

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Belgium

Lodewick Prompers, Sari Corrijn, Florian Jonniaux (Linklaters LLP) · Tuesday, May 14th, 2024

2023 proved another fruitful year for the Belgian competition law scene. The ambitious agenda of the Belgian Competition Authority (“**BCA**”) resulted in a busy and impressive enforcement record.

To sum up a couple of highlights in a single sentence, the BCA: was the first competition authority to apply the landmark [Towercast judgment](#), conducted several sectoral investigations, issued three antitrust infringement decisions, imposed conditions in two mergers, made a referral request to the European Commission under Art. 22 of the EU Merger Regulation (in [Qualcomm / Autotalks](#)) and, last but not least, appointed a new President.

This blogpost provides a comprehensive (but non-exhaustive) overview of the key developments, pivotal cases, and strategic enforcement actions that have shaped Belgian competition enforcement over 2023. We conclude with some insights into what is so far, and further promises to be, another busy year for Belgian competition law and policy in 2024.

Antitrust: focus on key sectors

Pharmaceutical sector

*Abuse of collective dominance regarding off-label use warnings**

In January 2023, the BCA **imposed** a fine of €2.8m on Novartis for the abuse of a collective dominant position held together with Roche in relation to medicines that can be used to treat certain eye diseases.

Roche’s subsidiary Genentech developed two medicinal products: (i) Lucentis, which was authorised for the treatment of eye diseases, and (ii) Avastin, which was authorised for the treatment of tumorous diseases. Genentech licensed the commercial exploitation of Lucentis to Novartis, while Roche marketed Avastin. Avastin, however, was also increasingly prescribed to treat an eye disease, age-related macular degeneration (“**AMD**”), despite not being authorised for AMD treatment (so-called “off-label” use). To counter this off-label use, Roche and Novartis adopted a strategy to differentiate between Avastin and Lucentis. For example, as part of this strategy, the two companies set up a campaign to disseminate information on safety concerns regarding the off-label use of Avastin.

The BCA concluded that, between November 2013 and the end of 2015, Novartis abused the collective dominant position it held together with Roche regarding medicines for treatment of AMD by disseminating misleading information. It found that Novartis had continued to warn ophthalmologists, hospitals, and regulators without appropriate caveats or nuances about the risks of an off-label use of Avastin, even after the publication of a study indicating that Avastin would be equivalent in terms of safety and effectiveness as Lucentis.. The BCA did not separately pursue Roche due to lack of proof but did disclose more details in this regard.

The BCA's decision came exactly five years after the Court of Justice of the EU ("CJEU") ruled in the context of the same eye disease treatment medicines that disseminating misleading information on the off-label use of a medicine could constitute a restriction of competition "by object" (see Case C-179/16). It was the Italian Council of State which had referred the matter for a preliminary ruling to Luxembourg, in the context of an appeal against the [Italian competition authority's](#) fines of over €90m on each of Roche and Novartis for the same behaviour in 2014. The [French](#) and [Turkish](#) competition authorities followed suit, although their fines of respectively €444m and €30.9m were later annulled by courts in [Paris](#) and [Ankara](#). Interestingly, besides relating to the same companies and products, these authorities pursued different infringements of competition law: while the Italian and Turkish authorities built a collusion case, the French and Belgian authorities assessed the issue as an abuse of collective dominance. And whilst the French authority pursued both Novartis and Roche (collective abuse of collective dominance), the Belgian authority went for a remarkable unilateral abuse of a collective dominant position, in the absence of sufficient proof to pursue Roche.

*Pharmaceutical wholesalers' cartel**

In October 2023, the BCA [imposed](#) a total fine of approximately €780k on Centre européen de repartition pharmaceutique ("CERP") for breaching Art. 101 of the Treaty on the Functioning of the EU ("TFEU") and the equivalent in Art. IV.1 of the Belgian Code of Economic Law ("CEL"). CERP is active in the daily wholesale distribution of a full range of pharmaceutical products to pharmacists in Belgium. After years of investigation since dawn raids in 2016, the BCA concluded that CERP and two other Belgian wholesale distributors, Febelco and Pharma Belgium-Belmedis, had fixed commercial conditions regarding the fulfilment of so-called "transfer orders".

