

Kluwer Competition Law Blog

Seller fined for obstructing merger control investigation by Belgian Competition Authority

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A seller that failed to provide requested information to the Belgian Competition Authority ('BCA') on time in a merger control investigation has been fined €50,000 for obstruction. Beyond the particulars of the case the decision provides more general guidance on the different types of procedural infringements which can give rise to fines under the Belgian Competition Act and on the calculation of the fine.

On 15 June 2015, De Persgroep notified its acquisition of a number of popular Dutch-language Belgian magazines from the Finnish media group Sanoma to the BCA. The concentration was conditionally approved on 04 August 2015. As a side issue, the Investigation Service of the BCA also pointed out that the behaviour of the seller during the investigation might have amounted to obstructing the investigation. The investigators invited the Competition College to impose a fine. In line with the approach previously taken in a similar situation, however, the Competition College decided to look into this issue separately and to open a case on this specific issue.

In a decision dated 30 September 2015, the Competition College fined Sanoma € 50,000 for obstructing the merger control review procedure by the Investigation Service.

The facts of this case relate to a request for information that the Investigation Service had addressed to Sanoma on 17 June 2015. The request asked for the disclosure of all available information on the substitutability of magazines on the Belgian market for Dutch-language magazines. On 29 June 2015, Sanoma informed the investigators that it had no internal or external market research documents relating to the request. However, subsequent to further internal inquiry, Sanoma submitted two internal documents discussing price elasticity. Sanoma submitted these documents at 11.41pm on 08 July 2015, i.e. the last day of the 20 working day review period within which the Investigation Service needs to inform the notifying party of its concerns regarding the permissibility of the concentration.

The Competition College considered that the documents provided by Sanoma on that day included substantive information regarding market definition and potential theories of harm. Hence there was no question that the documents contained valuable information relevant to the assessment of the contemplated concentration by the Investigation Service and should have been provided in response to the request for information. In addition, the Competition College took particular offence at the timing of the submission. By providing the documents only just before midnight on the 20th day of the review period, the Investigation Service was not able to take this information

into consideration when stating its concerns.

Sanoma was found to have negligently obstructed the merger control investigation by the Investigation Service. First, the College held that Sanoma should have known that those documents included substantive information required for the Investigation Service's analysis. In addition, the documents had already been in Sanoma's possession for two working days before they were transmitted to the Investigation Service, and the delay even prevented the documents from being taken into account by the Investigation Service at the last minute.

The fine imposed on Sanoma is rather modest due to a number of attenuating circumstances in the case at hand. The Competition College particularly took into consideration Sanoma's lack of intent and the lack of clear guidance and precedents at the time regarding fines for procedural infringements.

Beyond the details of the case, this decision is also of a more general interest. For the first time, the BCA has provided guidance on the different types of infringements that can occur in relation to requests for information and their increasing order of severity. Further, it is now clear that in the absence of specific guidelines in relation to procedural fines, the BCA's general fining guidelines will apply. This approach allows the BCA to take into account the financial strength of the infringing undertaking.

The decision shows that in merger control investigations, the BCA attaches great importance to complete and timely responses to requests for information. Given the strict time-limits to which the BCA is subject, requests for information are considered material in the context of the investigation. The BCA clearly expects the parties to a concentration to exercise a special duty of care and will not shy away from fining undertakings which, with or without intent, do not act diligently. This was already illustrated by the € 75,000 fine imposed on Belgacom in 2012 for providing incomplete information in the context of a merger case.

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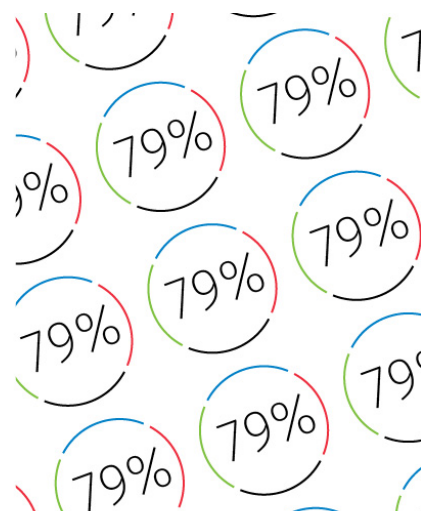
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