Dear Sir/Madam,

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

For Belgium, this newsletter discusses the Belgian Competition Authority (*BCA*)'s focus on public procurement, which is one of the BCA's enforcement priorities for 2017. The BCA published an information guide on bid rigging in public procurement procedures and recently imposed its first fine for bid rigging. We also cover the BCA's increasing activity in the area of verticals, as evidenced by its first settlement decision in a resale price maintenance case against Algist Bruggeman and the two recent dawn raids at the premises of retail companies. We summarise the Brussels Commercial Court's judgment in the proceedings initiated by UGC against Kinepolis for the acquisition of the Toison d'Or complex and Kinepolis' request to the BCA to lift the expansion restrictions that were imposed on the company 20 years ago. Finally, we focus on a number of mergers that were recently approved by the BCA, including the approval decision of the BCA and the Dutch Competition Authority (Authority Consumer and Market, *ACM*) respectively regarding the acquisition of Van Gansewinkel by Shanks.

With regard to the Netherlands, we discuss the Dutch court decision in which the court confirmed that the parental liability doctrine can also apply to private equity firms. In addition, we focus on the information exchange risks in the ports and transportation and cement sector addressed by the ACM, and the implementation of the EC Directive on antitrust damages actions in Dutch law.

Finally, we also summarise the Luxembourg Competition Authority's decision to accept commitments offered by two passenger transport companies to address concerns in relation to the conformity of their tender for public procurement contracts under competition law.

We wish you pleasant reading!

In This Issue

Benelux Competition Newsletter 2017/1

Belgium

Belgian Competition Authority publishes information guide on bid rigging

On 31 January 2017, the BCA published an informal information guide on bid rigging practices, which is aimed as a tool for public authorities. Bid rigging is a form of cartel whereby competitors collude in their response to a public tender and is a criminal offence under Belgian law.

The guide issued by the BCA is in line with the BCA's focus on public procurement as announced in the BCA's fourth note on enforcement priorities. In the guide, the BCA first explains why public authorities are a "perfect target" for cartelists given the size of purchases and the administrative requirements in public procurement procedures.

The guide then provides practical explanations on the concept of bid rigging in its different forms (cover bidding, bid suppression, bid rotation, etc…) and an overview of warning signs to help purchasing managers to recognise suspicious behaviour that could reveal potential bid rigging. These warning signs can for instance relate to the bid (e.g. each bidder seems to win in turn or the winning bidder does not accept the contract, and becomes a subcontractor later on), the response to a tender (e.g. the same spelling or calculation errors), the price (e.g. a big difference between the price submitted by the winning bidder and the losing bidder or sudden identical price increases) or to statements from bidders (e.g. references to the fact that a competing bidder was not allowed to issue an offer or to customer allocation).

The guide also indicates which market conditions can facilitate bid rigging and sets out preventive steps that can be taken by public authorities to avoid bid rigging.

Belgian Competition Authority adopts 2017 note on enforcement priorities

In February 2017, the BCA published its fourth note on enforcement priorities. As in previous years (see Belgian Competition Law Newsletter 2016/2 and 2014 1/3), the note expands on the BCA's methodology for selecting cases, and sets out the strategic and sector priorities for the upcoming year.

The BCA's methodology for selection and prioritisation of cases involves four criteria: impact, strategic importance, risks and resources. In assessing the impact of cases, the BCA will consider not only the direct harm caused by the alleged infringement in the relevant sector in terms of prices, product quality and service to consumers, but will also take into account indirect effects such as the dissuasive factor of the enforcement in connected sectors. A case will be considered to have strategic importance when it involves a priority sector, or where the case would enable the BCA to clarify the interpretation of the Competition Act.

The BCA has indicated that in 2017 it will prioritise enforcement in the following sectors:

- liberalised sectors and network industries, in particular telecoms (triple or quadruple play offering);
- retail distribution and the relationship with suppliers;
- the activities of trade associations;
- public procurement;
- pharmaceutical sector; and
- the logistics sector

The BCA also states that it will attempt to maintain a good balance between the enforcement of hardcore infringements and more complex or innovative cases.

Belgian Competition Authority adopts first settlement decision in vertical case

On 22 March 2017, the BCA, imposed a EUR 5.5 million fine on Algist Bruggeman for resale price

maintenance and abuse of dominance on the market for fresh yeast.

Algist Bruggeman is the largest supplier of yeast products in Belgium and supplies fresh yeast to industrial, semi-artisanal and artisanal bakeries. Whereas the industrial bakeries are supplied by Algist Bruggeman directly, the semi-artisanal and artisanal bakeries are provided with fresh yeast from Algist Bruggeman through a broad network of distributors. On the basis of information received in 2012, the BCA initiated an investigations into the alleged anti-competitive behaviour of Algist Bruggeman and carried out inspections at the premises of Algist Bruggeman and one of its distributors.

