Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Belgium

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Even amidst another Covid-19 dominated year, the Belgian Competition Authority ("BCA") and courts have maintained a steady pace of competition law enforcement. With fewer substantive mergers to review, the BCA's focus in 2021 has rather been on unlawful information exchange and a variety of vertical restrictions. While the BCA has yet to rule on abuse of economic dependence, private enforcement before Belgian courts has rendered its first judgments on applying this new tool for complainants.

In this blog post, we share our main reflections, both on the BCA's public enforcement of competition rules and on the Belgian courts' application of the abuse of economic dependence provisions. We also look ahead to what the upcoming year will have in store. With an ambitious new BCA leadership, new amendments to the competition law provisions in the Belgian Code of Economic Law ("CEL") and the prospect of a breakthrough in Belgium's long-awaited FDI screening law, 2022 promises to be a busy and fascinating one!

Antitrust: BCA focus on unlawful information exchange and vertical restraints

The *Caudalie* saga: BCA (too) eager to enforce vertical restraints

On 6 May 2021, the BCA imposed a fine of €859,310 on French cosmetics manufacturer Caudalie for imposing minimum resale prices and limitations of active and passive online sales on its selective distributors.

The BCA's investigation started back in 2017, following complaints from Newpharma and Pharmasimple, two online retail chains of pharmaceutical products. After a dawn raid at Caudalie's Belgian and French offices and a series of information requests, the BCA's investigatory body (*Auditorat*) concluded that Caudalie's prohibition for its distributors to offer discounts above fixed ceilings and mention discount-related words directly on their product packaging amounted to illegal RPM. In the same vein, the strict (territorial) authorisation conditions to qualify for online distribution amounted to illegal sales restrictions that clearly went beyond legitimate protection measures to preserve the luxury character of Caudalie's brand image.

Before the Competition College, Caudalie offered a series of commitments aiming to close the

investigation without a fine. First, Caudalie proposed to clearly communicate to its distributors which conditions it could legitimately require to safeguard the integrity of its selective distribution network. Second, it would be made clear that distributors could independently determine their resale prices.

In an unprecedented move, the Competition College accepted Caudalie's commitments and made them binding, but concluded at the same time that Caudalie had committed hardcore antitrust infringements also necessitating the imposition of a fine. It took the commitments into account as mitigating circumstances in its fine calculation, allowing for a reduction of the total amount.

However, on 1 December 2021, the Brussels Market Court quashed the BCA's decision on appeal, precisely rejecting this unprecedented combination of a fine and commitments. By re-qualifying them as mitigating circumstances, the Court ruled that the College had stripped Caudalie's commitments from their intended purpose, i.e. obtaining a closing of the investigation without establishing an infringement and without a fine. The authority argued that it had merely imposed the commitments as 'modalities' accompanying its fine to ensure that Caudalie would effectively stop its infringement, which is claimed to be part of its fine setting prerogatives. However, whilst accepting the College legally has the ability to add conditions to its infringement decisions, the Court dismissed this argument by referring to the CJEU's *Alrosa* (2010) judgment: conditions that are imposed as part of an infringement decision (Art. 7 Reg. N° 1/2003) must meet a higher proportionality standard than proposed commitments that aim to close an investigation without establishing an infringement (Art. 9 Reg. N° 1/2003). According to the Court, Caudalie had clearly proposed its commitments in view of the equivalent of Art. 9 under Belgian competition law, meaning the BCA was not entitled to take them into account under the equivalent of Art. 7 without assessing them to the appropriate higher proportionality standard.

On this basis, the Brussels Market Court annulled the decision and referred the case back to the BCA to re-adopt a corrected decision. As such, Caudalie did not contest the finding of an infringement in its appeal. Paradoxically, this means that the BCA could now re-adopt a decision including a potentially higher fine than the original €859,310 as the commitments would no longer be used as mitigating circumstances to reduce the amount.

Unlawful information exchange: from hub-and-spoke to purchasing alliances

Another topic that has been high on the BCA's enforcement agenda this past year is the unlawful (indirect) exchange of commercially sensitive information between competitors.

