division during the coming 2016-2017 season, and as a result KAS Eupen instead ascended to division 1A.

According to the BFA, White Star did not satisfy all of the conditions set out in its regulation to obtain the licence as, due to financial instability, the club was unable to guarantee its continuity during the entire season for which the 1A licence was requested. White Star appealed this decision before the Belgian Arbitration Court for Sports ("CBAS"). The CBAS confirmed the BFA's decision and repeated that White Star's application did not meet the requirements laid down in the BFA's general terms given the existence of a outstanding debt and the absence of an agreement with the

commune of Molenbeek that it could use the stadium during the 2016-2017 season.

White Star filed a complaint and a request for interim measures before the BCA on 7 June 2016. It requested the BCA to impose interim measures so that it could start playing in division 1A. White Star claimed that the lack of a licence could potentially inflict serious financial and sporting harm to the club. White Star held that the refusal to grant a licence violated Article 101 TFEU and Article 102 TFEU, as well as their Belgian law counterparts.

More specifically, White Star claimed that the decision of the BFA, which is to be considered as a group of undertakings for the purposes of the application of competition law, was in fact based on anti-competitive grounds. It held that the BFA wanted to prevent it from entering division 1A by allowing KAS Eupen to play in division 1A instead. It also claimed that, even if the decision had been based on legitimate objectives (i.e. the non-fulfilment of the principle of continuity for the upcoming season), it was disproportionate and discriminatory. White Star also held that the BFA abused its dominant position in the market for the organisation of football tournaments by refusing the licence to play in division 1A as this refusal had an exclusionary effect. It hindered new competitors from entering the market and, as such, prevented White Star from exercising competitive pressure on the other members of 1A division.

In its decision of 14 July 2016, the BCA considered the request as admissible but unfounded. It ruled that, given the specificities of the sport sector, there were no prima facie indications that the principle of continuity imposed by the BFA's regulation and the appeal procedure with the CBAS infringe Article 101 and 102 TFEU. Furthermore, it found that White Star was not treated in a discriminatory way compared to other football clubs that also experienced financial difficulties but had obtained a licence. As such, the BCA refused to grant interim measures.

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Belgian Competition Authority adopts competition law guidelines for small and medium-sized enterprises

On 20 July 2016, the BCA adopted competition law guidelines for small and medium-sized enterprises (“SMEs”). In the introduction of the guidelines, reference is made to the fact that Belgium has an open economy, which is largely driven by SMEs and that only free and sustainable competition can give consumers and undertakings the chances they are entitled to. Free competition is therefore of utmost importance for SMEs, but also requires that SMEs are perfectly aware of the rules that apply, and how they can improve a compliance culture within the organisation, which is the aim of the guidelines.

The guidelines first set out in a brief manner the applicable rules in the area of restrictive practices, and the sanctions that can be imposed for infringements. They then explain how SMEs can implement a tailored compliance programme, with practical guidance in the area of risk assessment, codes of conduct, the appointment of compliance officers and training. Finally, the importance of management support for a compliance culture is stressed. At the same time, the BCA restates its position that the existence of a compliance programme does not constitute an attenuating circumstance for the fine calculation in case an infringement is established.

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Telenet loses appeal to annual interim measures in relation to exclusive broadcasting rights

On 7 September 2016, the Brussels Court of Appeal confirmed the BCA's decision (“the decision”) to impose interim measures on both Telenet and vzw Verenigde Veldritorganisatoren in relation to Telenet's exclusive broadcasting rights for the Superprestige cyclocross championship (see Belgian Competition Law Newsletter 2015/4).

The rights to broadcast the Superprestige cyclocross (as well as the UCI World Cup cyclocross) were previously in hands of two open-net broadcasters, VIER (SBS Belgium) and Sporza (VRT). These rights were then transferred to Telenet, which meant that only Telenet-subscribers would be able to watch the championship (excluding all other competing TV-distribution platforms such as Proximus TV). Proximus filed a complaint with the BCA, which imposed interim measures and found that when an agreement grants exclusive broadcasting rights for five years without a transparent, non-discriminatory bidding procedure, a *prima facie* infringement of competition rules can be established.

