Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Belgium

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2022 portrayed a critical year for Belgian competition law. The new leadership of the Prosecutor's Office of the Belgian Competition Authority ("**BCA**") was instantly put to the test in an active year. In the antitrust area, it pulled out all its enforcement tools, ranging from dawn raids, interim measures, and settlements to infringement decisions. The BCA stayed true to its 2022 priority sectors, pursuing the agri-food, pharmaceuticals, financial services, telecoms and sports sectors. Compared to previous years, there was also an uptake in substantive Belgian merger control enforcement.

The past year also saw a number of important reforms to the Belgian competition rules, stemming from the implementation of the ECN+ Directive, which entered into force in March 2022. The reforms introduced a merger filing fee, additional fining powers for the BCA, sharper rules on leniency applications and improved cooperation within the ECN Network.

Finally, the Belgian courts have not been idle. They have shed further light on the rules on the prohibition of an abuse of economic dependence introduced back in 2020. And while Belgium still doesn't figure among the typical destinations for follow-on cartel damage claims, a key ruling in 2022 may change that.

Lots to unpack. In this blog post we look back and reflect on 2022 and look ahead to what those developments mean for the future of Belgian competition law.

Antitrust: all enforcement tools pulled out in 2022

Pharmaceutical wholesalers settlement

In February, the BCA adopted its first-ever hybrid settlement decision. After years of investigation, it reached a settlement with two Belgian pharmaceutical wholesalers, Febelco and Pharma Belgium-Belmedis, over allegations that they had fixed commercial conditions regarding the fulfilment of so-called "transfer orders" and in relation to the distribution of flu vaccines.

Via their transfer order system, pharmaceutical laboratories offer special terms to pharmacists that order large quantities of their products. The laboratories set the prices themselves, but the actual fulfilment of these orders is managed by the wholesalers who supply the products concerned from

their existing stock. The BCA found that the wholesalers had agreed (a) to charge the same fees to the pharmaceutical companies for their order fulfilment services and (b) on the type of services they would offer for this fee as part of their transfer order system.

A second infringement related to the annual flu vaccine presale season in Belgium, during which pharmacies can pre-order certain quantities of vaccines before they are actually marketed during the autumn. The BCA found that the wholesalers made agreements around the duration of their presale periods and the commercial conditions offered to pharmacies (certain discounts, returns of unsold vaccines policy, etc.) as part of this presale system.

Febelco, the first leniency applicant, was granted immunity from fines for notifying the BCA of both infringements. Pharma Belgium-Belmedis received a total fine reduction of 50% for providing additional evidence to strengthen the BCA's case, for its cooperation and for the acknowledgement of its participation in the infringement for the purpose of the settlement.

While the decision is the ninth settlement decision since the introduction of the settlement option back in 2013, it is only the first hybrid one. The third wholesaler involved, CERP, refused to accept the settlement proposal. The BCA, therefore, continued its investigation in relation to this wholesaler. In December 2022, it announced that its Prosecution Service had submitted a reasoned proposal to its Competition College for an infringement decision against CERP for its alleged involvement in the two infringements.

Dawn raids in the press distribution and beef sectors

Now that most COVID-19 restrictions have been lifted, the BCA did not shy away from conducting unannounced inspections in 2022. That is in line with an uptake in dawn raids we have seen across the European continent in the past year.

In April, the BCA targeted the bovine meat sector with a dawn raid at FEBEV (*Federatie van het Belgisch Vlees / Fédération Belge de la Viande*) – the National Federation of Belgian Meat, comprising 130 members active as slaughterhouses, cutting plants and meat wholesalers. The dawn raids were prompted by concerns voiced by several players in the sector suggesting a potential infringement of the Belgian cartel prohibition in the form of price agreements.

More high profile were the dawn raids in the press distribution sector in November at the premises of DPG Media, one of Belgium's largest media companies, and PPP, a smaller press distributor. The dawn raids reportedly followed a leniency application by bpost, the Belgian incumbent post operator. The BCA suspects the companies involved in bid rigging under a government concession tender for the delivery of newspapers and magazines in Belgium over the period 2023 to 2027. At the centre of the debate is an alleged agreement whereby PPP refrained from competing in the tender in favour of bpost, in exchange for a certain volume of newspaper deliveries from Flemish publishers (including DPG Media) in various regions.