In its decision, the BCA first held that the recommended resale prices issued by Algist Bruggeman issued to its distributors amounted in reality to fixed resale prices since distributors were not allowed to grant discounts without prior consent from Algist Bruggeman. Such consent would only be granted in cases where bakeries were on the verge of switching to competing yeast products. Moreover, approved discounts were reimbursed by Algist Bruggeman to the distributors, contrary to non-approved discounts, and non-complying distributors were pressured (under the threat of sanctions) not to deviate from the "recommended" price. In addition, Algist Bruggeman discouraged each of its distributors to serve customers of other distributors.

Second, the BCA concluded that Algist Bruggeman had abused its dominance by granting its distributors individualised exclusivity, loyalty, and year-end discounts which dissuaded them to incorporate other brands into their portfolio. Algist Bruggeman had also entered into exclusive long term purchasing agreements with some of the bakeries, not allowing them to purchase competing products. Lastly, Algist Bruggeman undermined the reputation of low price competitors in its communication to the public, which, according to the BCA, could negatively affect the structure of the market since distributors or bakeries were dissuaded to use these products.

This is the first case where the settlement procedure was applied in a pure vertical case. Settlement decisions are made at the level of the Competition Prosecutor, without any involvement of the Competition College. Like in EU settlement proceedings, the companies involved in the investigation can benefit from a 10 per cent reduction in fines for admitting their involvement in the infringement.

Belgian Competition Authority clears acquisition of Zetes by Panasonic

On 13 April 2017, the BCA cleared the acquisition of Zetes by Panasonic. Zetes' activities are focused on the identification of people (for example the production of electronic identity cards) and the identification of goods (for example by means of bar code readers and small ruggedized mobile computers).

In its decision, the BCA assessed the vertical relationship between the upstream market for the supply of large form ruggedised mobile computers on which Panasonic is active, and the downstream market for automatic data capture solutions for goods ID (usually consisting of a combination of hardware and software) on which Zetes is active.

The BCA concluded that the transaction would not give rise to any competition law concerns as there would be no foreclosure risks given Zetes' low market share on the downstream market and the very limited integration of large form ruggedised mobile computers in Zetes' solutions.

Belgian Competition Authority clears acquisition of Belmedis by McKesson subject to commitments

On 20 April 2017, the BCA conditionally approved the acquisition by McKesson of Belmedis, Espafarmed, Cophana and Alphar Partners after a phase II investigation. The transaction was reviewed by the BCA further to a request by McKesson in April 2016 to refer the case from the European Commission to the BCA.

In its decision, the BCA identified two affected markets: the full-line wholesale market for pharmaceuticals and the pharmaceuticals retail market. The BCA decided to open a phase II investigation in December 2016 as it concluded that, in addition to expected price increases on the full-line wholesale market for pharmaceutical products, the structural characteristics of that market

(including a high degree of market concentration and IMS Health data contributing to transparency) would likely give rise to tacit coordination. In addition, the BCA considered that the transaction would result into a quasi duopoly consisting of Febelco on one hand and the new entity on the other.

The BCA approved the transaction subject to commitments including the divestiture of a warehouse in the Ghent district and a number of measures aimed at protecting smaller full-line wholesalers.

It is worth nothing that the merger review of this transaction by the BCA also prompted a raid in November 2016 at several pharmaceutical wholesalers and the opening of a cartel investigation into possible illegal pricing agreements (see Belgian competition Newsletter 2016/3-4). This investigation is on-going.

Kinepolis did not infringe competition law by acquisition of Toison d'Or complex

Kinepolis purchased the Toison d'Or cinema complex in Brussels from Immobilière de la Toison d'Or ("ITO") in 2014 which is operated by its competitor UGC.

UGC initiated proceedings before the Commercial Court of Brussels, seeking the annulment of the purchase agreement between ITO and Kinepolis on the basis of the competition rules. The Court ruled on 5 January 2017 that UGC's appeal was unfounded.

According to UGC the purchase agreement (and the broader strategy behind it) amounted to an agreement restricting competition, and infringed the fourth condition of the decision of the Competition Council of 17 November 1997 according to which Kinepolis is under the obligation to seek the BCA's approval if it intends to acquire one or more cinema complexes.

The Court held that the purchase agreement between ITO and Kinepolis did not restrict competition since ITO and Kinepolis are not competitors. Finally, the Court held that the acquisition of the Toison d'Or complex by Kinepolis did not require prior approval by the BCA because the acquisition of the building does not give Kinepolis decisive influence over the activities of the cinema complex. UGC appealed the Court's decision but on 15 May Kinepolis announced that it sold the Toison d'Or complex to UGC.

