Dear Sir/Madam,

We are pleased to send you the second edition of our Benelux Competition Newsletter for 2018.

Belgium

The Belgian Competition Authority ("**BCA**") continues its enforcement activities with dawn raids at companies active in fire protection, and dawn raids at the request of the Romanian competition authority at several immunoglobulin producers.

The BCA also looked at market definitions in the newspaper sector and mobile telecom sector, clearing two mergers unconditionally in phase I.

A new chapter in the Kinepolis saga has been added, with the BCA reaffirming its partial lift of the merger remedies imposed on Kinepolis back in 1997.[1]

Finally, the Supreme Court confirmed the judgments of the Brussels Court of Appeal which annulled the dawn raids conducted by the BCA in the travel agency and cargo handling sector respectively. These judgments confirm that procedural guarantees regarding dawn raids under the old Belgian Competition Act were insufficient to safeguard the searched companies' rights of defence, leading to the illegality of the dawn raids.

The Netherlands

The Authority for Consumers and Markets ("**ACM**") has been focusing on its key priorities. For example, ACM recently opened a sector inquiry into the prices of rheumatic drugs. It also looked at the "risks and opportunities of digitalization". Finally, ACM closed its investigation into possible cartel behavior in the bunker sector as part of its focus on "competition in ports".

In *Ledeboer*, ACM exceptionally granted an

In This Issue

exemption from the "stand-still obligation" under Dutch merger control regulations to avoid an imminent liquidation of a care organization. The normal rule is that transactions cannot close until the ACM has approved the transaction.

In addition, further light was shed on the effects of unlawful resale price restrictions for the validity of a franchise agreement. Confirming that an unlawful resale price restriction does not automatically lead to the annulment of the entire franchise agreement which contains these clauses.

A number of recent cases confirm that it can be beneficial for companies to object to fines imposed by ACM, as several fines for alleged cartel conduct in the cold storage industry were annulled and a fine for a construction company for cover pricing was reduced by almost 85%.

Luxembourg

The Luxembourg Competition Council issued two interesting decisions on price fixing agreements.

In *Webtaxi*, we found a welcome, but exceptional, reminder that even hard core restrictions of competition can in extreme circumstances benefit from exemption if demonstrated efficiencies follow from the price fixing agreement.

In *Epiceries du Luxembourg*, it was confirmed that market definition is crucial in examining whether a price fixing agreement is actually concluded between competing undertakings. If not, no infringement of competition law can be found.

We wish you a very pleasant read!

[1] Note that these were partially lifted in 2017.

supermarkets for illegal price fixing in joint promo folders but does not impose any fine

Benelux Competition Newsletter 2018/2

BELGIUM

Belgian Competition Authority clears acquisition of Mediafin by Roularta and Rossel & Cie

On 6 March 2018, the BCA cleared the acquisition of Mediafin NV ("**Mediafin**") by Roularta Media Group NV ("**Roularta**") and Rossel & Cie NV ("**Rossel**"). The case concerned a transaction where De Persgroep NV ("**De Persgroep**") sold 50% of its shares in Mediafin to Roularta. Since Rossel already held 50% of the shares in Mediafin, Roularta and Rossel would jointly control Mediafin as a result of the transaction.

The BCA evaluated the (i) non-coordinated vertical and (ii) conglomerate effects of the transaction, as well as

(iii) the coordinated effects.

First, the BCA assessed the non-coordinated vertical effects of the sale of advertising space for thematic advertising in Dutch and French-language magazines within the Belgian market. It concluded that the transaction would not result in anti-competitive, non-coordinated vertical effects, since the closest competitors (i.e., De Standaard, De Morgen, Le Soir and La Libre) of De Tijd and L'Echo (part of the merged company's portfolio) provided sufficient alternative access to advertising space. Access to a range of other advertising channels was thus secured even if the merging partners denied competitors access to its newspapers or magazines. The merged company's titles did not constitute an indispensable advertising channel for competitors.