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 that supply the products concerned from existing stock. The BCA found that CERP had agreed with the others: (a) to charge the same fees to the pharmaceutical companies for their order fulfilment services; and (b) the type of services they would offer for this fee as part of their transfer order system.

In February 2022, the BCA already reached a [settlement](#) with Pharma Belgium-Belmedis. Febelco, the first leniency applicant, was granted immunity from fines for notifying the BCA of both infringements. CERP refused to settle, meaning the normal infringement procedure continued in its regard, leading to the above-mentioned second BCA decision in this case, in October 2023. While the 2022 decision was the ninth settlement decision since the introduction of the settlement option in Belgium back in 2013, it was the first hybrid one.

Banking services sector

The banking services sector persists as a top priority on the BCA's enforcement priorities list in 2023. The BCA's attention to the banking sector already culminated in 2022, when the BCA launched its investigation into Belgium's four largest banks' agreement to pool their ATMs into a single network (the "**Batopin project**"). With a sneak peek to 2024, the BCA's scrutiny will also cross over to 2024 and beyond, as the BCA [concluded](#) in May 2024 its preliminary analysis of the Batopin project, flagging initial concerns for consumers relating to the reduction of the number of ATMs as well as increased travel distance. More on this in next year's edition of this post.

Alleged "gentlemen's agreement" not to compete with the State treasury bond

In September 2023 (and following rumours in the media over the summer), the BCA started a preliminary investigation into a potential "gentlemen's agreement" in the banking sector not to compete with the State treasury's bonds and increase rates of return on savings accounts during the subscription period. The BCA [found](#) no evidence of such a gentlemen's agreement between the banks and, therefore, suspended its investigation to refocus its resources.

In its investigation, the BCA focused on a [press release of the Federation of the Belgian Financial Sector](#) (Febelfin) which stressed that each bank individually agreed to a standard contractual clause, imposed by the government when issuing bonds. This clause prohibits banks to adjust interests on saving bonds during the subscription period. The BCA found that the disputed clause was indeed interpreted freely, extensively and inaccurately, on the part of certain banks. This provision only restricts the release of savings certificates ("*bonds de caisse/kasbons*") during the subscription period of the State treasury bond. However, such savings certificates are hardly offered by the banks today, and it was found inaccurate to interpret the clause as covering a range of savings and investment products, and their yields.

Interestingly, however, the BCA Prosecutor General did question the concomitant use by two leading banks of the term "gentlemen's agreement" to designate the disputed clause, while this term is not standard terminology in the sector. It considered that the level of approximation in communication of certain banks on this topic raises a series of questions.

BCA's advice on retail banking services confirms an "oligopoly" of four

Although the BCA thus suspended the investigation into the alleged gentlemen's agreement, the approximation in communication of certain banks did form part of the BCA's separate sectoral investigation into the banking sector in 2023. The BCA was requested by the Deputy Prime Minister and Minister for the Economy and Labour to investigate and draw up a report on competition in the retail banking sector in Belgium.

In its [report](#), the BCA concluded that the Belgian retail banking market currently and historically has the characteristics of an oligopoly dominated by four main players. This results in a tendency of the banks to "ride in peloton" by observing and following each other. The banks' comparable

conditions for saving interests qualify as a prime example. According to the BCA, the characteristics of the markets bring further obstacles, such as information asymmetry for consumers, the lack of customer mobility, high fixed costs at supply-side, and other supply-side barriers.

In a positive outlook, the BCA advises a number of ways of stimulating competition within the existing banking market structure, focusing on transparency, simplification, mobility of customers and other principles. The Belgian Ministries of Labour and Finance were not surprised by the report and signalled that they will implement the proposals of the BCA as necessary. More on this can be expected for 2024, as, next to the Batopin investigation, the BCA has suggested it may conduct a (rather unique) sector-wide enquiry in the entire banking sector.

