Dear Sir/Madam,

We are pleased to send you the second edition of our Benelux competition law newsletter.

In major developments, we discuss the implementation of the EU Directive on Antitrust Damages Actions in Belgian law. This new legal framework will facilitate the initiation of competition damage claims before the Belgian courts. Until now, damage claims before the Belgian Courts under Belgian tort law principles were quite rare, and not always successful. Notable examples include the damage claim (estimated at EUR 1.84 billion EUR) that was lodged by Base and Mobistar against Proximus for excessively high mobile termination rates, which was finally settled in 2015 after 12 years of litigation and the damage claim by the European Commission against elevator manufacturers (where the Commission had already imposed very high fines) which was rejected by the Brussels Commercial Court after 6 years of litigation because the EC failed to provide adequate proof of damage suffered. The case is currently on appeal. It remains to be seen whether the new legal regime, and in particular the legal presumption of damage which it introduces, will make damage claims in Belgium a more prominent feature.

We also focus on the ruling of the Court of Appeal In the AB Inbev case, which relates to a merger that was not subject to merger control, but which a third party tried to stop on abuse of dominance grounds. Whilst the Court has confirmed that a concentration will only fall under the abuse of a dominance rules in exceptional circumstances, this is a risk that merging parties should keep on their radar screen particularly when considering a transaction that would lead to high combined market shares post-transaction.

In the Netherlands we see continued investigations by the Competition and Markets Authority (ACM), as well as courts critically reviewing (and annulling) ACM decisions. In particular, we discuss the ACM fine in the forklift truck batteries cartel, as well as the fine on the Dutch railway operator NS for abusing its dominant position in a public

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transportation tender. We further cover the Dutch Trade and Industry Appeals Tribunal's annulment of fines imposed by the ACM on a large number of real estate traders. The Tribunal also reduced fines imposed by the ACM on demolition companies for bid-rigging. In addition, we discuss the judgment of the District Court of The Hague on the ACM's investigatory powers to select and inspect digital data. We report on the investigation launched by the ACM into a possible cartel in the bunker sector. Finally, we cover a recent judgment allowing a ban on online sales via an unauthorised third party platform.

We also summarise the Luxembourg Competition Authority's decision to reject a complaint against Amazon for alleged abuse of dominance in relation to the unilateral termination of an agreement for the supply of on-line third party platform services.

We wish you a very pleasant read!

Benelux Competition Newsletter 2017/2

BELGIUM

Directive on antitrust damages action implemented in Belgian law

On 6 June 2017, the EU Directive of 26 November 2014 on national damages actions for competition law infringements (2014/104/EU) was implemented in the Belgian Code of Economic Law ("Damages Act").

The Damages Act enables every natural or legal person, that has suffered harm as a result of a competition law infringement, to claim damages from the infringer. This possibility is not new. Damages actions for competition law infringements were already possible under Article 1382 of the Belgian Civil Code ("CC") which deals with non-contractual liability. But recourse to Article 1382 CC made for an opaque system considering the lack of guidance as to quantification of damages and proof of harm. The Damages Act brings some clarity in that respect.

The Damages Act foresees a (rebuttable) presumption that a cartel caused harm. In addition, the Damages Act provides that a (final) finding of a competition law infringement by the BCA or by the Brussels Court of Appeal constitutes irrebuttable evidence that there has been a competition law infringement. This is not the case for final decisions rendered in other EU member states, which only constitute prima facie evidence.

The Damages Act acknowledges the so-called "passing-on defence". If invoked successfully, the defendant does not have to (fully) compensate the claimant if the defendant proves that the claimant (partly) passed on the surcharges caused by the competition law infringement.

The Damages Act foresees that national judges can, upon request of a party, order the disclosure of evidence from the defendant or a third party, including confidential information (which the judge needs to safeguard). Evidence contained in the competition authority's file

may also, under certain conditions, be disclosed, with the important exceptions of leniency statements and settlement submissions.

When it comes to the assessment of damages, a national judge can request the BCA to assist it in assessing the amount of damages to be awarded.

Finally, the Damages Act foresees a joint and several liability for infringers which means that each participant in the infringement can be held liable for the compensation in full (except for immunity applicants and SMEs, who are only liable vis-à-vis their own (direct and indirect) purchasers or suppliers except where full compensation cannot be obtained from the other infringers).