In its appeal, Telenet argued, *inter alia*, that the conditions for imposing interim measures were not met. It argued that the BCA had limited itself to establishing whether it was not "manifestly unreasonable" to consider the facts as an infringement whereas it should have followed the "actual possibility" test prescribed by Belgian case law (i.e. the

requirement that there is an actual possibility of there being an infringement). The Court disagreed, finding that the tests are not incompatible as both seek to avoid interim measures being imposed on behaviour that manifestly falls within the boundaries of what is acceptable. The Court considered that when, on the basis of a first diligent analysis there are serious doubts about this, it is not manifestly unreasonable to conclude that there is a possible *prima facie* infringement, in particular given the limited investigation possibilities of the Competition College (as opposed to the Auditor), the very short time limits, and the possibility of review by the Brussels Court of Appeal.

Telenet also rejected the BCA's reasoning that Telenet's obtaining of exclusive live broadcasting rights for the Superprestige, without there being a prior tendering procedure, for a long period, on top of the exclusive rights for the live broadcasting of the UCI World Cup, constitutes an abuse of dominance on the retail market for the supply of TV services. The Court disagreed, finding that this goes further than competition on the merits, as it leads to premium content being available on only one distribution platform, resulting in a large amount of viewers not having access to the content unless they switch to Telenet. Furthermore, Telenet obtained these rights outside the context of an open, transparent and non-discriminatory tender procedure and for a period exceeding 3 years.

Furthermore, the Court also reiterated the principle that the BCA does not necessarily only have to look at harm suffered by one party, and that it can impose measures benefitting not only the applicant, but also other undertakings, as it is the BCA's task to ensure that the public interest is safeguarded. Therefore, it did not agree with Telenet's view that the "harm" in this case consisting of a loss of viewing figures or subscribers that could translate into a loss of publicity income and/or a loss of credibility as sports channel would only apply to broadcasters, but not to Proximus as a distribution platform.

Finally, Telenet also took issue with the duration of the preliminary measures, until season 2015-2016 and beyond, considering the harm should be immediate and the requirement for preliminary measures should be urgent. Telenet argued that the measures should have only been imposed for the time the BCA needs to assess the complaint on its merits, which it considered would be dealt with before the start of the 2016-2017 season (i.e. in October 2016). The Court dismissed Telenet's arguments, holding that the measures would not constitute a lasting and irreversible disadvantage for Telenet and that they were limited to the loss of the anti-competitive and unlawful advantage to operate rights exclusively.

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Belgian Competition Authority approves a commitment offered to remedy concerns about Kinepolis' acquisition of Utopolis

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 regarding Kinepolis becoming too dominant in certain regions post-transaction (see Belgian Competition Law Newsletter 2016/1).

It is noteworthy that Kinepolis ultimately decided to divest not two but all four cinema complexes. On 3 October 2016, the BCA approved the purchase of all four Belgian Utopolis cinema complexes (Mechelen, Aarschot, Lommel and Turnhout) by UGC Belgium NV, in accordance with the commitments required by the BCA mentioned above.

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Belgian Competition Authority raids company distributing infra-red sensor cabins

On 20 October 2016, the BCA announced that inspections had been carried out at a company distributing infra-red sensor cabins over suspected resale price maintenance. These are the first ever vertical raids by the BCA. No further information is publically available at this stage.

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Belgian Competition Authority accepts commitments offered by Immoweb

On January 30 2015, the BCA opened an investigation against Immoweb. The BCA's investigation related to the most-favoured-nation clauses ("MFN") included in agreements between Immoweb and software providers. Under these clauses, whenever a software provider lowers its price to be paid per displayed property on other real estate portals, Immoweb has the right to claim the same lower tariff from that software provider (see Belgian Competition Newsletter 2015/4).