Second, the BCA held that the transaction would not lead to any anti-competitive conglomerate effects in the readers' markets. A commercial strategy imposing a bundle against the will of readers could have serious financial consequences given the falling circulation figures of newspapers and magazines. The BCA found that the merged company would not have the ability or incentive to foreclose competitors in the advertising markets by bundling advertising space on television channels, in magazines and newspapers (cross-media advertising combination packages).

Third, the BCA decided that the transaction would not give rise to anti-competitive coordinated effects. It reasoned that the parties were mainly active in different markets, and that the transaction would not result in the disappearance of an important competitor, nor the reduction of the number of players in the market.

Based on the absence of any competition law concerns the BCA cleared the transaction after a Phase I investigation.

Belgian Competition Authority reaffirms the partial lift of remedies imposed on Kinepolis in 1997

On 26 April 2018, the BCA reaffirmed that the remedy which required Kinepolis to obtain prior approval from the BCA each time it planned to build a new cinema complex could be lifted.

On 28 February 2018, the Brussels' Court of Appeal annulled the BCA's decision of 31 December 2017 which partially lifted the remedies imposed on Kinepolis in 1997 (see Newsletter 2018/1 and Newsletter 2017/2), on the basis of insufficient motivation.

In its decision, the BCA took into account the judgment of the Brussels' Court of Appeal, and reasoned that the pro-competitive effects of organic growth, such as meeting customer demand in blind spots or increasing competition in local markets, where another cinema operator is already present, outweigh any potential negative effects on competition. Kinepolis planned to construct new cinemas which would unlawfully harm planned or existing investment projects of its competitors, its conduct would be caught under the rules against abuse of dominance.

This is shows that the BCA is, in very particular circumstances, willing to take up cases where the mere conclusion of a contract could qualify as an abuse of dominance when leading to foreclosure.

Supreme Court upholds judgments of Brussels' Court of Appeal on illegality of dawn raids in travel agency and cargo handling sector

In two judgments, which were both delivered on 26 April 2018, the Supreme Court dismissed appeals launched by the BCA against the judgments of the Brussels' Court of Appeal, which held that dawn raids in the travel agency sector (see Newsletter 2015/1) and the cargo handling sector (see Newsletter 2015/3) were illegal.

The Supreme Court confirmed that it is not excluded that Article 15 of the Belgian Constitution provides a

more far reaching protection regarding the "inviolability of the home" than Article 6 and 8 of the ECHR. The Brussels Court of Appeal was therefore right to hold that no dawn raid could be conducted without having a search warrant issued by an investigating judge, which was not present in either the Travel Agency case or the Cargo Handling case.

The Supreme Court further confirmed that the Brussels' Court of Appeal should impose appropriate remedies if it decides that the dawn raids were illegal. Such remedies must include the removal from the file of all evidence that has been directly or indirectly obtained by the BCA on the basis of the dawn raid.

Finally, the Supreme Court held that the Brussels' Court of Appeal was right to hold that it was up to the BCA to demonstrate that the evidence in the case file, which was not obtained during the illegal dawn raid but collected based on information gathered during that dawn raid, would also have been collected by the BCA if the dawn raid had not taken place.

The question whether the current regime for dawn raids under the Belgian Competition Act of 2013 satisfies both the requirements of the Belgian Constitution and the ECHR remains unanswered.

Belgian Competition Authority clears acquisition of Telelinq NV by Telenet Group BVBA

On 22 May 2018 the BCA unconditionally cleared the acquisition by Telenet Group BVBA ("**Telenet**") of all of Telelinq NV's ("**Telelinq**") outstanding shares and those of its subsidiaries: NEXTEL NV, NEXTEL Telecom Solutions NV and Telelinq Distribution & Finance NV.

Telenet is a Belgian cable network provider that supplies fixed internet and telephone services as well as cable TV in Flanders and in certain parts of Brussels. It is also active as a mobile phone service provider throughout Belgium.