Kinepolis requests Belgian Competition Authority to lift expansion restrictions

On 31 March 2017, Kinepolis introduced a request with the BCA to lift the conditions imposed in 1997 when the Competition Council granted approval for the creation of the Kinepolis Group. This is the second time that Kinepolis tries to get the conditions lifted. A first request was filed in 2007 and approved by the Competition Council. However, further to an appeal launched by the Belgian Federation of Cinemas, Utopolis and UGC, the Court of Appeal annulled the Competition Council's decision to abolish the conditions. The conditions include, *inter alia*, the obligation for Kinepolis to obtain the BCA's prior approval if it intends to acquire one or more cinema complexes. [Belgian Competition Law Newsletter 2016/1] Third parties are requested to submit comments on Kinepolis' request.

Belgian Competition Authority imposes first fine in bid rigging case

On 3 May 2017, the BCA imposed a 1,779,000 EUR fine on ABB, Siemens, AEG and Schneider Electric for bid rigging in the context of a public tender organised by the Belgian railway network operator Infrabel in relation to a framework agreement for the supply of compact stations. The BCA's investigation was triggered by a leniency application by ABB in 2013.

More specifically, the companies involved were found guilty of having allocated among each other the calls for tenders by coordinating their price offers. The infringement lasted from August 2010 until 30 June 2016. When setting the fine, the BCA took into account as an attenuating circumstance the fact that in its contacts with the bidders, Infrabel disclosed competitively relevant information which made the market more transparent than it would have been under normal market conditions in the context of a public procurement procedure. This is the first time the BCA imposed a fine in a bid rigging case. As set out above, bid rigging in public procurement procedures is one of the BCA's

enforcement priorities for 2017.

This is the sixth settlement decision adopted by the BCA, following the supermarkets case (see Belgian Competition Law Newsletter 2015/2), the Belgian National Lottery case (see Belgian Competition Law Newsletter 2015/3), the industrial batteries cartel (see Belgian Competition Law Newsletter 2016/1), the river cruise case (see Belgian Competition Law Newsletter 2016/2 and the yeast supplier case.

Belgian Competition Authority conducts dawn raids at the premises of two retail companies in relation to alleged vertical infringements

On 5 May 2017, the BCA announced that inspections had been carried out at a company active in the distribution and sale of water softeners. Three days later, on 8 May 2017, it was announced that inspections had been carried out at a company active in the distribution and sale of cooking utensils and wine accessories. These new investigations demonstrate the BCA's increasing focus on vertical infringements (as indicated in its note on enforcement priorities for 2017 referred to above).

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The Netherlands

Belgian and Dutch Competition Authority clear acquisition of Van Gansewinkel by Shanks

On 25 January 2017, the BCA cleared the acquisition of Van Gansewinkel by Shanks. In its decision, the BCA considered the market for the collection of household waste and the market for the collection of commercial waste in Flanders and Brussels (and its sub segment for large customers/projects), and the national market for the recycling of float and spherical glass. The BCA concluded that the acquisition would not significantly restrict competition on these markets as Van Gansewinkel is operating primarily in Flanders and Shanks in the Walloon region, and therefore the parties' activities only overlapped to a limited extent.

On 14 February 2017, the ACM also cleared the acquisition of Van Gansewinkel by Shanks. The ACM investigated the market for the collection of non-hazardous commercial waste, the market for the recycling of container glass, the market for the collection of packaged hazardous waste, the market for the recycling of packaged hazardous waste, the market for the collection of unpackaged (bulk) hazardous waste, the market for the recycling of unpackaged (bulk) hazardous waste, the market for the purification of commercial waste water and the market for industrial cleaning. According to the ACM, a sufficient number of competitors, including large players, would remain present on each of the markets concerned. In addition, the ACM considered that Shanks and Van Gansewinkel are not close competitors on any of the markets concerned. On these grounds, the ACM concluded that the acquisition would not give rise to any significant competition concerns.

Dutch court confirms liability of private equity firm for infringement of portfolio company

On 26 January 2017, the District Court of Rotterdam upheld the decision of the ACM to impose a fine, of approx. EUR 1.3 million, on a private equity firm for involvement of its portfolio company in the flour cartel. This judgment confirms that the ACM may attribute liability to and can impose fines on investment companies for competition law violations of a portfolio company.

The court held that the parental liability doctrine could also apply to private equity firms, as this doctrine is applicable to multiple companies that belong to the same chain and does not exclude investment companies. According to the court, a private equity firm manages one or more investment funds which in turn acquire participating interests in several portfolio companies. In addition, the behavior and powers of a private equity firm in such companies are not necessarily equal to those of a mere financial investor. Therefore, the relevant question is whether the portfolio company acts independently on the market or whether the private equity firm has a decisive influence over this portfolio company, as a result of which it does not act, or no longer acts, independently and should thus be considered to form a single, economic entity with the private equity firm.