Tobacco hub-and-spoke cartel

What started in 2017 with an *ex officio* investigation and several dawn raids, led to the BCA

imposing a €36 million fine on 13 April 2022 on four tobacco products manufacturers. The BCA's decision followed a similar decision by the Dutch Authority for Consumers and Markets in 2020, fining the same cigarette manufacturers €82 million.

The BCA found that the four manufacturers, representing 90% of cigarette consumption in Belgium, engaged in a "hub-and-spoke cartel" by systematically exchanging intended future prices through cigarette wholesalers. The parallel receipt by the four competitors of their future price lists, without any objection or distancing on their part, implicated an unlawful concerted practice and a by-object restriction of competition.

Hub-and-spoke cases are relatively rare, mainly because of the high evidentiary threshold the competition authority has to meet. In this case, however, the BCA found the absence of any opposition or distancing to the systematic receipt, via the wholesalers, of competitor pricing information sufficient to assume a consensus between the four competitors. The BCA applied to so-called "state-of-mind test" to conclude that the longstanding duration and frequency of the information exchange, each time relating to the exact same products, were sufficient to demonstrate the manufacturers' intent and their awareness that the information would be passed on to each other.

However, on 15 February 2023, the Brussels Market Court partially annulled the BCA's decision. While upholding the finding of an infringement of Art. 101 TFEU (and its Belgian law equivalent) the Court ruled that the BCA had not sufficiently motivated various aspects of the fine calculation. The BCA's Competition College will now reconsider the case in a different composition.

Investigation into the roll-out of fibre-optic networks in Flanders

Only one month after pointing out telecoms as an enforcement priority sector in its Policy Note 2022, the BCA announced it had opened an investigation into possible distortions of competition in the roll-out of fibre networks in Flanders. The investigation reportedly focuses on the joint venture agreement between Telenet (one of Flanders' main telecom operators) and Fluvius (one of Flanders' main network operators) to facilitate the roll-out of fibre connections in Flanders.

Although the roll-out of fibre networks is still in a relatively early stage in Belgium compared to other EU countries, the process recently accelerated. Fluvius is owned by all Flemish municipalities via several local inter-municipal companies. The BCA wants to ensure that the joint venture would not allow Telenet to obtain exclusive fibre roll-out rights in these municipalities, or at least preferential access rights, compared to its rivals such as Orange or Proximus.

In November, Telenet and Fluvius announced further delays in the anticipated implementation of their JV as they now also need to get clearance from the European Commission. As of the date of this publication, the Commission has not yet received the notification.

Interim measures regarding the development of a standard for cloud applications

The interim measures procedure is a frequently used tool under Belgian competition law, particularly when compared to the European Commission's scarce use of interim measures in

antitrust cases. The divergence is mostly because interim measures can also be imposed by the BCA at the request of complainants, whereas the Commission can impose such measures only *ex officio*.

In September 2022, for example, following such a third-party complaint by four manufacturers of pigeon clocks, electronic registration systems ("**ETS**") and associated pigeon rings, the BCA imposed various interim measures on the Royal Pigeon Fancier's Union (*Koninklijke Belgische Duivenliefhebbersbond* "**KBDB**"),

What happened? The complainants argued that the KBDB's mandatory 2022 standard governing the development of ETS for pigeon races favoured market leader Bricon (with a 90% market share and KDBD's preferred equipment supplier) to the detriment of the complainants. The standard ensured that only Bricon's cloud environment met ETS requirements, and therefore excluded (potential) competition from the complainants, who wished to offer cloud equipment on the Belgian market. The BCA broadly followed this reasoning and considered that the way the standard was created and the lack of clarity it brings about, involved a prima facie infringement, as it, at the least, rendered it extremely difficult for the complainants to compete with Bricon for new cloud ETS systems. The BCA also deemed the conditions that there must be serious and irreparable harm and extreme urgency – for interim measures to be imposed – were met. It is considered crucial to counter the disadvantaged position of the complainants and other potential market players as soon as possible, freeing competition for the next season.