In its preliminary report, the Auditor held that these most-favoured-nation clauses have anti-competitive effects as they keep the tariffs of software providers artificially high, i.e. at a constant level of around EUR 2.5 per advertisement. They disincentivise software providers to accept lower prices in their negotiations with real estate portals. Accepting lower prices would mean that Immoweb, the largest customer, would also automatically receive the same lower tariff.

Immoweb decided to offer commitments in order to put an end to the investigation. Immoweb commits, amongst others, to unilaterally put an end to these MFN clauses and not to incorporate MFN clauses in future contracts with software developers for a period of 5 years. Following these commitments the BCA decided to close the investigation on 7 November 2016.

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Belgian Competition Authority clears acquisition of AMP by bpost subject to conditions

On 8 November 2016, the BCA approved the acquisition of AMP by bpost subject to conditions. AMP, a subsidiary of French media group Lagardère, is mainly active on the market for the distribution and delivery of newspapers and magazines to points of sale, and is also active on the retail segment in Belgium through the Press Shop and Relay points of sale.

A number of competition concerns had been identified by the BCA, such as the fear that the transaction would give rise to price increases for press distribution services to points of sale, and the impact on the quality of such distribution. The BCA was concerned that bpost would have the incentive to restrict competition between unaddressed and addressed distribution of press articles by making services that are not governed by the current State concession agreement relating to the home delivery of addressed newspapers less attractive than the subsidized dispatching of addressed newspapers. There was also a concern that bpost would favour the Press Shop and Relay selling points to the disadvantage of independent points of sale.

In order to address these concerns, bpost offered 10 commitments, most of which are valid for a five year period. The commitments include *inter alia* the softening of the current exclusivity provisions between AMP and the editors, the maintenance of the current press distribution services offering by AMP (including the maintenance of the return system for unsold newspapers and magazines at a reasonable price), the prohibition to bundle AMP's distribution services with other bpost services, the guarantee to provide the same operational treatment for the distribution of newspapers and magazines to points of sale for in shop subscriptions and the distribution for individual sales, and equal treatment between independent points of sale and Press Shop/Relay points of sale. A trustee will monitor bpost's compliance with the commitments.

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Belgian Competition Authority raids several companies active in the sector of wholesale distribution of pharmaceutical and para-pharmaceuticals products to pharmacies

On 21 November 2016, the BCA conducted surprise inspections at the premises of a number of pharmaceutical wholesalers including Belmedis and Febelco.

The BCA has indicated that it has information in its possession about allegedly anticompetitive agreements between several players active in wholesale distribution of pharmaceutical and para-pharmaceutical products to pharmacies in Belgium.

Mrs Véronique Thirion, the Auditor General at the BCA, has stated that the BCA considers this as a "*very serious*" case due to the allegation that market players agreed on prices and discounts, and allocated markets amongst each other.

These practices would mainly concern the prices of the non-regulated medicines, which are available without prescription.

It is worth noting that these alleged infringements came to light as a result of the responses which the BCA received from various market players in the context of its market investigation and merger control review of the intended acquisition of Belmedis by Pharma Belgium (Celesio-group), which was notified to the BCA on 25 October 2016.

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Belgian Competition Authority rejects interim measures against AB InBev in Bosteels acquisition

Further to AB InBev's intended acquisition of Brewery Bosteels (known for its beer brands such as Triple Karmeliet and Kwak), Alken Maes filed an application for interim measures with the BCA to suspend the planned acquisition until the BCA's decision on the merits under the abuse of dominance rules. Alken Maes argued that, even if Bosteels' turnover did not meet the Belgian merger notification turnover thresholds, the envisaged acquisition (and in particular the acquisition of the brand Triple Karmeliet) should to be considered as an abuse of dominance. More precisely, Alken Maes argued that by acquiring Bosteels, AB InBev was abusing its dominance on the Belgian off-trade and on-trade beer markets by reinforcing its portfolio position on each segment of the Belgian beer market, by blocking competitors' expansion in the growing degustation beer segment and by reinforcing its bargaining power towards pubs.