Telecommunications sector

Fibre network roll-out co-operations in the spotlight

On 18 April 2023, the BCA **announced** it had closed its formal investigation into possible competition concerns stemming from conflicts of interest between Telenet and Fluvius in their envisaged joint venture for the joint roll-out of fibre networks in Flanders over summer 2022 (the “**JV**”) (see our [2022 edition](#) of this blog post). Telenet is one of Flanders’ main telecom operators, while Fluvius is one of Flanders’ main network operators.

The BCA’s decision to close the investigation came after Telenet and Fluvius submitted a package of voluntary binding measures to counter the BCA’s competition concerns. The measures included a comprehensive series of guarantees around the operation of the JV as an autonomous entity, independently from Telenet and Fluvius, as well as internal safeguards and firewall processes to prevent information flows on network deployment activities between Telenet and Fluvius.

The BCA’s decision is interesting for two main reasons. First, the measures proposed by Telenet and Fluvius did not constitute formal commitments in the merger control or antitrust sense. They were thus not subject to any formal approval by the BCA, but at the same time also do not bind the BCA in any future assessments. The BCA only took these voluntary measures into account as relevant facts in its overall conclusion to close the investigation as it was no longer deemed an enforcement priority. Thus, the BCA did not conclude on whether or not the parties infringed the competition rules. Second, the BCA’s announcement came on the exact same day Telenet and Fluvius notified the JV to the European Commission (the “**Commission**”). In the end, the latter unconditionally cleared the creation of the JV, in absence of any horizontal or vertical concerns and considering the voluntary measures of the parties to the BCA.

When it launched its investigation in June 2022, the BCA highlighted the importance of the country-wide deployment of so-called high-performance fibre-to-the-home (FTTH) networks for the future of the Belgian economy and society as a whole. In a [press release of 16 October 2023](#), the BCA also acknowledged the need for certain pooling arrangements between telecom operators to timely and feasibly deploy FTTH networks, while avoiding duplication of networks and related investments. However, this did not equal a free pass for pooling arrangements. The BCA highlighted that it would examine any (draft) pooling agreement between telecom operators, to ensure that the cost savings achieved by the operators actually benefit end-users, consumers and businesses. It also signalled its intention to fully co-operate with the Belgian Institute for Postal

services and Telecommunications (BIPT) during such examinations. Earlier in October 2023, the [BIPT published a dedicated communication](#) on the six relevant conditions for assessing the legality of co-operation agreements to roll out FTTH networks. The BCA committed to follow these conditions, which include, for example, access for non-co-operating parties, availability of active and passive (to the extent possible) wholesale services, equal/faster speed of roll-out and equal/better coverage.

Commission clearance in Orange/VOO to facilitate Flemish telco's entry into Wallonia

Another notable development in Belgium's telecom landscape was the Commission's conditional [clearance](#) of Orange's acquisition of VOO and Brut el on 20 March 2023. The Commission's approval was made possible by a network sharing agreement (NSA) between Telenet and Orange Belgium (announced in January 2023). Through the NSA, Telenet will obtain access to VOO's (now Orange) existing fixed network infrastructure for 15 years (the Commission requested at least 10 years). On top of that, as a future-proofing measure, the commitments also include access for Telenet to Orange's future fibre-to-the-Premises (FTTP) network, planned to be rolled out in the coming years. The Commission concluded that these commitments would pave the way for Telenet to enter as a new player in the Walloon region and parts of Brussels in the immediate future.

Belgium continues a stringent stance on resale price maintenance

In a settlement decision on 13 December 2023, the BCA [imposed](#) a fine of €490k on the luxury cookware manufacturer Le Creuset for pursuing a resale price maintenance (“RPM”) policy.

The BCA's investigation confirmed that for a period of over six years, Le Creuset not only recommended resale prices to distributors, but also actively monitored their compliance. It applied pressure and sanctions against distributors who deviated from the “correct” application of its pricing recommendations. Le Creuset was also put on notice for supervising promotional activities of distributors and informing distributors of price changes made or planned by competing distributors. The BCA concluded that Le Creuset's policy aimed at guaranteeing a certain price level on the market by limiting the ability of distributors to determine their own resale prices to consumers.

