



Dear Sir/Madam,

We are pleased to send you the first edition of our Benelux competition law newsletter for 2018.

In Belgium, the BCA continues to focus on vertical infringements, as evidenced by the recent raids in cosmetics distribution and a sector enquiry into prices for branded products sold in supermarkets.


The BCA also looked into market definitions in the automotive sector (markets for after sales services and retail automotive sales) in the context of two merger cases. In one case, the parties were able to convince the Competition College during the oral hearing not to open a phase II investigation, against the Competition Prosecutor's recommendation.

In line with recent legislative developments in France and Germany, the Belgian Government is currently finalising a proposal on significant market power to protect small companies in B2B relations. This proposal is expected to be published before the summer.

In the Netherlands, competition in the ports sector remains on the radar of the ACM. The ACM listed this area as one of its key priorities for the coming years, and announced the results of cooperation with the German competition authority in investigations into cartel conduct in the towage sector.

The pharmaceutical industry was also designated as one of ACM's key priorities. This is in line with the trend in other jurisdictions to critically look at pharma pricing. The ACM published a position paper on competition law and patented pharmaceuticals. We will monitor whether this will result in enforcement action in the Netherlands.

We wish you a very pleasant read!

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Benelux Competition Newsletter 2018/1

BELGIUM

Belgian Competition Authority unconditionally approves acquisition of Sweetinvest SA and Verguts Gebroeders SA by Lyfra SA despite high combined market shares

On 18 September 2017, the BCA unconditionally approved the acquisition of Sweetinvest SA and Verguts Gebroeders SA by Lyfra SA. All companies are active in the wholesale distribution of food and non-food products. The transaction particularly concerned the Belgian market for (i) wholesale distribution of tobacco products and (ii) production of tobacco products.

The BCA focused on the Belgian market for wholesale distribution of tobacco products and found that the transaction would not lead to a significant impediment of competition. The BCA held that the parties' market share post-transaction would remain below 50%, that the transaction would not eliminate an important competitor and customers could easily change wholesaler. Coordinated effects could also be excluded because the market was non transparent, customers multisource and tobacco producers held considerable market power. On that basis, and despite the considerable market share of the merged entity and the fact that after the transaction only two major distributors would remain active on the wholesale market, the BCA cleared the transaction without conditions and in first phase.

Belgian Competition Authority imposes interim measures and periodic penalty payments on organisers of show jumping competitions

The BCA held that Federation for Equestrian Sports ("FEI") was dominant on the market for the organisation of 5 star international horse jumping competitions, and that it had prima facie abused its dominant position because (i) it treated competitions differently without objective justification, and (ii) it restricted access to FEI competitions for riders not part of a Global Champions League ("GCL") team. The BCA imposed interim measures on Global Champions Tour ("GCT"), GCL and FEI in December 2017, to ensure that at least 60% of the invitations for GCT/GCL events are sent to riders on the basis of their world ranking, and not depending on whether riders are part of a paying GCL team.

This is the second time that the BCA imposed interim measures on the FEI. In April 2016, the Brussels Court of Appeal upheld the BCA's decision to instruct the 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 Newsletter 2016/2](#) and [2015/4](#)].

On 16 April 2018, the BCA decided to impose daily penalty payments on FEI and GCT/GCL due to their continued failure to comply with the imposed interim measures. It is the first time that the BCA imposed penalty payments in an interim measure case. Under Belgian competition law, the BCA can impose daily penalty payment with a maximum of 5% of an undertakings' average daily turnover.

Belgian Competition Authority clears acquisition of Rietje Group by D'Ieteren

On 11 January 2018 the BCA unconditionally approved the acquisition of Rietje Group by D'Ieteren.

In its decision the BCA considered the market for retail automotive sales, the market for after-sales services, and the market for the sale of automotive spare parts. The BCA left open the exact definition of the markets, but reviewed the transaction under the narrowest product and geographic market definition. It assessed the market for retail automotive sales by province and catchment area, and considered after

sales services per car brand in the area in which 80% of a repairer's turnover is realised (35 minutes by car with a maximum distance of 31,5 km from the repair center).

On the overlapping local after-sales services catchment areas for Audi and VW Commercial Vehicles on which the parties' combined market share would exceed 25%, the BCA ruled that post-transaction sufficient competitive pressure would continue to be exercised by both authorised and independent repairers.



The BCA also analysed two vertically affected upstream markets for retail automotive sales of Audi and VW and the sale of automotive spare parts for Audi and VW, and concluded that no issues would arise on these markets given the presence of multiple interbrand and intrabrand competitors.

BCA conditionally clears acquisition of Kant by Volvo Group Belgium in phase I, against Competition Prosecutor advice to open phase II

On 31 January 2018, the BCA conditionally cleared the acquisition by Volvo Group Belgium NV ("VGB") of Kant, an authorised Volvo distributor and service provider in Belgium and the Netherlands.