The BCA's interim measures required the KBDB: (i) to organise a new consultation with all ETS manufacturers to discuss envisaged changes to the standard; (ii) to inform all KBDB members that ETS systems supplied by any manufacturers, which are already homologated for the seasons 2020, 2021 and/or 2022, may continue to be used for (max.) one year after the entry into force of any new standard; and (iii) to publish the text of the interim measures on the entry page of its website, until a new standard enters into force.

Investigation into Belgian banks' ATM pooling network

Right before Christmas, the BCA announced it had launched an antitrust investigation into an agreement between Belgium's four largest banks (Belfius, BNP Paribas Fortis, KBC and ING) to pool their ATMs into a single network. With the so-called "Batopin project", the banks aim to replace their respective own-branded ATMs with commonly branded, neutral ones. To justify the agreement, the banks point to the increasing use of electronic payments with customers withdrawing less cash from ATMs, thus making the ATMs too expensive for banks to stock and secure. By pooling their ATMs within a common network, the banks also aim to ensure a better spread of ATMs throughout the country, with the ultimate aim that 95% of the population will (continue to) be able to withdraw cash within a 5km radius from their home.

However, several politicians and consumer organisations have voiced concerns over the potential decrease in the quality of the ATM service offering and higher costs for consumers. In this context, the BCA stated it is focusing the investigation on the Batopin project's potential impact on the quality of cash distribution and deposit services, as well as competition between retail banking service providers in Belgium.

Complaint against Belgian telecom providers' RAN sharing agreement dismissed after in-depth investigation

On 23 December 2022, the BCA decided to dismiss Telenet's complaint against the mobile network infrastructure sharing ("**RAN-sharing**") agreement its rival telecom service providers Proximus and Orange signed in 2019. The BCA's investigation lasted three years but ultimately did not reveal any (potential) restriction of competition.

In the autumn of 2019, Proximus and Orange concluded an agreement on their shared deployment of a new 5G mobile network as well as on the merger of their respective existing 2G, 3G and 4G infrastructure throughout Belgium. Telenet argued that this RAN-sharing agreement would restrict competition at two levels: at the spectrum auction level on the one hand, and on the other hand at the level of competition in the Belgian retail and wholesale mobile telecommunications markets.

On 8 January 2020, the BCA first imposed interim measures on Proximus and Orange, obliging them to suspend the implementation of the RAN-sharing agreement for two months. This suspension was aimed at allowing the Belgian Institute for Postal Services and Telecommunications (BIPT) to conduct its own dedicated investigation and negotiate potential mitigating commitments with Proximus and Orange upfront.

The BCA ultimately concluded that Proximus' and Orange's RAN-sharing agreement did not have as its object or effect to limit competition in the Belgian mobile telecom markets. First, Proximus and Orange would remain technically and commercially independent, while the agreement enabled each to unilaterally invest in the deployment of their (combined) mobile network. Secondly, the agreement did not appear to strengthen the parties' market power to such an extent that Telenet would no longer be able to exert competitive pressure on the Belgian retail and wholesale mobile telecommunications markets. Thirdly, there was no indication that the agreement would distort competition between its parties or in relation to competitors like Telenet.

The potential impact of network sharing agreements ("**NSAs**") on competition has been a focus area also for the European Commission in recent years. Last summer, for example, the Commission accepted binding commitments from CETIN, T-Mobile CZ and O2 CZ to close a six-year investigation into their respective NSAs over concerns regarding anti-competitive information exchange and reduced incentives for the mobile operators concerned to independently improve their networks and services.

Merger control: uptake in substantive merger control enforcement

2022 witnessed an uptake in the BCA's substantive merger control enforcement. The BCA published in total 18 merger decisions, involving one decision to open a Phase II investigation (only the second one in the last five years), one conditional clearance in Phase I, three unconditional clearances in Phase I, one decision to waive commitments imposed as part of a previous conditional clearance decision and 13 simplified clearance decisions. Below we zoom in on the BCA's two most prominent decisions last year.