On a wholesale level, Telenet sells access to its mobile network to mobile virtual network operators ("**MVNOs**") such as Telelinq.

Telelinq, active on the market as Nextel, is a company providing one-stop shop solutions, primarily, to SMEs, large undertakings, care institutions, non-profit organizations and government authorities in Belgium, for their network and telecommunication needs ("integrator services").

The BCA investigated whether the acquisition could give rise to input foreclosure in relation to (i) the Belgian wholesale market for access and call origination on mobile networks for MVNOs, and/or (ii) the Belgian retail market for the provision of fixed internet access services. In addition, the BCA assessed whether the transaction could give rise to coordinated effects (more specifically whether post-transaction, the parties would find it economically preferable to coordinate their behavior on one or more markets) or non-coordinated conglomerate effects (such as bundling).

The BCA found that the acquisition would not give rise to input foreclosure or any other anticompetitive (coordinated or non-coordinated) effect and cleared the proposed acquisition unconditionally.

Belgian Competition Authority raids companies active in the fire protection sector

On 4 June 2018, the BCA announced that inspections had been carried out at companies active in fire protection over suspected violations of Article IV.1 of the Belgian Code of Economic Law and/or Article 101 TFEU. No further information is publically available at this stage.

Belgian Competition Authority raids companies active in the human immunoglobulin sector

On 3 July 2018, the BCA confirmed that inspections had been carried out at the premises of producers of normal human immunoglobulins. The inspection was conducted at the request of the Romanian Competition Council. The Romanian Competition Council has information about possible infringements of Article 5 of the Romanian Competition Law n° 21/1996 and/or Article 101 TFEU.

Simultaneous inspections were conducted in Romania, Belgium and Italy. The companies under investigation include Biotest Pharma, Octapharma ,CSL Behring, Baxter and Baxaltam. All of these companies are members of the Plasma Protein Therapeutics Association, whose premises in Brussels were also raided.

>> Back to Top <<

THE NETHERLANDS

Insights from Authority for Consumers and Markets on digitalization

On 1 of April 2018, ACM published its annual publication in which it discusses current trends and developments that are relevant to its supervisory activities. In this year's edition, ACM touched upon several opportunities and risks of digitalization, including market power of internet platforms, price discrimination, access to data sets and self-learning algorithms.

ACM currently only has limited possibilities to act against undesirable forms of price discrimination. According to ACM, current consumer laws are complied with as long as consumers are clearly informed about the prices they pay (even where such prices differ from one individual to another) and competition law enforcement is unlikely to be "fruitful" in the absence of market power, as price discrimination is then unlikely to lead to restrictions of competition.

With regard to self-learning algorithms, ACM identified risks in relation to the creation of so-called "automated cartels" in which algorithms can converge towards an equilibrium with higher prices as a result of their ability to process large amounts of data, adjust prices instantly, and learn from different scenarios. Interestingly, ACM noted that such practices are unlikely to violate current Dutch and EU competition laws as there is no underlying agreement or intention to form a cartel. Instead, it considered such situations to be similar to tacit coordination or parallel behavior. Therefore, ACM appears to take the position that collusion between algorithms should not (necessarily) be attributed to the undertakings by which these are used.

This publication emphasizes that the digital economy is high on the agenda of ACM, as also shown by its recently published key priorities and position paper on market dominance of internet and technology companies (see Newsletter 2018/1). Therefore, we expect that more developments in this field will follow in the coming year.

District Court annuls fines for cartel conduct in cold storage industry

In four separate judgments delivered on 12 April 2018, the District Court of Rotterdam annulled fines imposed by ACM in 2015 on companies and company managers active in the cold storage industry (i.e., freezing and refrigerated storage).

In two cases, the District Court found that ACM wrongfully established that there was a single and continuous infringement, which requires that distinct acts are part of an "overall plan" due to their common objective. The District Court considered that evidence of contacts between the undertakings was limited and it was to a large extent possible that these could have taken place in the context of an intended cooperation and/or merger. Therefore, it considered that ACM did not provide sufficient evidence for the existence of an overall plan pursued by the parties involved. The District Court further considered that ACM failed to adequately address

indications that the relevant geographic market could be wider than national, and that it could not have defined the scope of this market without further investigation.