In its decision of 21 November 2016, the BCA rejected Alken Maes' request for interim measures. The BCA first held that, unlike European law, Belgian competition law does not exclude the application of the rules on restrictive practices (Article IV.2 Code of Economic Law) to concentrations. However, the BCA stressed that any assessment of a concentration under the abuse of dominance rules should always be subject to the following guiding principles: (i) a concentration is a legitimate transaction (unless the BCA can demonstrate that this is not the case); and (ii) concentrations in principle need to be assessed under the merger control rules. Based on these principles, the BCA held that, in the context of a request for interim measures, acquisitions that are not subject to merger control review can only be assessed under the abuse of dominance rules if there are strong indications of restrictions which can *prima facie* be distinguished from the mere effect of the concentration and which can *prima facie* by themselves be qualified as an abuse of a dominant position. In practice, this means that there would need to be very strong indications of restrictive effects on competition that are distinguishable from the concentration effects.

The BCA then indicated that the transaction would not lead to a reinforcement of AB InBev's position given the limited increment of AB InBev's market share (1,5% on the Belgian on-trade and off-trade beer market and 6,5% on the smaller degustation beer segment on which there was no overlap). As to the other abuse of dominance allegations, the BCA concluded that there was insufficient evidence that the transaction would result in restrictions on competition that are *prima facie* distinguishable from the mere effects of the concentration and which might by themselves *prima facie* be qualified as an abuse of a dominant position.

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Court of Appeal annuls EUR 37 million abuse of dominance fine imposed on bPost

On 10 December 2012, the BCA fined bpost EUR 37 million for abuse of dominance by applying an exclusionary rebate scheme to different categories of users of its “Direct Mail” and “Admin Mail” services (to the benefit of large customers) between January 2010 and July 2011. The case was triggered by complaints from several post intermediaries. Back in July 2011, the Belgian postal and telecom regulator (BIPT/IBPT) imposed a fine of EUR 2.3 million on bpost for breaching the non-discrimination obligation imposed on bpost by postal regulations due to its monopolist position. In March 2016, the Brussels Court of Appeal annulled the BIPT/IBPT's decision as it considered bpost's rebate system to be non-discriminatory because the clients were not in comparable positions. IBPT did not appeal the annulment.

In 2013, bpost appealed the BCA's decision and argued that the *ne bis in idem* principle had been violated. The Court of Appeal followed bpost's reasoning, and ruled that the three conditions for the *ne bis in idem* principle as laid down in Protocol 7(4) of the European Convention of Human Rights to apply. First, both authorities' fines have a criminal character (particularly in light of the nature of the infringement and the gravity of the sanction). Second, both cases concerned the same facts (i.e. bpost's pricing system for the Direct Mail and Admin Mail products from 1 January 2010 until July 2011). Third, since the judgment of the Court of Appeal annulling the IBPT fine in March 2016 had not

appealed, the issue at stake had been decided at final instance. On that basis, the Court of Appeal annulled the BCA's decision in its judgment of 10 November 2016.

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Belgian Competition Authority expands

The BCA announced that it will expand its workforce in 2017. Currently, the BCA has 38 employees, and it is planning to recruit 24 additional employees.

The BCA launched a first recruitment round on 14 October 2016 to hire lawyers-investigators, and personnel for the Chief Economist's department. A second recruitment phase is foreseen at the start of 2017, to hire legal advisors, economic investigators and forensic investigators.

The additional workforce will allow the BCA to grow and investigate more cases. That said, the BCA will remain a small authority compared to other national competition authorities.

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