DPG / Rossel / RTL

In March 2022, the BCA gave its conditional green light to the biggest Belgian media deal in recent years: the acquisition by media companies DPG Media and Rossel of the Wallonian media player RTL Belgium (including its subsidiaries). In a rapidly evolving media landscape, the deal aimed to enable the three media companies to more effectively compete with digital giants such as Netflix and Spotify, by strengthening their cross-media and digital offering.

Highlighting the two-sided nature of the markets in which the companies operate, the BCA focused its investigation on the advertising side. An important element of the BCA's investigation was the tenability of the traditional division of advertising markets per media (i.e. radio, television, digital, and newspapers). Has the market evolved into an overarching cross-media advertising market? No, according to the BCA. While recognising the dynamic nature of advertising under influence of digitalisation, the BCA considered that different advertising media remained complementary and continue to have important differences in terms of reach, output and costs. The BCA nevertheless took into account the asymmetric pressure digital advertising exercises on the traditional media channels for the competitive assessment.

The BCA focused on potential conglomerate effects considering the parties' wide-ranging media coverage. It concluded that the parties would not have the opportunity nor the incentive to exclude competitors from the advertising markets through bundling or tying strategies or by refusing access to advertising on the television, radio and print channels of RTL Belgium.

The BCA did identify a risk that Vlaanderen 1 (Nostalgie) would be excluded from the advertising services of IP Belgium (RTL's advertising agency), in favour of the parties' own radio channels. To counter these concerns, the parties offered to prolong the advertising agreement between IP Belgium and Vlaanderen 1, with the introduction of a Chinese Wall Policy to protect Vlaanderen 1's proprietary information in the hands of IP Belgium. A Monitoring Trustee supervises the implementation of these commitments.

The BCA's clearance is exceptional in view of unsuccessful media consolidation attempts to counter the GAFAs growing importance in neighbouring countries. In the meantime, the BCA's clearance decision has been appealed to the Brussels Market Court by competing advertisers Ads & Data and IPM. By judgment of 5 October 2022, the two appeals were joined and the BCA has been obliged to produce the results of its market survey to the Court.

Intermarché / Mestdagh

In November 2022, the BCA gave the unconditional green light for Intermarché Belgium's acquisition of the 87 Mestdagh supermarkets after a Phase I investigation. This is the largest takeover in the Belgian food retail market since the combination of Ahold and Delhaize in 2016.

The transaction was originally notified to the European Commission, but was, at the request of Intermarché, referred to the BCA in June 2022. After a detailed investigation, the BCA did not identify any competition concerns.

However, 2022 showed that the BCA's clearances do not result in good graces with the merging parties' competitors. In December 2022, rival retailer Carrefour launched an appeal against the BCA's clearance decision. In addition to the annulment request, Carrefour also requested the Brussels Market Court to suspend the BCA's decision and correspondingly the implementation of

the transaction.

In a summary proceedings judgment, the Court rejected Carrefour's arguments regarding the necessity for a suspension. The Court opposed the idea that the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the EU would require the suspension to be granted, since, in practice, this would leave any annulment action with an automatic suspensory effect (which the law explicitly excluded). Carrefour's arguments of urgency also did not convince. Carrefour mainly relied upon the fact that Mestdagh terminated its franchise agreement with Carrefour, alleging that the termination was intimately linked with the BCA's clearance. The Court opposed this and found that a lawful termination would also have been possible without the concentration, and thus had to be differentiated from the questions around the legality of the clearance decision. This judgment confirms yet again that the standard of proof to get a BCA decision suspended is high, requiring powerful and robust arguments on necessity and urgency. The Brussels Market Court's judgment on the merits is expected later in 2023, with a hearing scheduled in May.

Courts shed further light on the rules around abuse of economic dependence

Since August 2020, companies can face private court litigation or BCA scrutiny (with fines of up to 2% of their consolidated Belgian turnover) for abusing a position of economic dependence on a supplier, distributor or customer. Similar rules exist in Austria, Cyprus, France, Germany, Greece, Hungary, Italy, Portugal, Romania and Spain.