Belgian Competition Authority raids tobacco sector

On 29 May 2017, the BCA conducted raids at the premises of several manufacturers and wholesalers of tobacco products. No further information is publicly available at this stage.

Belgian Competition Authority partially lifts remedies imposed on Kinepolis in 1997

Further to Kinepolis' request on 31 March 2017 [See Benelux Competition Newsletter 2017/1], the BCA partially lifted the remedies it had imposed on Kinepolis in 1997 following the merger of Groep Bert and Groep Claeys, which created the Kinepolis Group.

Kinepolis requested to lift all remedies arguing that in the 20 year period the market had significantly evolved due to the presence of new cinema operators, increased competitive pressure from other viewing experiences (DVD, home cinema, etc.), and full digitalisation of the film industry.

The BCA found that Kinepolis still held a dominant position on the relevant markets for showing films. The BCA then examined the likely effect of the dominant position on competition and concluded that the first condition (the prohibition on Kinepolis to request or demand that film distributors provide exclusivity or priority for the distribution of films and the prohibition to reserve, promote more intensively or grant any other favourable treatment to films that Kinepolis distributes itself) and second condition (the prohibition not to enter into new agreements with independent cinema operators) needed to be maintained, but that the third condition (the obligation to obtain prior approval from the BCA each time it intends to build or acquire a new cinema complex) could be lifted for the building of a new complex from 31 May 2019.

Commercial Court Antwerp asks European Commission to issue "amicus curiae"

On 7 April 2017, the Commercial Court of Antwerp requested the assistance of the European Commission as amicus curiae for a dispute between Nike and Euro Shoe to determine the relevant product market and to estimate the market share of Nike.

Nike sells its products in Belgium and the Netherlands via a selective distribution system. Euro Shoe has been a distributor of Nike's products for over a decade. Nike decided to end its collaboration with two retail chains of Euro Shoe Euro Shoe considers Nike's refusal to sell a violation of competition law and an act of unfair competition or at least an abuse of rights.

The Commercial Court of Antwerp ruled that Nike's selective distribution system is covered by the safe harbour of the Block Exemption Regulation if both Nike's and Euro Shoe's market share on the relevant market does not exceed 30%. The Commercial Court could not determine the relevant product market and asked the Commission's opinion on this point. In addition, the Commercial Court enquired whether private label shoes should be included in the relevant product market. The European Commission has not yet answered the Court's questions.

Belgian Competition Authority approves the acquisition of Coditel by Telenet subject to commitments

Telenet is a Belgian cable network provider which provides 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. Coditel provides cable TV, fixed internet and telephone services as well as mobile phone services, via BASE's network, in a few municipalities in Brussels, Flanders and in part of the Hainaut province. Through the transaction, Telenet would be able to extend the coverage of its cable network to other parts of Brussels, Wallonia and Luxembourg.

Orange voiced concerns that post-transaction Telenet would have an incentive to refuse or delay access to Coditel's cable network. Without this access, the transaction would lead to an impediment of effective competition on the retail market for the delivery of TV-services, fixed internet services, mobile communication services and multiplay services as the competitive pressure stemming from Orange would be diminished.

To address the BCA's concerns, Telenet committed to provide access, at normal wholesale prices, to Coditel's cable network within four months of completion of the transaction. On that basis, the BCA cleared the transaction on 12 June 2017.

Belgian Competition Authority rejects Medicare-Market's request for interim measures against the Order of Pharmacists

On 19 June 2017, the BCA rejected Medicare-Market's request to impose interim measures against the Order of Pharmacists.

Medi-Market stores have both a pharmacy and a "para-pharmacy". The Medi-Market commercial policy is aimed at offering attractive prices coupled to a large choice of products. From the start of its activities in Belgium in 2014, Medicare-Market has faced strong opposition from competing pharmacists and by the Order of Pharmacists. In particular, the Order of Pharmacists has initiated several disciplinary proceedings based on its deontological code, attacking the low pricing, the rebate policy, the pharmacy/para-pharmacy concept, and the opening hours of Medi-Market.

The BCA ruled that the Order of Pharmacists tried everything to block the development of Medi-Market and that prima facie the Order of Pharmacists could have infringed the competition rules, in particular given the impact on the freedom to set prices, offer rebates and the freedom to determine opening hours. In addition, by trying to extend its decision making power beyond the tasks conferred to it by the legislator, notably in trying to regulate the "para-pharmacy" activities, the Order of Pharmacists may have abused its dominant position.