The *Le Creuset* decision is a testament to the BCA's continued dedication to combat RPM practices, particularly when it comes to pricing of luxury goods. The decision follows other landmark RPM cases of the BCA in recent years: [Caudalie](#) (2021 – revised in 2023), [HM Products](#) (2019), and [Algist Bruggeman](#) (2017). It reconfirms that caution remains warranted when applying systems of recommended resale prices towards distributors.

Statements of objections

In the distribution of betting products on French horse races in Belgium

On 3 July 2023, the BCA sent a [statement of objections](#) (“SO”) to global betting company

Ladbrokes and the French company PMU, which holds a legal monopoly in France on the organisation and collecting of bets on horse races in physical locations. The BCA preliminarily concluded that certain agreements between these companies for the distribution in Belgium of betting products on French races had infringed Art. 101 TFEU and its counterpart under Belgian competition law at the time the agreements were still in force. The BCA's infringement procedure is still ongoing.

Regarding cartel agreements in the private security sector in Belgium

Later that same week, on 6 July, the BCA issued an [SO](#) to Securitas, G4S and Seris regarding a potential cartel in the private security sector in Belgium. The BCA charges are threefold. First, the private security service providers are accused of setting common minimum prices within the context of the professional association they are members of. Second, the BCA alleges that they coordinated tenders and exchanged information regarding bid intentions. Third, the BCA argues that the companies agreed not to poach employees from one another. The BCA preliminarily concluded that the practices have lasted for several years, potentially breaching Art. 101 TFEU and Art. IV.1 CEL.

Formal / informal Opinions

Informal opinion about the Belgian Agro-food chain's code of conduct

In 2023, the BCA welcomingly applied its 2020 guidance on [informal opinions](#). The mechanism allows the BCA to provide informal clarifications on whether certain (planned) practices may be infringing Belgian antitrust rules. The trend of informal “comfort letters” has resurrected with the increased emphasis on ESG and other innovative co-operation initiatives.

The BCA's [informal opinion](#) concerns the antitrust compliance of a new provision in the code of conduct of the Belgian agri-food chain platform. Partners of the Belgian agri-food chain platform established a code of conduct to facilitate fair relationships between suppliers and purchasers in the food supply chain. One conduct rule was not to exclude contractually (legally or de facto) the hardship clause, i.e. a clause that ensures that suppliers/purchasers in the food chain retain the possibility to modify the terms of an agreement, in situations where it becomes very difficult to perform contractual obligations following a change of circumstances. The BCA did not assess the clause in concrete terms but noted that not each limitation of the freedom of contract constitutes a *per se* limitation of competition. A separate factual assessment (of the anti-competitive effects) is necessary. The BCA also emphasised that a competition infringement would be present if it is agreed that, in case of hardship, both supplier and purchaser increase their sale prices (i.e. the purchaser would be able to pass on the price increase by a supplier to its customers). While this informal opinion is rather high-level, it may be the start of a positive trend towards more informal opinions as a way to further guide businesses.

BCA supported an ESG initiative on “living wages in the banana sector”

In 2023, the BCA also jumped on the ESG bandwagon and issued its first concrete application of competition policy to a sustainability initiative promoting fair wages. The BCA had previously indicated that it supported the initiatives by the Commission as well as its Dutch counterpart but did not yet have the chance to engage in a concrete antitrust assessment of ESG initiative.

Without specifying the grounds for investigation, the BCA issued a press release in which it concluded that an initiative of IDH-Transforming Markets and certain large retail chains to promote [living wages in the banana sector](#) did not raise antitrust concerns. The proposed initiative aimed at closing the gap between actual wages and living wages in the banana sector – targeting fresh (branded/private label) bananas sold on the Belgian market by the majority of retailers.