As explained in our more detailed commentary in the 2021 edition of this blog post, there is still quite some uncertainty around the practical application of these rules. In particular, the interpretation of the existence of a position of economic dependence proves challenging. It requires companies to make a customer or supplier-specific assessment, separate from an assessment of dominance on the market as a whole. Conceptually, one can view a position of economic dependence as a situation of dominance in a bilateral setting rather than a market.

The BCA has created a dedicated internal task force, but it has so far not adopted any decision in relation to an abuse of economic dependence (but has investigated several claims). This means that the only guidance has so far come from the enterprise courts. However, as the selection of abuse of economic dependence cases in 2022 below shows, the judicial interpretation and application of the rules remain highly fact-specific and rather inconsistent. While some judges conduct a detailed assessment of every legal condition to prove an abuse of economic dependence, others discretionally focus on one or the other or decide not to assess some of them at all (especially the required effect on competition).

Refusal to grant a licence to use patented technology

Last year's most striking case is undoubtedly the Brussels Enterprise Court's judgment in *Tunstall v Victrix – Télé-Secours* (26 July 2022). For the first time, a court explicitly stated that a position of economic dependence can be established without there being any existing or past contractual relationship between the companies concerned.

Tunstall owns a European patent protecting certain protocols it developed for use in the telemonitoring sector. Victrix uses these types of protocols downstream in its development of software for telemonitoring platforms. To offer its services to a new customer, Télé-Secours, which is active in telemonitoring solutions for people living alone who require special aid, Victrix claimed it required Tunstall's specific protocols. Victrix argued that, by refusing to grant a licence, Tunstall abused Victrix' economic dependence on these protocols.

An interesting aspect of this case is that the Court had asked the BCA to intervene as an *amicus curiae*, but in the end, did not entirely follow its observations. The BCA submitted that, in principle, a situation of economic dependence requires a contractual relationship between the companies concerned. The Court disagreed. It found that, in the case at hand, a (sufficient) relationship between Victrix and Tunstall already existed because Tunstall prevented Victrix from offering the specific telemonitoring software clients like Télé-Secours required, by refusing to grant Victrix a licence to use the Tunstall protocols, which were the only appropriate ones available in Belgium for this software to work.

The Court reasoned that Tunstall abused Victrix' economic dependence by discriminatorily refusing to grant Victrix a licence based on false claims that the latter had already been integrating its protocols without having the licence. It found that Tunstall had granted a licence to several of Victrix' rivals and therefore ordered it to grant one to Victrix too.

Refusal to supply popular lace-up boots

On 4 April 2022, the Ghent Court of Appeal dismissed a big Belgian shoe retailer's (Berca.com) abuse of economic dependence claim against Dr Martens (a popular lace-up boots manufacturer) and the latter's Belgian distributor.

Since 2015, Berca.com had been sourcing Dr Martens lace-up boots from the defendants via successive agreements but it had not concluded any framework distribution agreement in this regard. In autumn 2020, Dr Martens informed Berca.com that it would stop the commercial relationship because it preferred to work with a smaller customer base going forward. Berca.com, in turn, accused Dr Martens of unlawful refusal to supply, especially as it was still supplying Berca.com's direct competitors.

After seeing their claim dismissed in the first instance, Berca.com claimed on appeal that Dr Martens, among others, had abused Berca.com's economic dependence. The Court of Appeal, however, dismissed all claims and reasoned that Berca.com was not economically dependent on Dr Martens as the latter's boots only represented 3% of its turnover and because it did not demonstrate that there were no sufficient reasonably available alternative lace-up boots brands that could satisfy its demand. Unlike in several previous judgments, this Court also assessed the condition that an abuse of economic dependence should have an impact on competition. It concluded that there would still remain sufficient other retailers of Dr Martens shoes on the Belgian market, so Dr Martens' refusal to continue supplying Berca.com would not distort competition.

Refusal to supply sportswear directly to retailers

Also, the President of the Antwerp Enterprise Court underlined the high standard of proof for an abuse of economic dependence in his ruling in *De Backer Sport v Adidas Benelux* (20 April 2022). De Backer Sport (DBS), a retailer of trainers and sportswear of, among others, the Adidas brand, claimed that Adidas was abusing DBS's economic dependence by deciding to no longer directly supply to retailers like DBS but only via intermediaries.