Nevertheless, the BCA decided not to impose interim measures because Medicare-Market was able to continue its commercial activities, and the risk of serious and irreparable damage to competition or damage to the general economic interest was not substantiated.

Brussels Court of Appeal rejects appeal against refusal of interim measures against AB InBev of Bosteels

Further to AB InBev's intended acquisition of Brewery Bosteels, 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 should 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. [See Belgian Competition Newsletter 2016 – 3/4].

On 28 June 2017, the Brussels Court of Appeal upheld the BCA's decision. It ruled that the BCA had not committed any manifest error of assessment when it ruled that there were no strong prima facie indications of restrictive effects on competition that are distinguishable from the concentration effects and which can prima facie by themselves be qualified as an abuse of a dominant position. This confirms that it is very difficult to establish that a transaction (such as an acquisition) constitutes an abuse of dominance. This is in line with other jurisdictions where such findings are extremely rare.

Belgian Competition Authority approves acquisition of Henrard group by Sator Holding

On 3 July 2017, the BCA cleared the acquisition of Henrard by Sator. The BCA assessed the impact of the transaction on the independent aftermarket (IAM) import market for spare parts and accessories for light motor vehicles, which has a vertical relationship with the IAM-wholesale market for spare parts and accessories for light motor vehicles.

Wholesalers were worried that post-transaction Sator could have the incentive to limit import to or increase prices for other wholesalers. However, since sufficient other players remained active on the upstream import market, wholesalers would still have the opportunity to purchase from other importers, or even directly from the manufacturer. Considering the dynamics of the market structure, and in particular the fact that the import market and wholesale market increasingly exert competitive pressure on each other, the BCA approved the transaction.

Belgian Competition Authority approves acquisition of Thomas Cook Airlines Belgium assets by Brussels Airlines

On 11 September 2017, the BCA approved the acquisition of certain assets of Thomas Cook Airlines Belgium including airport slots and the lease of aircraft by Brussels Airlines.

In its decision, the BCA considered that the Brussels and Charleroi airport are substitutable for holiday destinations and assessed the competitive situation on the market of transport of passengers by scheduled airlines. The BCA held that sufficient actual and potential competitive pressure would be exercised on Brussels Airlines post-transaction, in particular by Ryanair and TUI Fly Belgium. A similar conclusion was reached in relation to the effects of the transaction on the market for the wholesale supply of airline seats to tour operators, on which both airline companies based in Belgium and airline companies based outside Belgium are active.

Belgian Competition Authority approves acquisition of ALL 4U by ALSO Deutschland

On 4 July 2017, the BCA cleared the acquisition of ALL 4U by ALSO Deutschland. Both companies are active on the procurement and wholesale markets for information technology products (IT-products), electronic communications products, consumer electronics, printing supplies and paper. As the parties' combined market share only exceeded 25% on the procurement and wholesale market for printing supplies, these were the only relevant product markets which were further examined.

The BCA's analysis of the wholesale market for printing supplies reconfirms the position of both the BCA and the European Commission that the direct supply by manufacturers of printing supplies to

retailers does not form part of the relevant wholesale market. Secondly, the wholesale market for printing supplies is held to be at least Benelux-wide and possibly EEA-wide whereas in previous decisions this question was left open or the competition authority opted for a national market.

Based on the presence of numerous competitors active in the market and the absence of any concerns raised by suppliers, customers or competitors, the BCA unconditionally approved the transaction.

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NETHERLANDS

ACM imposes fines in forklift truck batteries cartel

In July and August 2017, the ACM published its decisions to impose fines, of over EUR 17 million in total, on several importers of forklift truck batteries and their trade association for price-fixing agreements concluded between 2004 and 2013.

According to the ACM, the parties regularly exchanged competition-sensitive information and agreed upon the inclusion of a "lead surcharge" in the retail price of their batteries. This surcharge was based on the lead price trend on the metal exchange and listed as a separate item on customers' invoices. As the importers in general adhered to the agreed lead surcharge, the ACM found that an important component of the battery price (approx. 10-30%) was fixed.

The trade association was considered to have facilitated the infringements as it circulated lists with applicable lead surcharges among its members every three months. In addition, it was a recurring item on the agenda of the trade association's meetings.

Five importers and the trade association obtained a fine reduction as they admitted their involvement in the prohibited behaviour. Two other importers did not agree to a settlement with the ACM and were fined via the normal procedure.