To assess whether the initiative could be anti-competitive, the BCA took into account a range of factors, such as transparency in the standard selection process, voluntary participation, freedom to set stricter standards, possibility of exchange of commercially sensitive information, effective and non-discriminatory access, possibility of significant price increases or choice reduction, monitoring and control mechanisms. Also key to the positive assessment was that no recommendations would be made on passing on cost changes in the supply chain, as well as the lack of mandatory or recommended minimum prices in the initiative. While the BCA did not specifically refer to it, these relevant factors broadly align with the Commission’s guidance set out in Chapter 9 of the [2023 Horizontal Guidelines](#).

Abuse of dominance – the BCA’s record-speed application of the CJEU’s *Towercast* judgment

The BCA’s investigation into Belgian incumbent telecom provider Proximus’ acquisition of Edpnet by Proximus emerged as a pivotal case for the BCA over the past year, capturing the attention of legal professionals all across the EU.

The case unfolded against the backdrop of the CJEU’s seminal [Towercast judgment](#) of 16 March 2023. In this landmark judgment, the CJEU confirmed that national competition authorities have the competence to analyse ex-post non-notifiable concentrations (under merger control rules) on the basis of the prohibition of abuse of dominance under Art. 102 TFEU.

The BCA struck while the iron was still hot: only one week after the *Towercast* judgment it launched an *ex officio* abuse of dominance inquiry into the acquisition by Belgian telecom provider Proximus of Edpnet. Edpnet is an alternative provider of broadband services at wholesale and retail level in Belgium. Edpnet’s turnover did not meet the Belgian merger control thresholds, so no merger control filing was made. Proximus acquired Edpnet’s assets in the context of judicial reorganisation proceedings as Edpnet faced financial difficulties. It won the bid from new telecom entrant Citymesh. A regional Enterprise Court had authorised the sale of Edpnet to Proximus (but this did not prevent the BCA’s probe). In the context of the judicial reorganisation proceedings, the BIPT was the first to express concerns about the deal’s potential competitive implications in an already concentrated Belgian telecom market.

In this unprecedented move, the BCA positioned itself as the first EU national competition authority to apply the freshly minted *Towercast* case law. It did have prior experience already. In 2016, the BCA assessed a complaint of brewery Alken-Maes alleging that AB InBev abused its dominant position in acquiring the brewery Brouwerij Bosteels. In that case, the BCA rejected the

complaint because the acquisition did not include accompanying abusive conduct beyond the mere fact of the acquisition itself. This position was also confirmed by the Brussels Markets Court. In the [press release](#) on its decision in that case, however, the BCA explicitly confirmed already that “[u]nlike the EU merger regulation, Belgian competition law does not explicitly exclude the application of the rules on restrictive practices to concentrations”.

In *Proximus/Edpnet*, the BCA went all-in, and also, for the first time, made use of its power to impose *ex officio* interim measures. The BCA urgently wanted to prevent that Proximus’ acquisition would lead to the potential exclusion of an independent competing operator on the wholesale and retail broadband Internet markets. The interim measures aimed at maintaining Edpnet’s autonomy and preventing completion of the transaction pending the BCA’s investigation. Proximus was required to: (i) ensure the ongoing viability and competitiveness of Edpnet; (ii) maintain separate operations; (iii) prevent access to confidential information relating to Edpnet; and (iv) appoint an independent monitoring trustee to oversee compliance. Following the BCA’s investigations and measures, Proximus ultimately abandoned the acquisition and decided to divest Edpnet to Citymesh. The BCA endorsed the divestiture, stating that it promoted market competition and consumers’ benefits. Consequently, the BCA closed its investigation.

Merger control

The BCA’s merger control enforcement increased significantly in 2023. The BCA published in total 35 merger clearance decisions, which is nearly double the total number in 2022 (see [last year’s edition of this post](#)). These included two conditional clearances in Phase 1, three unconditional clearances in Phase 1, and 30 simplified clearance decisions. In addition, 2023 witnessed a rare case of a Phase 2 withdrawal (practically a de facto prohibition decision).

In this Section, we focus on the two conditional clearance decisions, the Phase 2 withdrawal, and two 2023 judgments by the Markets Courts regarding 2022 BCA clearance decisions.

