

Kluwer Competition Law Blog

Belgian Reforms: Here Comes the Price Police!

Anouck Meier (Sidley Austin LLP) · Tuesday, October 2nd, 2012

After a long period of political deadlock, the Belgian Government is finally moving the reform of the Belgian Competition Authority to the top of its priority list. At the heart of the political battle is the old question what or whom the Authority should seek to protect: the competitive process or the end consumer?

Reforms – A Clear Necessity

Merely looking at the enforcement record of the Authority in past years, it had become painfully obvious that a reform was long overdue. In 2011, only a single cartel decision was handed down, with other investigations being dismissed mainly because of procedural defects. Low output has been attributed to an overly formalistic procedure, the complex structure of the Authority, a strained workforce, a general lack of resources and – last but not least – the lack of political support and awareness.

There is also a wide consensus that the actual Competition Act needs revision, at least on a number of procedural issues. Notably, a referral to the European Court of Justice in the *VEBIC* case^[1] drew attention to the fact that current law does not permit the Authority to participate in appeal proceedings, which the Court held to compromise the application of Articles 101 and 102 TFEU.

The Plan on the Table

First, the investigative body, now an integral part of the Ministry for the Economy, and the Council, the actual decision-making body, will be merged into one structure with a single management. Although it is clear that this should enhance efficiency, what is not yet clear is which guarantees will be put in place for the rights of defence. There are some concerns that former civil servants will be able to faithfully execute guidelines from the Minister and for investigations to be politically influenced. The decisions of the Authority will be appealable before a newly established and more specialized Market Court, a welcome development.

Second, the reform will bring about a number of substantive changes. Among the most eye-catching is the proposal of imposing fines on individuals. It is doubtful whether the sanctions be effective, however, with individual fines ranging between a meagre 100 and 10,000 euros. Another measure which is bound to attract attention is the settlement procedure, with a possible reward of a 20 per cent reduction in any fine and thereby going beyond the European Commission's reward for settling, which is a mere 10 per cent cut. A reform of the interim measures procedure is aimed

mainly at speeding up the pace of investigations into dominant companies.

Finally, the reform of the Price Observatory is by far the most controversial. The Observatory will be able to call directly on the Authority when it considers that there is a problem regarding prices or margins, or when it notices an abnormal price trend or a structural market deficiency. In parallel, the Observatory will notify the Minister who will be able to take measures to remedy the situation. If the Authority acts upon a referral of the Price Observatory, the Court will be able to confirm, annul or amend the measures and will therefore have the final say on whether prices or price trends are “abnormal”. Actions taken by the Minister won’t be subject to judicial review.

A Solid Plan for Enhanced Competition Enforcement?

Anyone will agree that a reform of the Authority is necessary and that certain of the proposed changes should allow the Authority to work more efficiently and increase the output in years to come.

The enhanced role of the Price Observatory, however, raises fundamental questions. More than anything, the instrument is a useful tool in the hands of Johan Vande Lanotte, Minister of Economic Affairs: he will be able to submit a plan to the government with a view to “improving the market under scrutiny”. As a tool for competition law enforcement, the measure seems less than ideal: the relationship between prices and competition law infringements is far from unambiguous. And how exactly is the Price Observatory going to determine which price trends are “abnormal”? How the Minister’s action will affect the independence of the Authority and to what extent a coherent policy might be jeopardized by this parallel circuit, remains to be seen.

Vande Lanotte has presented the reform as part of a broader framework of the fight against inflation and price increases. He sees the malfunctioning of the Authority as an important reason why prices have risen more quickly in Belgium than in neighbouring countries and he seeks to protect consumers from the negative consequences – it is no coincidence that Vande Lanotte has been dubbed the “Guardian Angel of Consumers”.

An interventionist government, taking over the function of market mechanisms, however, may not be the most desirable nor effective solution to the problem of inflated prices. In fact, it’s arguably the Belgian government’s very own socio-economic policy which may be at the heart of the issue: competition-restricting regulations which limit opening hours, protect incumbents against new entry and inhibit the spread of new business models and technologies are no small part of the problem. Higher wage bills, strong trade unions, labour market regulations and the automatic indexation mechanism also play their part.

And while it is true that certain sectors still suffer from dominant incumbent players, the majority of measures the government has proposed to improve cost competitiveness do not focus on fostering competition, but rather on reducing end consumers’ bills. Are price controls really the preferred tool in a liberalised market? And is it (only) the end consumer which we are trying *to protect here*?

Future Prospects

There is no need to get ahead of ourselves, however. The proposed reform could in theory become operational in the Spring of 2013 – although after 18 months of forming a government, the divide between the coalition partners still runs deep. With the October local elections potentially further

polarizing the political landscape, Autumn 2013 seems like a more realistic timeframe. The upcoming negotiations for the 2013 budget are the real test for how serious the Guardian Angel of Consumers is about competition reforms. As always, the proof will be in the pudding.

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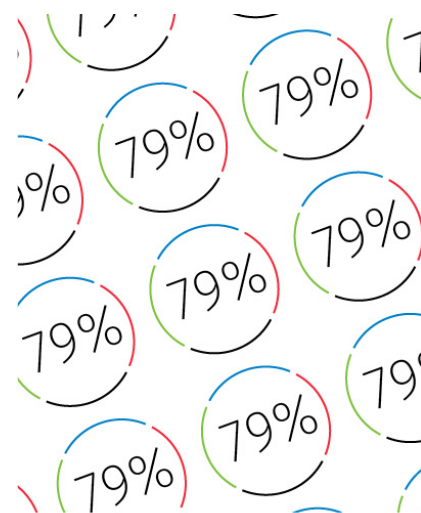
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