In parallel investigations, the ACM established that competition-sensitive information on other topics, such as future and actual rates for maintenance services and recommended prices for technical inspections, was also exchanged within the trade association. However, the ACM was not able to establish how such rates extended to the competition process between the relevant trade association members, as the costs for maintenance services were not considered to be inherently connected to the purchase of the vehicles concerned or to be an important factor in the customers' selection process of such vehicles. As a result, no actual violations were established and no fines were imposed for such information exchanges.

ACM fines Dutch Railways (NS) for abuse of dominance

On 29 June 2017, the ACM published its decision to impose a fine of EUR 40.95 million on NS for abusing its dominant position in the tender process for the Limburg public transportation concession for the period 2016-2031.

According to the ACM, NS wanted to secure the Limburg concession at all costs in order to avoid a potential future decentralization of the main railway network, on which NS has a dominant position. Therefore, NS obstructed its competitors in the tender process.

The ACM established two separate violations.

The first infringement was the submission of a lossmaking bid in the tender process, which - according to the ACM - amounted to predatory pricing. The ACM concluded that NS' expected costs would be higher than its expected revenues from the contract. As a result, other bidders could not match or surpass NS' bid without suffering losses themselves, even if they operated as efficiently as NS.

The second infringement consisted of a combination of several related actions, which taken together, constituted an abuse. Firstly, the ACM found that NS used confidential information that it acquired from a former director of Veolia, the competitor that operated the regional rail services in Limburg at the time of the tender process. Secondly, NS would have put its competitors at a disadvantage by providing delayed and incomplete information to requests for access to related services and facilities that NS had to make available. Finally, NS provided confidential information about its rivals to Abellio, the subsidiary through which it participated in the tender, and also allowed Abellio to use 'useful' information on NS passenger revenues while withholding this information from its competitors. NS has announced that it will appeal the decision.

Dutch Trade and Industry Appeals Tribunal annuls fines of 61 real estate traders in execution auction cartel

In 2011 and 2013, the ACM imposed fines on more than 70 real estate traders who were allegedly involved in a single and continuous infringement relating to the sale of houses at execution auctions. This infringement was held to have covered more than 2,300 auctions throughout the Netherlands for a period of almost 10 years.

On 3 July 2017, the Dutch Trade and Industry Appeals Tribunal annulled the fines of 61 real estate traders. The Tribunal found that the ACM only provided evidence of 215 official execution auctions being followed by secret "follow-up auctions". These follow-up auctions were aimed at restricting competition at the official auctions and were thus considered to be anti-competitive. At the same time, the ACM failed to provide evidence that the other auctions (approx. 2,100) were also followed by such secret follow-up auctions. Therefore, these auctions could not be considered to be part of a single and continuous infringement.

With regard to the auctions that were proven to be followed by secret follow-up auctions, the Tribunal considered that an additional assessment would have been required to establish that these auctions formed a separate single and continuous infringement on their own.

Despite the possibility under Dutch law to refer the decisions back to the ACM, the Tribunal did not grant the ACM an opportunity to review and amend the defects in its decisions and decided to annul them. This judgment is final and cannot be appealed.

District Court of The Hague clarifies powers of ACM to select and inspect digital data

In its judgment of 18 July 2017, the District Court of The Hague clarified the powers of the ACM to select and inspect digital data in the context of competition law investigations.

In case of a dawn raid, the ACM typically copies large amounts of digital data that may be relevant to its investigation. After securing this data, the ACM makes a further selection on the basis of search terms, which are typically quite broad. This results in a so-called "within-scope dataset". Although a company under investigation may object to the use of certain search terms, this can be burdensome in practice. Only after private and legally privileged documents have been claimed by the company and excluded from the data set, an investigation dataset is handed to the investigation team of the ACM.

In its recent judgment, the District Court has clarified that the search terms used by the ACM to create the within-scope dataset should have sufficient connection with the subject matter and purpose of the investigation. Such connection should be sufficiently motivated by the ACM, if the use of certain search terms is challenged.

The Court further considers that a company under investigation should have the possibility to object to the use of certain documents that it deems to be outside the scope of investigation and, if necessary, bring such objections before a court. In this respect, it is not sufficient for the company to state in general terms why certain documents or categories of documents should be excluded from the data set. If objections are brought against the use of certain documents, the ACM cannot argue that the documents concerned fall within the scope of the investigation only because they were selected by using such search terms. Instead, the ACM should substantiate the connection between the document and the subject matter and purpose of the investigation.