The BCA considered non-coordinated effects on local markets for the repair and maintenance of commercial Volvo vehicles and found that post-transaction, the intra-brand competition for repair and maintenance of commercial Volvo vehicles would be impeded in certain catchment areas where the parties' combined market share would amount to 70%.

To remedy the BCA's concerns, VGB agreed to two commitments. First, VGB committed to appoint an additional official Volvo service centre in the Mechelen area where the parties had a very high combined market share. Second, VGB committed to discontinue all repair and maintenance activities relating to Volvo trucks in the Kant garage in Sint-Niklaas, and to not open a workshop for maintenance and repair of Volvo trucks within a 15 km radius of that garage (for a period of 36 months after closing date of the transaction).

Against the Competition Prosecutor's advice to open a phase II investigation, the Competition College considered that the commitments offered, in conjunction with the existing competitive pressure, were sufficient to clear the transaction in phase I.

Brussels Court of Appeal agrees with the in-scope categorisation by the BCA of disputed documents in Distripaints case

In June 2011, the BCA raided Distripaints (and others) as part of its investigation into exclusivity requirements in the supply contracts between Akzo Nobel and its main wholesalers. Distripaints turned to the Brussels Court of Appeal to challenge the legality of the dawn raid and the characterisation of certain documents by the BCA as being "in scope".

On 26 November 2014, the Brussels Court of Appeal dismissed the proceedings initiated by Distripaints ([see Belgian Competition Newsletter 2014/4](#)). However, as regards the discussion concerning the qualification of the in or out of scope character of certain seized documents, the Court ruled that the BCA had been too limited in its explanations. In its judgment of 26 November 2014, the Court requested the parties to come to an agreement on the in or out of scope character of the disputed documents by way of a verification process, which was to be initiated by the BCA. As parties failed to come to such an agreement, the proceedings before the Court were revived, leading to the Court's judgment of 13 December 2017.

In its judgment of 13 December 2017, the Court considered that the reasoning provided by the BCA on the in-scope character of the documents, for each document individually, was not prima facie unacceptable, unreasonable or unlawful and that the BCA had now sufficiently substantiated the in scope character of the documents. Consequently, the disputed documents now officially form part of the BCA's investigation file.

The Court held, *inter alia*, that the BCA should also be able to consider background information relating to the sector, relevant products, (competitor) evolution on the relevant markets (and their market shares) and the commercial strategy of the companies involved. The Court also held that the BCA was entitled to take into account facts (and documents) post-dating the complaint that were relevant for the facts and allegations in the complaint.

Brussels Court of Appeal annuls decision of Belgian Competition Authority which partially lifted remedies imposed on Kinopolis in 1997

On 28 February 2018, the Brussels' Court of Appeal annulled the decision of the BCA of 31 December 2017 which partially lifted the remedies imposed on Kinopolis in 1997 following the merger of Groep Bert and GroepClaeys, which created the Kinopolis Group. 19. ([see Benelux Newsletter 2017/2](#)).

Euroscop and I-Magix, both competitors of Kinopolis, launched an appeal against the decision of the BCA, claiming that the BCA had violated its duty to state reasons.

The Court of Appeal sided with the Appellants and annulled the BCA decision. The Court stressed that the Competition College, as an administrative authority, needs to substantiate extensively and convincingly why it departs from the opinion formulated by the Competition Prosecutor in the draft decision, and that the Competition College had not reasoned to the requisite legal standard why prior approval would no longer be necessary for the building of a new complexes from 31 May 2019.



This is another chapter in the Kinopolis saga, which started in 1997 when conditions were imposed on Kinopolis following the merger of Groep Bert and Groep Claeys. It is the second time that Kinopolis tried to get the conditions lifted.

Belgian Competition Authority raids cosmetic distributors

On 1 March 2018, the BCA conducted raids at the premises of several distributors of cosmetic goods. The investigation seems to concern potentially restrictive conditions imposed by cosmetic maker Caudalie on its authorised distributors. Raids were also conducted in France upon the request of the BCA. No further information is publicly available at this stage.

Belgian Competition Authority opens sector enquiry into supermarket prices

The BCA has opened a sector enquiry into the prices for branded products in supermarkets. The investigation was triggered by a finding of the Pricing Observatory that supermarket prices in Belgium are 11% higher than in the Netherlands and 8% higher than in France. The Pricing Observatory reviewed the prices of 65,000 products based on Nielsen data. The enquiry will focus on suppliers and distributors of branded products. Companies active in this sector will likely receive a request for information from the BCA.



New plans for Act on significant market power

After earlier attempts to propose a legislative act on significant market power failed to gather the necessary support in parliament, the Belgian Government is now planning to table a new proposal before the summer.

The proposal aims to regulate the behaviour of undertakings which are not dominant but have significant market power, and primarily intends to protect small companies in a B2B context, for instance in their dealings with internet platforms which play a key role in the digital economy.