- ***Cigarette manufacturers (hub-and-spoke information exchange)***

On 1 October, the BCA's Prosecutor General announced its intention to prosecute cigarette manufacturers Philip Morris Benelux, Établissements L. Lacroix Fils, JT International Company Netherlands and British American Tobacco Belgium for their alleged engagement in an unlawful 'hub-and-spoke' exchange of information on prices.

The announcement follows an investigation that started already in 2017 with several dawn raids that same year. According to the prosecutor in charge, these manufacturers shared their future pricing intentions through their common wholesalers, who subsequently passed the sensitive pricing information on to their rivals. The BCA underlined the potential significant effect on

competition, as these four manufacturers account for 90% of cigarette consumption in Belgium.

Last year, the Dutch competition authority already imposed fines totalling €82 million on the same parent companies for a similar 'hub-and-spoke' price exchange. The BCA's final decision is expected in the first half of 2022.

- ***Carrefour / Provera (purchasing alliance)***

On 28 April, the BCA concluded its investigation into the purchasing alliance between Carrefour and Provera with binding commitments and no fine. Carrefour is one of the largest supermarket chains in Belgium, while Provera is the central purchasing body of Carrefour's rival, the Louis Delhaize Group.

At the outset of the investigation, the BCA conducted dawn raids in relation to the 2018 purchasing agreement that would see Carrefour negotiate purchasing conditions for branded products from approximately 140 suppliers on behalf of both Carrefour and Provera. This negotiation set-up was found to potentially give rise to illegitimate information exchange between Carrefour and Provera, and the functioning of this arrangement was likely to impact the commercial policy of each of Carrefour and Provera.

In the end, a fine was avoided by offering three binding commitments. First, Carrefour's entire purchasing department will be transferred to a separate legal entity, Interdis. Second, Carrefour and Provera will implement stricter supervision of the exchange of information necessary for the proper functioning of Interdis, with strict firewalls put in place. Finally, Interdis' negotiations will be strictly limited to the financial aspects of joint purchases only, with Carrefour and Provera continuing to independently determine their own commercial strategies.

The BCA's approach provides helpful guidance for other purchasing alliances but can also inform exchanges of commercially sensitive information more generally. In particular, the decision gives guidance on what safeguards should be taken to prevent antitrust breaches. The use of strict firewalls and guaranteed independence of each of the participating undertakings' commercial strategies are key for any legitimate cooperation.

Concerns around purchasing alliances continue to be high on the EU's enforcement agenda. The European Commission has been investigating two French retailer groups for potential collusion through their purchasing alliance already since 2017. The BCA's choice to resolve its probe by accepting binding commitments, moreover, mirrors a similar approach taken by the French competition authority in its decisions regarding the joint purchasing alliances of respectively Auchan, Casino, Metro et Schiever and of Carrefour and Tesco during the fall of 2020.

Merger control: mostly simplified reviews … and reviews for hospital networks fall outside of merger control

Out of the 18 merger decisions published in 2021, 17 were (unconditionally) cleared under the simplified merger control procedure. This is remarkable, albeit not entirely surprising since the BCA expanded the scope of its simplified merger control procedure in 2020 (see the new rules

here).

Proximus' acquisition of rival mobile telephony services provider Mobile Vikings was the BCA's only non-simplified decision that was cleared (unconditionally) after a Phase I investigation on 31 May 2021. The BCA examined potential coordinated and non-coordinated horizontal concerns in the retail supply of mobile telephony and fixed telephony services. It also assessed the effect of the transaction on the Belgian wholesale markets for transit services on fixed networks and for termination and hosting services. After a thorough economic analysis and market test, it got comfortable that the concentration would not lead to price increases for consumers.

Hospital managers, on the contrary, no longer need to worry about getting BCA approval for their hospital networks in Belgium. Despite the BCA's initial position to the contrary, the Act of 29 March 2021 now officially exempts 'loco-regional hospital networks' from the scope of Belgian merger control. This exemption has been justified for two reasons. First, the Belgian legislator decided in 2019 that greater cooperation between hospitals was needed to guarantee efficiency and quality in Belgium's healthcare system. Second, the "specificity of the hospital sector" justifies a different treatment, given the strong regulation of the sector and considering hospitals are non-profit organisations in Belgium.

Importantly, the exemption only relates to Belgian merger control, meaning any (cross-border) hospital network that would amount to a concentration under the EU turnover thresholds would still need to be notified to the European Commission.