AG Insurance/Touring Club Royal de Belgique ASBL (phase 1 – conditional)

On 22 May 2023, the BCA [conditionally approved](#) AG Insurance’s acquisition of the commercial activities of the Touring Club Royal de Belgique ASBL. AG Insurance offers life and non-life insurance services and supplementary pensions. Touring has various subsidiaries in a wide range of activities, going from vehicle roadside breakdown assistance, to travel insurance broker services, and mandatory technical inspections of motor vehicles and driving licence examinations, amongst others.

It is in relation to the Touring’s mandatory technical inspections of motor vehicles and driving licence examinations that the BCA identified a potential competition issue. These activities are held by Touring’s subsidiary KBTC Holding. The BCA’s investigation revealed that KBTC Holding has significant market power in both the markets for mandatory vehicle inspection and in the markets for organising the mandatory driving licence examination. The BCA found that the transaction would enable data exchanges between AG Insurance and KBTC Holding. It was concerned that through these data exchanges, AG Insurance would get access to commercially sensitive information regarding KBTC Holding’s testing and examination activities. Access to

those data would confer an unfair advantage on AG Insurance's automobile insurance and roadside assistance services.

To address BCA's concerns, AG Insurance offered two different hold-separate commitments, which were accepted and made legally binding by the BCA. As part of the operational separation remedy, AG Insurance committed not to sell any of its other commercial services or use any of its other brand names and logos in the context of its operation of the examination and testing centres through KBTC Holding. As part of the structural separation remedy, it promised to continue holding the shares regarding the operation of the examination and testing centres through KBTC Holding. The latter will also need to have at least two independent directors with a joint veto right on all decisions relating to the compliance with these hold-separate requirements.

ACE Pharmaceuticals Belgium and Febelco/Pannoc Chemie (phase 1 – conditional)

On 8 November 2023, the BCA [approved](#) the acquisition of Pannoc Chemie by ACE Pharmaceuticals Belgium and Febelco subject to conditions. While originally notified to the European Commission, the BCA requested the transaction to be referred to it under Art. 9 of the EU Merger Regulation. This transaction (and the referral request) features the BCA's focus on the Belgian pharmaceutical sector, which is year-by-year emphasised as one of the BCA's strategic enforcement priorities.

The transaction combines three Belgian pharmaceutical players with different focus areas. Pannoc is a Belgian pharmaceutical company dedicated to medical raw materials and cosmetics, as well as a limited number of medicines. The first acquirer, Febelco, is a wholesale distributor of pharma products. The second acquirer, ACE Belgium, is a manufacturer and distributor of drugs, and is also active in the procurement and repackaging of medical raw materials.

The BCA identified three main vertical competition risks resulting from the transaction: (i) a risk of input foreclosure, i.e. where Pannoc's semi-solid medical raw materials would be no longer or less (favourably) available to competing wholesale distributors and pharmacists who do not purchase from Febelco; (ii) a risk of customer foreclosure, where Febelco would be no longer or less available as a sales channel to competing seller-distributors and producers of medical raw materials; and (iii) finally, a risk that Pannoc would be able to access commercially sensitive information of its competitors via Febelco and ACE Belgium.

The acquirers offered a set of behavioural commitments, as well as a hold-separate remedy to successfully alleviate the BCA's concerns: (i) Febelco and ACE Belgium will continue supplying Pannoc's semi-solid medical raw materials to competing wholesale distributors and pharmacists (on fair, reasonably and non-discriminatory terms); (ii) Febelco will continue distributing competing semi-solid medical raw materials in Belgium (again on fair and reasonable terms); and (iii) a strict Chinese wall policy will be implemented.

Abandonment in Phase 2: What's Cooking (Ter Beke) / Imperial Meat Products and assets of Campofrio Food Group (Abandonment in Phase 2)

On 2 June 2023, the BCA confirmed that meat producer What's Cooking (formerly Ter Beke)

[decided](#) to abandon the proposed acquisition of its rival Imperial Meat Products and (other assets of) Campofrio Food Group. This rare abandonment of a deal in the Belgian competition law scene followed an unusually long [Phase 2](#) merger investigation in which the BCA Prosecutor General recommended no less than two times to the Competition College to prohibit the deal. This deal was the only Phase 2 investigation in the past five years. What's Cooking simultaneously also [withdrew](#) from the equivalent Phase 2 procedure before the Dutch Authority for Consumers and Markets.