The proposal is under discussion in a parliamentary working group. Different options are considered

ranging from amending the Competition Act, the Unfair Trade Practices Act or changes to contract and judicial law. We will report further on this topic in future Newsletters, as and when the likely direction and details of the Act become clearer.

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NETHERLANDS

District Court rules that Authority for Consumers and Markets may copy mobile phones in full

The District Court of The Hague ruled in a judgment of 22 November 2017 that ACM is allowed to make full copies of mobile phones during dawn raids.

During a dawn raid at company "X", ACM made full copies of mobile phones of six of the company's employees. The company objected to this, stating that these mobile phones were used for both business and private purposes and therefore likely also contained private data. As a result, the copying of data would be an infringement of the right to respect for private and family life and unlawful without a court authorization. It was also argued that ACM is only allowed to inspect business data and, hence, there is no statutory basis for copying mobile phones, including private data, in full.

The District Court rejected the argument that a court authorization would be necessary for inspecting and copying mobile phones, because there is no such statutory requirement for inspections carried out by ACM. The District Court further considered that the mobile phones contained a substantial amount of data, as a result of which it was not possible for ACM to select relevant business data on-site and it was appropriate to create a copy for selection purposes at a later moment. Although this means that any private data is also copied, this is not considered unlawful as - according to the court - the interests of the investigation outweigh the right to privacy, provided that sufficient safeguards are in place to ensure that ACM does not gain unauthorized access to certain data.

The District Court concluded, and agreed with ACM, that such safeguards are included in the 2014 ACM Procedure for the inspection of digital data. An automatic first selection takes place on the basis of search terms, on which the company can exert some influence, and without any actual inspection of data. After this selection, the company receives a copy of the selected data and is allowed to identify any data which it considers to be wrongly included in the selection which includes private data. If no consensus is reached on whether certain documents are to be excluded from the data set, the matter may be taken to court.



Authority for Consumers and Markets and German Federal Cartel Office cooperate in investigations into cartel conduct in towage sector

Following investigations in November 2014 by ACM and the German Federal Cartel Office (Bundeskartellamt, FCO), ACM announced on 18 December 2017 that the FCO had reached settlements with three companies and their managers for cartel behavior in the towage sector. On 5 March 2018, ACM announced that a settlement was also reached by the FCO with a fourth company that is headquartered in the Netherlands.

After leniency applications, both ACM and the FCO initiated investigations into possible cartel behavior in the towage sector in ports in the Netherlands and Germany. The German and Dutch authorities concluded that the FCO was best placed to act against the alleged cartel conduct. As a result, ACM decided to cease its investigations whereas the FCO continued its investigations, which ultimately resulted in the above settlements.

According to findings of the FCO, German and Dutch towage providers allocated markets among each

other in a number of German ports as from 2000/2001. In total, the companies and managers concerned have settled with the FCO for approximately EUR 17.5 million.



Key priorities of Authority for Consumers and Markets for 2018 and 2019

On 13 February 2018, ACM published its key priorities for 2018 and 2019, which include digital economy, greening of the energy market, prices of pharmaceuticals and competition in the ports sector.

With regard to digital economy, ACM will focus on the power of companies due to the use of data and algorithms, clear information and freedom of choice for online consumers, and a good and open infrastructure for fast and affordable internet. In this context, ACM recently published a position paper (available [here](#)) on its strategy with regard to market dominance of internet and technology companies.

According to ACM, competition in the pharmaceutical industry stimulates innovation and affordability of pharmaceuticals. ACM considers its role in this regard two-folded: on the one hand it supervises competition law compliance of pharmaceutical companies, whereas on the other it provides guidance to hospitals, healthcare insurers and other parties - for example on how they can join forces when purchasing expensive medicines. In addition, ACM states that it will pay particular attention to innovation incentives in order to maintain and encourage innovation in the pharmaceutical sector, including development of new pharmaceuticals.

Although competition in ports was already on ACM's radar in the past years ([see Benelux Newsletter 2017/2](#)), it is now clear that this subject will remain a key priority of ACM for the coming years. ACM will focus on creating awareness and improving knowledge of competition rules as well as carrying out investigations.

Authority for Consumers and Markets publishes paper on competition law and patented pharmaceuticals

On 8 March 2018, ACM published a working paper written by three of its senior officials, including its current chairman Chris Fonteijn, which focuses on abuse of dominance in relation to patented pharmaceuticals. This publication is available [here](#).

The paper discusses various subjects, including parallel trade, pay-for-delay and, in particular, excessive pricing for IP protected pharmaceuticals. The authors argue that even if a pharmaceutical company has a patent for a pharmaceutical product, competition law may be used as a tool to intervene in excessive pricing practices. Meanwhile, the authors note that with regard to any related enforcement actions the underlying economic goals of patent protection - maintaining innovation incentives to allow pharmaceutical companies to make profits on successful innovations - can and should be taken into account.

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