Enterprise courts shed light on brand new provision prohibiting "abuse of economic dependence"

Since 22 August 2020, companies can now face private court litigation or BCA scrutiny (with fines of up to 2% of their consolidated Belgian turnover) for abuse of economic dependence. As such, companies having 'relative market power' vis-à-vis certain suppliers or customers can be sanctioned if their commercial actions quality as abusive and affect competition.

These provisions, included in Article IV.2/1 of the Belgian Code of Economic Law ("CEL"), require three (rather open-ended) cumulative conditions to be met before an infringement can be established, i.e. (i) the existence of a position of 'economic dependence', (ii) an abuse of this dependence and (iii) a possible effect on 'competition on the Belgian market or an essential part of it'. The interpretation and application of these conditions is subject to intense debate and uncertainty. The law nor the interpretative works give any clear steer as to the precise scope of these new provisions, but it is clear that the potential for complaints is high, and compliance risk can be significant. In particular, this *contentieux* requires companies to make customer or supplier-specific assessments as to whether they could find themselves in a position of economic strength (without being deemed objectively dominant under the applicable competition rules of Article IV.2 CEL). Having clearly taken inspiration from neighbouring countries such as France and Germany, the Belgian regulator states that enforcement varies greatly by jurisdiction. Taking France as an example, the French rules were first only used occasionally in practice, but now seem to have gained renewed momentum in light of the growing enforcement focus on the digital sector (see e.g. Apple's fine in France in 2020 for abusing the economic dependence of its Apple Premium Resellers). Also Austria, Cyprus, Greece, Hungary, Italy, Portugal, Romania, and Spain already

have similar rules.

Given the above complexities and uncertainties, guidance from the Belgian courts and/or the BCA in 2021 was long anticipated. However, the first 2021 court cases are not a testament of consistent practice in Belgium. Instead, they rather confirm that the application of economic dependence abuses is very case-specific, with judges having wide discretion in assessing whether the three conditions are met.

- ***Refusal to execute payments in the diamonds sector***

On 16 March 2021, the President of the Brussels Enterprise Court ordered Ebury, a financial institution, to restart executing the payment orders of diamond dealer Yakar. In 2018, Ebury had agreed to open a bank account for Yakar so it could receive and make payments for its diamond business. But in September 2020, Ebury abruptly refused to continue providing its banking service, allegedly due to its increased anti-money laundering screening obligations and a 'changed customer strategy'.

The President reasoned that Yakar was in a situation of economic dependence. For a situation of economic dependence to exist, the Belgian CEL requires *"a position of subjection of an undertaking in relation to one or more other undertakings characterised by the absence of reasonable equivalent alternatives available within a reasonable time and under reasonable conditions and costs, which permit the latter undertaking(s) to impose performances or conditions which could not have been obtained under normal market conditions"*. As an SME in the diamond sector, Yakar had no reasonable alternative suppliers of banking services available within a reasonable time, given that Belgian financial institutions are generally reluctant to provide their services in the diamond sector. Ebury, on the contrary, was precisely targeting clients in this sector. As such, the President found that Ebury was able to freeze Yakar's funds only because Yakar's banking services were 100% concentrated with Ebury and given Yakar's *de facto* lack of access to alternative banking services from rival providers. Under normal market circumstances, a financial institution would not be able to limit its financial services offering in a similar way. By freezing Yakar's funds for no legitimate reason, Ebury thus abused its position of relative market power. In this case, the President also effectively assessed the third condition, concluding that Ebury's behaviour affected competition on the market of diamond dealers operating as SMEs. It enabled Ebury to arbitrarily decide which dealers can and cannot perform their diamond activities.

- ***Refusal to supply hunting weapons***

On 16 April 2021, the Antwerp Enterprise Court ordered Blaser and Mauser, two German manufacturers of hunting weapons, to resume deliveries to Pletsers, a local Belgian retailer, under a penalty of €10,000 per day. The manufacturers had suddenly refused to continue supplying Pletsers due to a pending distribution dispute with one of Pletsers' sister companies.