The President mentioned that also in this case there was no (framework) delivery agreement between both sides so that the applicant's claim was purely of a non-contractual nature. However, unlike the Brussels Enterprise Court in *Tunstall*, he did not assess whether this lack of contractual basis could prevent the finding of a situation of economic dependence. Instead, he focused on the assessment of whether Adidas abused such a situation (assuming there was one), concluding that Adidas is perfectly entitled to (re-)organise its distribution business as it deems fit, as long as it applies the new system equally to all its (potential) customers.

Follow-on damage claims

In contrast to certain other European countries which have been depicted as enforcement havens for mass damage claims (in particular, the Netherlands and the UK), follow-on damage claims have not gained much traction yet in Belgium.

In 2022, only one judgment involving a follow-on damage claim was published. The Ghent Enterprise Court's ruling in *Veurink v DAF Trucks* (29 April 2022) forms just a small part of the wide range of follow-on claims across Europe following the European Commission's prominent Trucks Cartel (settlement) decision in 2016, fining multiple truck manufacturers with €2.9 billion for price fixing and other cartel conduct from 1997 to 2011.

Veurink, a Belgian logistics and transport company, claimed damage compensation from DAF Trucks for the price surplus paid for DAF trucks purchased and leased (via an independent intermediary) during the infringement period. The Court sided with Veurink and awarded damages of €307,150 plus interest.

The judgment focused on proof of the existence of damage, and its valuation. Preliminarily, the Court did not allow Veurink to rely on the legal (refutable) presumption that a cartel infringement causes damage, given that the facts entailing the infringement pre-dated the entry into force of the Belgian law implementing the EU Private Damages Directive. However, in view of the long infringement period, the time elapsed since the end of the cartel practices, and the inequity of information between Veurink as claimant and DAF as cartel participant, the Court determined there was evidence of damage based on mutually consistent factual presumptions. More specifically, along the lines of a judgment by the District Court of Amsterdam in a similar case, the Belgian Court held it highly improbable that the claimant did not suffer damage following the pricing cartel. The Court considered it evident that the impact of the cartel practices on gross pricing (as established by the Commission decision) negatively influenced the price-setting downstream to the impairment of the end-customer, such as Veurink. Similarly, the Court utilised a fairness approach to quantify the damages, by applying a flat-rate percentage to the purchase price of the trucks.

Despite the attempt at harmonisation following the EU Private Damages Directive, private enforcement around the *Trucks Cartel* has led to different outcomes across different jurisdictions,

mostly due to diverging national rules on the burden of proof for damages. In line with the Netherlands, the possibility of relying on presumptions may make Belgium a more attractive jurisdiction for follow-on damage claimants.

Outlook: towards even bigger changes in 2023?

2023 is likely to follow 2022 with important challenges and fascinating developments:

- After the recent change in the BCA Prosecutor Office's leadership, with a new Prosecutor General, Mr. Damien Gerard, and Chief Economist, Ms. Griet Jans, coming in at the end of 2021, there is still a lack of clarity around the open position of the President of the BCA. Whilst long-time President, Mr. Jacques Steenbergen, ended his mandate on 31 January 2023, the Belgian government parties are still trying to reach an agreement on his successor, with native language requirements being the biggest political stumbling block. In the interim, the President's duties are exercised by the BCA Managing Board, chaired by the oldest member (currently, Yves Van Gerven, the BCA's General Counsel).
- The long-awaited Belgian foreign direct investment screening regime is expected to enter into force on 1 July 2023. The regime is set to screen acquisitions by non-EU investors of certain control rights in Belgian entities active in sensitive and strategic sectors. The FDI regime will add to the regulatory burden for M&A deals next to merger control, with a different layer of political complexity.

**The authors represented some of the undertakings mentioned. Any views or conclusions provided in this blog post are largely based on publicly available information and shall in any case not be ascribed to Linklaters LLP or any of these clients.*

This entry was posted on Thursday, March 16th, 2023 at 10:00 am and is filed under Belgium, Competition Law 2022
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