In two other cases, the District Court established that the statute of limitations had lapsed because ACM failed to inform the company concerned of the purpose of its investigation within five years after termination of the infringement. As a result, the power of ACM to impose fines had expired.

In each case, the District Court eventually annulled the imposed fines.

These judgments not only show that it may be beneficial to appeal against decisions of ACM, but also confirm that both substantive and technical grounds should be taken into consideration when objecting to such decisions.

Authority for Consumers and Markets closes cartel investigation in bunker sector

On 26 April 2018, ACM announced that it had closed its cartel investigation into the bunkering sector in the ports of Amsterdam, Rotterdam and Antwerp. The announcement of this probe was previously discussed in our Newsletter 2017/2. Although ACM found evidence of discussions on price-fixing between 2011 and 2014, this did not lead to actual cartelization because not all parties agreed. In addition, further to discussions with ACM, trade association NOVE indicated that it had taken steps to improve competition law compliance and will pay continuous attention to this topic. ACM announced in February 2018 (see Newsletter 2018/1) that competition in the ports sector remains one of its key priorities for the coming years. This shows that having a compliance program is considered a mitigating factor by ACM

Trade and Industry Appeals Tribunal significantly reduces fine for construction company

On 8 May 2018, the Trade and Industry Appeals Tribunal ("**CBb**") decided to reduce a fine of EUR 3,000,000 imposed by ACM by almost 85%. On 29 October 2010, ACM fined a construction company for cover pricing in various tender procedures. The "cover pricing" consisted of aligning bidding data and exchanging information on their intended bids prior to submitting the actual bids. The District Court of Rotterdam had already lowered the initial fine in first instance.

On appeal, the appellants argued that the fine was "excessively high" in relation to the conduct concerned. They stated that the fine was not reasoned and had been determined in an arbitrary way, as it had not been established on the basis of the Fining Code. As a defense, ACM argued that the applicable fine on the basis of the Fining Code (of approx. EUR 540,000) would not have had a sufficient deterrent effect, also considering the fact that the appellants had been fined before for more than EUR 1,500,000 for a separate cartel. Therefore, it decided to rely on an exception in the Fining Code that allowed for adjustments due to desired deterrent effects, by virtue of which it was able to multiply the basic calculation fine, resulting in a fine of EUR 3,000,000.

The CBb considered that although ACM based its fine on the Fining Code, it failed to take the principle of proportionality into account. The CBb considered that ACM failed to convincingly substantiate why the factor that appellants had been fined before required a fine that was at least higher than the previous fine of EUR 1,500,000, let alone a fine of EUR 3,000,000. Also, ACM failed to take into consideration that, although the appellants were fined for a cartel violation previously, the nature of the more recent violation was different and less serious. As a result, the CBb could see no reason why the calculation methods in the Fining Code would not have been sufficient. Accordingly, it recalculated the fine based on these methods and fixed the amount at EUR 463,000.

This judgment confirms that it may be beneficial for companies to object to fines imposed by ACM, as these may be significantly reduced or even annulled.

Authority for Consumers and Markets grants exemption from "standstill obligation" for winding-up petition of Dutch Tax and Customs Administration

By decision of 18 May 2018, ACM granted an exemption from the "standstill obligation" under Dutch merger control regulations to Ledeboer Investments B.V. ("**Ledeboer**") and Stichting Bestuur Vérian ("**Vérian**"), two companies active in the home and personal care market. The standstill obligation prohibits parties from implementing a concentration without prior notification to ACM and within a period of four weeks after such notification, unless earlier approval from ACM has been obtained. In special circumstances, however, ACM may grant an exemption from this prohibition for "serious reasons", which exist in any case where adhering to the waiting period would result in irreparable damage to the concentration.