The Court found that Pletsers was economically dependent on Blaser and Mauser for two reasons. First, these two suppliers combined accounted for 90% of its turnover, and the Court considered that Pletsers could not source the hunting weapons from other manufacturers, given that its customers had a very specific interest in Blaser/Mauser products only. Moreover, Pletsers had built

a strong network of loyal customers who regularly purchase spare parts that cannot be sourced elsewhere. Consequently, the Court concluded there was an abuse because there was no valid reason for the termination of the supplies, which was merely motivated by the pending dispute with Pletsers' sister company. Remarkably, the Court decided that it was not necessary to also demonstrate a potential adverse impact on competition (the third condition), simply because the (potential) damage to Pletsers' commercial interests had been established and because this at least amounted to an unfair market practice under Article VI.104 CEL.

- ***Refusal to supply defibrillators***

Finally, that same month still, the President of the Leuven Enterprise Court dismissed a claim from an automated external defibrillator (AED) reseller against its exclusive supplier because it did not meet the conditions for an abuse of economic dependence. After initially letting the reseller distribute the AEDs without written agreement, the supplier wanted to conclude a written distribution agreement to formalise the distributorship. Because the reseller rejected all of the supplier's proposals, orders for a new AED model were withheld as the supplier felt negotiations were being unjustifiably blocked. The reseller, in turn, initiated proceedings claiming that the supplier's sudden refusal to supply constituted an abuse of its economic dependence, exacerbated by the fact that the supplier had already unilaterally imposed a price increase right before the supply stop.

Interestingly, the President underlined that the new prohibition on abuse of economic dependence should be interpreted narrowly, in light of the general principle that an undertaking should be able to choose its own trading partners and determine its own terms and conditions. In light of this strict view, the President found that the reseller was not in a position of economic dependence because it had a certain degree of power vis-à-vis the supplier given its strong relationship with end-users (first condition). Moreover, as the supplier had actually been the one pushing the contract negotiations forward, it was difficult to find any abuse on its part (second condition). Finally, and contrary to previous precedents, the President conducted a detailed analysis regarding the third condition, i.e. adverse impact on competition on the Belgian market. The defendant was only one of the many suppliers of AEDs on the Belgian market, with only a limited market share. Moreover, the end-user's choice would not be significantly reduced as AEDs could be sourced from several other distributors if the reseller leaves the market due to the supplier's refusal to supply.

This remains a space to watch in 2022 with (hopefully) a more streamlined approach in the case law and, potentially, also some first investigations dealt with by the BCA.

Ingredients for a fascinating 2022: a new BCA leadership, important procedural changes and finally, an FDI screening regime?

2022 promises to be a year for the books: not only may a new leadership bring a different focus to the BCA's enforcement policy, but we will also see important procedural changes. And finally, we may see a breakthrough in the creation of Belgium's long-awaited federal foreign direct investment ("FDI") screening mechanism (Flanders already has a limited *ex-post* FDI screening regime in force since 2019, but this has not been used in practice so far).

On 1 December 2021, Damien Gérard (until recently a Deputy Head of Unit at the European Commission's Directorate General for Competition) replaced Véronique Thirion as Prosecutor General of the BCA and also current BCA President Jacques Steenbergen will be replaced in 2022. It will be interesting to see whether this change in leadership will make the BCA change its approach on certain procedures and/or reshuffle its focus. Its soon expected Priorities Policy Nota for 2022 may already offer a first insight.

We will also soon see additional procedural rigour being introduced in the Belgian CEL. The Act of 28 February 2022 not only transposes the ECN+ Directive (2019/1) into Belgian law but will also bring a number of additional remarkable amendments to Belgian competition procedures, such as the long-awaited introduction of pretty steep filing fees (€52k for non-simplified procedures) and the introduction of fines for failure to comply with interim measures, instead of only periodic penalty payments. The new rules enter into force on 17 March 2022.

Although FDI screening has become an unavoidable and often crucial aspect of large global and European M&A projects, Belgium to date has not yet introduced a national screening mechanism. Despite some political movement and a new draft bill, no significant progress was made on this topic in 2021 amidst concerns about the potential protectionism of Belgium's traditionally very open economy. In December 2021, the Minister of Economy and Employment Pierre-Yves Dermagne recognised the delay but emphasised his team is working hard to make headway soon. Omen for a breakthrough in 2022?

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