Belgian Competition Law NEWSLETTER

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Settlement between Base, Mobistar and Proximus in telecommunications abuse case

On 22 October 2015, mobile network operators Base, Mobistar and Proximus (formerly Belgacom) announced their decision to settle an antitrust dispute that had been on-going for over ten years.

The dispute concerned Belgacom's mobile termination rates applied from 1999 to 2004. Base and Mobistar accused Belgacom of abusing its dominant position by charging excessively high mobile termination rates for calls originating on their networks and terminating on Belgacom's network compared to the rates Belgacom applied to calls on its own network.

The dispute was brought before the Brussels Commercial Court in 2003, which ruled in 2007 that there were strong indications that Belgacom holds a dominant position on the market for mobile telephony and ordered an expert report to analyse Belgacom's data from 1999 to 2005. According to the expert's interim report, the harm caused to Base and Mobistar would amount to EUR 1.84 billion. Belgacom appealed the decision of the Commercial Court, but on 26 February 2015, the Court of Appeal agreed with the lower Court's findings. The parties decided to settle, and Proximus accepted to pay EUR 66 million to Base and EUR 54 million to Mobistar.

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Brussels Court of Appeal obliges manufacturers to disclose documents in elevator damage claim

In 2007 Kone, Otis, Schindler and ThyssenKrupp were fined nearly EUR 1 billion by the European Commission for price fixing, bid rigging, market sharing and exchange of commercially sensitive information in Germany and the Benelux in relation to the installation and maintenance of elevators and escalators. As the EU itself had concluded service contracts with the infringing parties covering inter alia the Commission's Berlaymont building and the European Court of Justice buildings with the infringing parties, it claimed that it had suffered damages due to the surcharges, resulting from the cartel. The EU, represented by the European Commission, therefore brought a claim before the Brussels Commercial Court, seeking EUR 6 million in damages. On 24 November 2014, the Court ruled that the EU failed to provide sufficient proof that the elevator units had been more expensive as a result of the cartel, and had thus caused the EU institutions damage.

The Commission appealed the Commercial Court's decision and in its appeal inter alia requested the companies involved to disclose parts of the original fining decision drafted by the Commission's DG COMP to further substantiate its damage claim. The Commission's lawyers suing the cartel members made this request because they do not have access to information contained in DG COMP's file. The Court of Appeal on 11 December 2015 accepted the Commission's request and ordered the parties to provide the court with a non-redacted version of the Commission's fining decision and investigative file as sent to the undertakings involved, and to provide a version with the confidential information blacked out.

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Fine imposed on Sanoma for obstruction of merger investigation

On 1 October 2015, the Belgian Competition Authority (BCA) imposed a EUR 50,000 fine on Sanoma Media Belgium (Sanoma) for the late provision of information in the context of the BCA's merger control review of De Persgroep's acquisition of several of Sanoma's periodicals) (see, Belgian competition newsletter 2015/03).

The BCA decided that Sanoma impeded by negligence the merger investigation because it provided a market study of which it had knowledge for at least two days only after the Competition Prosecutor had already notified his objections to the parties. Whilst the BCA indicated that Sanoma acted in good faith, it ruled that Sanoma had nevertheless failed to comply with its special duty of care in merger proceedings. Due to this delay, the Competition Prosecutor was unable to take into account the study in his assessment of the proposed transaction. The BCA took into account the fact that the market study would likely not have led the Competition Prosecutor to raise additional objections in his report but held that this does not mean that the delay in passing along the information was not an obstruction of the investigation.

The BCA took into account as an attenuating circumstance the fact that it was the first time that the late provision of information by negligence was qualified as obstruction and the first time that the BCA fining guidelines were applied to this type of infringement.

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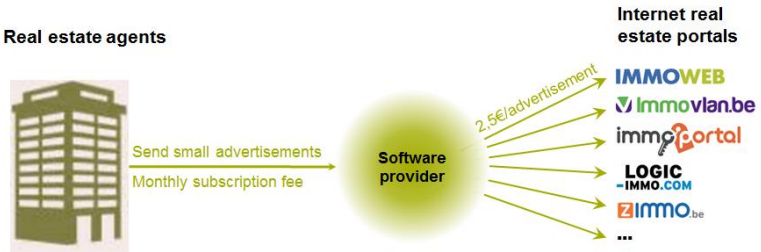
BCA investigates most-favoured-nation clauses in Immoweb contracts



By early 2016, the BCA is expected to decide whether a Statement of Objections will be sent to real estate portal Immoweb. The investigation was initiated in January 2015 as a result of an informal complaint with the BCA. Questionnaires were sent out in September to several market players.