The Dutch Tax and Customs Authority had filed a winding-up petition for Vérian on 2 May 2018, which it intended to pursue if it had not received payment of Vérian's tax arrears by the 18 May 2018. Ledeboer was willing and able to meet Vérian's payment obligations, and therefore secure the continuity of its business, provided that it would acquire sole control over Vérian. Although this constituted a reportable concentration, the parties argued that any discontinuity of Vérian's business would put employment of approximately 1,000 employees and care provision to approximately 4,000 clients at risk. Therefore, they submitted an exemption request.

ACM considered that Vérian's financial distress was, as such, not sufficient to conclude that an urgent situation existed and justified an exemption, as Vérian had been in a liquidity squeeze for several years and there were indications that it was trying to bring its business to order. However, the winding-up petition of the Tax and Customs Administration and its intention to persevere, **did** lead to such an urgent situation putting its business continuity at risk. Discontinuity of Verian's business in case of deferment of a merger approval could lead to irreparable devaluation of the company (among others relating to the employees and patients) and irreparable damage to the intended concentration. Therefore, ACM decided to grant an exemption.

ACM unconditionally approved the concentration on 19 June 2018.

Court of appeal rules on nullity of resale price restrictions in franchise agreement

On 5 June 2018, the court of appeal of 's-Hertogenbosch confirmed that unlawful resale price restrictions in a franchise agreement do not necessarily nullify the entire agreement.

This judgment relates to a dispute between a franchisor and its former franchisees, who provided courses and training programs to companies, governments and institutions through a franchise organization that was established by the franchisor. After several years, the franchisees sought to terminate their franchise agreements, among others, arguing that these were void as certain provisions of the agreements and the accompanying regulations infringed competition law.

The franchisees argued that they were obliged to charge fixed prices to their customers, as price lists with rates and applicable discounts were established on an annual basis, all rates were binding on all franchisees and discounts exceeding those provided for were only allowed upon prior written approval from the franchisor. Accordingly, the court found that these obligations amounted to resale price maintenance and a by-object restriction of competition.

The court held that the provisions containing resale price restrictions had been void from the time the agreements were signed. However, such nullity did not affect the franchise agreements as a whole, as the court considered that convincing arguments to that end (e.g., an inextricable connection between these provisions and the rest of the agreement) had neither been argued nor became evident.

This judgment confirms that nullity of clauses that violate competition law does not automatically extend to the

entire agreement under Dutch law, even where it concerns by-object restrictions. Therefore, companies seeking to nullify an agreement on such grounds, should not only provide evidence of an actual competition law infringement but also substantially argue why the nullity of one or more clauses affects the validity of the agreement as a whole.

Authority for Consumers and Markets opens sector inquiry into rheumatic drugs

ACM has opened a sector inquiry into TNF alpha inhibitors, as well as other drugs, used for treatment of rheumatism. An announcement was made on 28 June 2018. This inquiry fits in with ACM's key priorities for 2018-2019, among which is 'prices of (prescription) pharmaceuticals'. According to ACM, this investigation was triggered by a finding that prices for these drugs remain high, although various alternatives are available for patients. ACM will in particular focus on choices for prescribers between alternatives and competition after patent expiry. ACM will contract pharmaceutical companies, hospitals, health insurers and patient organizations.

>> Back to Top <<

LUXEMBOURG

Competition Council exempts a price fixing agreement between competing taxi service providers

On 7 June 2018, the Luxembourg Competition Council ("**LCC**") exempted an agreement between competing taxi service providers which fixed prices for certain taxi services.

On 5 June 2015, two competing taxi companies, Benelux and Inter-Taxis created a joint-venture "ProCab", which offered taxi reservation services and online taxi reservation. Other taxi companies could join ProCab and benefit from the centralized reservation system against payment of a monthly fee.