Finally, the Court stressed that a company has the right to object to the inclusion of certain documents, also after the investigation dataset has been compiled.

ACM announces cartel investigation in bunker sector

The ACM announced on 12 July 2017 that it had launched an investigation into possible price-fixing agreements in the bunker sector (which concerns production, transport, storage and marketing of marine fuel oil) in the ports of Rotterdam, Amsterdam and Antwerp. According to the ACM, this sector is critical for Dutch shipping companies and ports, in particular Rotterdam as the world's third largest bunkering port.

The ACM launched its investigation upon receiving "valuable information" from the Dutch Public Prosecutor. The ACM indicated that it will investigate certain practices in more detail in the coming months in order to assess whether competition rules have indeed been infringed.

The Dutch Trade and Industry Appeals Tribunal reduces cartel fines for bid rigging

On appeal, the Dutch Trade and Industry Appeals Tribunal ruled on 12 October 2017 that demolition companies had infringed competition law ruled by engaging in "bid rigging" in various tenders for demolition assignments. However, the Tribunal did reduce the fines as it found that the practice of "cover pricing" was a less serious form of bid rigging which merits a reduction in fine.

"Cover pricing" concerns a practice where the bidder has no intention to win the tender and submits an unrealistic bid (which is higher than the bid submitted by another bidder). It was argued that the purpose of this practice was to allow the bidder who is not interested in actually winning the assignment to maintain a relationship with the customer for possible future tenders.

In 2012 and 2013, the ACM imposed modest fines on the companies concerned for illegal information exchange (the bidder interested in winning the bid disclosed its offer price to the competitor not interested in winning, to allow the latter to know at what level to place its bid) and bid-rigging ranging between EUR 2,000 and EUR 69,000. On appeal, the Court agreed that this was a very serious infringement but found that the ACM had not properly distinguished between bid-rigging and cover pricing when it applied a "gravity factor" of 1.75 to set the fine. The Court lowered the gravity factor to 1.5. On appeal, the Tribunal agreed with the findings of the ACM and the Court, but further reduced the gravity factor to 1, resulting in fines of up to EUR 39,000. It is interesting that the ACM and the Dutch Courts make such an explicit distinction between different forms of bid-rigging, and that some forms are considered less serious than other forms.

Dutch Court allows restricting online sales via Amazon marketplace

On 4 October 2017, the Amsterdam Court ruled that prohibiting an authorised dealer from selling goods via Amazon marketplace was permitted in specific circumstances.

Nike operates a selective distribution network and one of its Italian authorised distributors is Action Sport. Nike sought the annulment of the distribution agreement with Action Sport as the latter had sold Nike products via the unauthorized platform of a third party (Amazon). Under the contract, Action Sport was permitted to sell products via its own authorised website as well as via authorised online platforms, such as Zalando, La Redoute and Otto. Amazon, however, had not been authorised by Nike.

With reference to the recent Opinion of European Court of Justice's Advocate-General Wahl in the Coty case, the Amsterdam Court concluded that it was permitted for Nike to prohibit sales via an unauthorised platform as this was necessary to preserve the quality or image of the products concerned. The Court noted that there was no absolute ban on online or platform sales as Nike did allow online sales via authorised channels.

This judgment demonstrates the importance of how online sales restrictions are assessed under competition law. The European Court of Justice's judgment in the Coty case is eagerly awaited to give clarity on the matter and contribute to a consistent approach across European countries.

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LUXEMBOURG

Competition Council rejects complaint against Amazon for alleged abuse of dominance

On 21 June 2017, the Luxembourg Competition Authority rejected a complaint from a complainant who sold products on Amazon's internet platform. According to the complainant the unilateral termination of the contract without prior notice amounted to an abuse of dominance.

In its decision, the Authority considered the upstream market for the supply of on-line third party platform services, but left open the question whether Amazon would be dominant on this market as the unilateral termination did in any event not amount to an abuse. The Authority ruled that no evidence was found of any exclusionary intention on Amazon's side and that there existed an objective justification for the termination of the agreement as the complainant had repeatedly violated Amazon's terms and conditions. Finally, the Authority also rejected the argument that Amazon's platform was to be considered as an essential facility since it was not established that it was indispensable for the complainant's business activity given the existence of numerous competing platforms.

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