In its judgment, the court confirmed the conclusion of the ACM that the portfolio company's violation

could be attributed to the private equity firm as the latter had a decisive influence on the basis of economic, organizational and legal links, such as the power to nominate and appoint the president and other members of the supervisory board, influence strategic decisions of management through the supervisory board and dispose of the only priority share with which certain important decisions could be blocked.

This judgment re-emphasizes that private equity firms should be aware that the mere fact of having decisive influence over a portfolio company will generally result in liability, and thus the risk of fines, for the relevant private equity firms in a situation where such portfolio company is involved in a cartel. A close monitoring of ongoing compliance of portfolio companies is therefore advised.

ACM identifies information exchange risks in ports and transport sectors

Exchanging competitively sensitive information between companies can constitute a cartel. Competition in the ports and transportation sectors is a key priority of the ACM, and therefore it announced on 30 January 2017 to engage in discussions with companies and trade associations in these sectors to get a better understanding of what information is exchanged to allow the ACM to address any competition concerns. In December 2016, the ACM presented the results of a study which showed that competition law awareness in the ports sector is low and the ACM indicated that it would take measures to address this. Entering into discussions on information exchange is one of these measures.

The ACM appreciates that in these sectors there is an objective need for information exchange to function properly. However, the exchange of competitively sensitive information is not allowed. This generally includes information on prices, inventories, customers, offers, investments, and market shares. This applies to direct exchanges between companies, but also to information that is disseminated through trade associations.

This initiative also underlines the importance that the ACM attaches to the prevention and prohibition of illegal information exchange between competitors in all industry sectors.

Dutch law implements EC Directive on antitrust damages actions

On 10 February 2017, the European Commission Directive on damages actions for competition law infringements was implemented in Dutch law. These rules will make it easier for businesses and consumers to claim damages for harm caused to them by competition law violations.

Under the new Dutch law it is easier to claim damages for the following reasons:

- ACM decisions that are final can be used in antitrust damages actions as irrefutable evidence;
- Damages can also be claimed for harm caused by indirect price increases resulting from cartel agreements.
- If cartelists do not provide certain pieces of evidence themselves, ACM can, in specific circumstances, provide such evidence.

Dutch concrete cement companies obliged to adapt collaboration with competitors

On 15 March 2017, the ACM obliged competitors to amend their collaboration with respect to concrete mortar depots in line with earlier agreed commitments.

In 2016, seven concrete mortar companies offered commitments to address serious competition concerns identified by the ACM. According to these commitments, the seven companies would amend their collaboration in relation to specific concrete mortar depots if their combined market share would exceed 40% in a particular region. The ACM is of the view that close cooperation between competitors in relation to one depot reduces the incentive to compete and increases the risk of commercially sensitive information. This risk increases when market shares are higher.

The ACM has found that in six of the concrete mortar depots concerned the combined market share of the collaborating companies exceeds 40%. To comply with the commitments, the ACM ordered these companies to sell their share in the respective depot or end the collaboration within three years. In addition, the companies agreed to other commitments, such as not giving assignments to competitors

and registering contacts between competing companies. The ACM has indicated that it will visit depots in the coming months to verify that these commitments have been implemented.

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Luxembourg

Luxembourg Competition Authority accepts commitments to close antitrust investigation into joint bidding in transport market

On 3 May 2014, the Ministry of Sustainable Development and Infrastructures ("Ministry") launched a public tender for the transportation of passengers with special needs. The tender submitted by Transport Union Lëtzebuerg ("TUL"), a joint venture between the two most important passenger transport companies in Luxembourg (Sales-Lentz and Voyages Emile Weber), was the only one that met the requirements laid down in the tender documents. In order to submit its offer, TUL had subcontracted parts of the tender to almost all the other companies active on the transport market in Luxembourg.

Further to the Ministry's cancellation of the tender on 16 July 2016 due to concerns that TUL's submission amounted to an infringement of competition law, the Luxembourg Competition Authority (*LCA*) decided to open an investigation. The investigation revealed that the main aim of the tender submitted by TUL was to respect each participating undertaking's existing market share and that commercially sensitive information had been exchanged in the context of the preparation of the tender.

In response to the concerns raised in the statement of objections issued by the LCA, TUL's parents companies submitted commitments to the LCA whereby they committed to dissolve TUL at the latest before 1 July 2017, to organise competition law compliance trainings for their staff for a period of two years and to store all data and information relating to negotiations and commercial exchanges with competitors in the context of their next submission to the Ministry for a period of 5 years. On 9 March 2017, these commitments were accepted and made binding by the LCA, which at the same time also closed its investigation against the subcontractors that had participated to the preparation of the tender.

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