In Belgium, Immoweb allegedly has a market share of almost 50% on the market of real estate portals. Other players, such as Immovlan, ImmoPortal, Logic-Immo, Z-Immo and Realo are less well known by the general public and therefore generate less advertisements.

The market for real estate advertisements functions in a very particular way. Real estate agents pay a monthly fee to software providers to administer and distribute their announcements. Software providers, in their turn, in addition charge a variable fee of around EUR 2,5 for each property displayed on the real estate portals.

The BCA's ongoing investigation relates to the most-favoured-nation clauses included in the agreements between Immoweb and the software providers. Under these clauses, whenever a software provider lowers its price to be paid per displayed property, Immoweb has the right to claim the same lower tariff from that software provider.

Including most-favoured-nation clauses in commercial contracts is not per se illegal. However, the effect of these clauses on competition in the market needs to be assessed. In the case at hand, the most-favoured-nation clauses are alleged to have anti-competitive effects since they may work as barriers to entry for newcomers. The allegation is that the clauses keep the tariffs of software providers artificially high, i.e. at a constant level of around EUR 2.5 per advertisement, because they disincentivise software providers to accept lower prices in their negotiations with real estate portals. Accepting lower prices would mean that Immoweb, their largest customer, would also automatically receive the same lower tariff.

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BCA imposes provisional measures with regard to broadcasting rights for the Superprestige cyclocross

On 5 November 2015, the BCA imposed interim measures on vzw Verenigde Veldritorganisatoren in relation to an agreement which granted exclusive broadcasting for the Superprestige cyclocross championship to Telenet for a period of five years.

Broadcaster SBS Belgium owned these rights for two consecutive seasons (2014-2015 and 2015-2016). It then transferred its rights to the current season to Telenet, which had already previously acquired exclusive rights for the other cyclocross races.

Proximus filed a complaint with the BCA, arguing that the exclusive agreement formed part of an exclusionary strategy by Telenet, and asked the BCA to impose interim measures.

The BCA 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. Therefore, the BCA ordered vzw Verenigde Veldritorganisatoren to choose, within one month, between (i) either suspending the exclusivity of rights until a final decision on the complaint (in which case vzw Verenigde Veldritorganisatoren would have to offer the broadcasting rights under reasonable terms to other interested parties as well); (ii) or to organise a transparent, non-discriminatory bidding procedure, granting the exclusive rights from the end of this season until a final decision on the complaint.

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Brussels Court of Appeal upholds preliminary injunction imposed by BCA on Fédération Equestre Internationale

On 27 July 2015, the BCA instructed the Fédération Equestre International ('FEI') to partially suspend an exclusivity clause in its general terms and conditions whereby horse riding athletes and horses are prevented from participating in show-jumping competitions that are not approved by the FEI and that are scheduled to take place six months prior to a FEI approved event. FEI appealed the BCA's decision, but the Brussels Court of Appeal found on 22 October 2015 that FEI had failed to demonstrate that the preliminary injunction imposed by the BCA inflicted serious and irreparable harm on it. The Court also added that FEI had failed to prove that its exclusivity clause was indispensable.

The compliance with competition law of the organisational rules governing sports events is not only on the radar screen of the BCA but also of the European Commission.

In October 2015, the European Commission, following a complaint by two Dutch ice speed skaters, opened a formal investigation into the International Skating Union (ISU) rules that ban skaters from competing in competitions such as the Winter Olympics and the ISU World and European Championships if they take part in events not organised or promoted by the ISU.

The message is clear: the organisation of sports events does not escape national and/or European competition rules and the antitrust authorities will investigate sport events organisers that impose overly restrictive terms and conditions.

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Launch of a public consultation on new leniency guidelines

On 10 November 2015, the BCA launched a public consultation regarding the revision of its leniency guidelines. Interested parties are invited to submit comments on the BCA's draft before 10 January 2016.

The aim of the revision is to bring the Belgian leniency regime in line with the European Model Leniency Program and to reflect the BCA's experience since the adoption of its first leniency Notice in 2007. In addition, the revision was also considered necessary to reflect the introduction of sanctions for private persons (fines up to 10,000 EUR) in the Code of Economic Law in September 2013. The key changes proposed in this respect are as follows:

- 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 a leniency application of the company always qualify for immunity from fines.

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