Initially, ProCab would direct the closest free taxi to the customer (based on GPRS-system) which would then charge the price freely negotiated with the client (the price listed in the taxis were only maximum prices). As from 3 February 2017, ProCab became a 100% subsidiary of Benelux Taxis and changed its name to Webtaxi. The services offered by Webtaxi remained the same for its members (competing taxi service providers) but the prices proposed by Webtaxi to customers became fixed prices which the taxi companies were obliged to charge.

The LCC held that an agreement between competitors to fix the prices charged to end-customers constituted a restriction of competition *by object*. However, the LCC held that there are no agreements that cannot benefit from an individual exemption, on condition that four cumulative conditions (efficiencies, fair share for consumers, restriction should be necessary, adequate and proportionate to reach efficiencies, no total exclusion of competition) are met.

The LCC decided that the efficiencies were undeniable in terms of ensuring a lower number of empty rides, a reduction of emissions, and optimal services to customers. It also found that a fair share of the savings were passed on to the consumers as the pricing algorithm results in lower net prices and the consumers benefit from the better quality of services. Furthermore, it found that the restriction (fixed prices) is necessary for the proper functioning of the system, as an individual price negotiation would increase waiting times, fail to ensure that the closest taxi is sent, and increase distances where the taxis run empty. Finally, competition would not be totally excluded as the members of Webtaxi only have a market share of around 26% and remain each other's competitors on the market where people hail taxis. Based on this analysis, the LCC exempted the agreements between Webtaxi and its members.

This case demonstrates that in very exceptional circumstances even on hardcore infringement can benefit

from an exemption. This is however a very thin line and companies are advised to err on the side of caution in such circumstances.

Competition Council condemns competing supermarkets for illegal price fixing in joint promo folders but does not impose any fine

On 13 June 2018, the LCC condemned two competing retailers (Pall Center and Massen) for anti-competitive price fixing but did not impose any fine due to the insignificant effect of the price fixing on the market.

In March 2015, four retailers created a common label *Les Epiceries du Luxembourg*, under which they released monthly a common promotion folder listing around fifty products available in all shops at the same promotional price.

Releasing a common promotional folder, including fixed promotional prices applicable in competing shops, infringes competition law.

However, the LCC held that the relevant product market is the market for retail distribution of predominantly food items, including "superettes", small proximity supermarkets, large supermarkets and hypermarkets.

Geographically, the LCC concluded that only two out of the four retailers, Massen and one of the shops of Pall Center, have overlapping catchment areas.

Based on these market definitions, the LCC concluded that the agreement on the common promotional prices could not be considered to be restrictive of competition with regard to Alima and Food2Go (two retailers with no overlap), but only with regard to Massen and Pall Center. However, because the geographic overlap between Massen and Pall Center is not significant, and the parties only agreed on promotional prices for a very limited amount of products, the LCC held that the anti-competitive effects of the agreement were marginal and could not justify the imposition of a fine.

LCC's decision reflects the importance of a proper market definition for the finding of an anti-competitive agreement between competitors. At the same time, it clarifies that defining the relevant geographic markets for retail distribution is a fact specific exercise which can lead to very different results based on the size and location of the shops.

>> Back to Top <<

Contact us

Belgium

Kurt Haegeman
Partner
+ 32 2 639 36 65
kurt.haegeman
@bakermckenzie.com

Joost Haans
Partner
+ 32 2 639 37 66
joost.haans
@bakermckenzie.com

Vincent Mussche
Associate
+ 32 2 639 37 41
vincent.mussche
@bakermckenzie.com

Bram Hoorelbeke
Associate
+ 32 2 639 3674
bram.hoorelbeke
@akermckenzie.com

Hannelore Wiame
Associate
+ 32 2 639 37 07
hannelore.wiame
@bakermckenzie.com

Miranda Van Limpt
Associate
+ 32 2 639 3672
miranda.vanlimpt
@bakermckenzie.com

The Netherlands

Christiaan Van Der Meer
Counsel
+ 31 20 551 7199
christiaan.vandermeer
@bakermckenzie.com

Derk Christiaans
Associate
+31 20 551 7545
derk.christiaans
@bakermckenzie.com