The BCA explained that the acquisition would combine the largest suppliers in several national charcuterie markets for dry sausages/salami, poultry, cooked ham and pâté, to the detriment of consumers. According to the BCA, the combined entity would be the only market player with a significant presence across a number of markets. This would likely lead to excessive market concentration and higher prices for customers and consumers, in a market that is already characterised by high meat prices compared to neighbouring countries. What's Cooking did not formally submit remedies that were capable of addressing these concerns.

As part of its investigation, the BCA sent requests for information to supermarkets and wholesalers, the primary customers of both parties, asking for tendering and sales data, as well as capacity data of producers of processed meat. Interestingly, the BCA lifted the confidentiality of some information, and made it available to What's Cooking via a data room. Responding to an appeal by Colruyt against this practice, the Assessor of the Competition College [confirmed](#) that this practice – together with necessary security measures that the BCA had been implemented – is well-established in EU competition law and did not go against legal certainty or legitimate expectations of Colruyt.

Brussels court rejects challenge to RTL Belgium takeover

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 Walloon media player RTL Belgium (see also in [last year's edition of this post](#)). Competing advertisers Ads & Data and IPM appealed the BCA's clearance decision to the Brussels Markets Court, supported by media companies RTBF and RMB and the *Conseil supérieur de l'audiovisuel*. The Markets Court dismissed the appeal by [final judgment](#) of 26 April 2023.

In its introductory remarks, the Markets Court stressed that it is not a policy body (while the BCA is), and its key task is to assess whether the decision carefully originated and is based on a proper motivation (the “manifest unreasonableness” test). The Markets Court also considered upfront that the transaction was approved subject to conditions that aimed at remedying any potential competition concerns. It ultimately concluded that the BCA's clearance was sufficiently motivated and passed all necessary tests.

The Markets Court did side with the appellants on some points. Regarding the claim that the BCA violated the presumption of dominance, the Markets Court confirmed that the BCA omitted to indicate that the parties could be presumed to be dominant for markets where they held a >50% market share, as well as that a strengthening of this market power could include a presumption of a significant impediment of competition (SIEC). However, despite such specific statements, the BCA's analysis included sufficient elements to rebut the relevant presumption of dominance and to conclude that the transaction would not result in a SIEC. The analysis could therefore not be

faulted.

Markets Court confirms BCA's approval for acquisition of Mestdagh by Intermarché

Following an appeal by rival retailer Carrefour, the Belgian Markets Court upheld the [BCA's clearance](#) (of November 2022) of Intermarché's acquisition of supermarket chain Mestdagh. In [last year's edition](#) of this post, we explained that the Markets Court rejected Carrefour's request for a suspension of the approval decision. On 14 June 2023, and despite lodging 11 pleas, Carrefour's attempt to get the BCA's clearance overturned with the Markets Court proved ultimately unsuccessful.

In dismissing Carrefour's pleas, the Markets Court helpfully [settled](#) some key procedural principles under Belgian competition law. First, the Markets Court confirmed that third parties have no principal right to access to the BCA's file and may only obtain partial access in exceptional circumstances. Providing (partial) access to interested parties is not aimed at addressing the interested parties' private interests (which come into play at the judicial procedure) but is intended to facilitate the BCA's investigation by enabling valuable views on the concentration.

Second, the Markets Court confirmed the BCA Prosecutor General's margin of discretion regarding the preparation of non-confidential decisions. It reiterated the need to balance the interests of the notifying parties (and their business secrets) against the general interest of the investigation and the information rights of third parties. A deadline of less than four days to provide observations to a non-confidential version also does not violate the principle of sound administration.

On the more substantive side, the Markets Court rejected Carrefour's arguments that the BCA made errors by joining two separate methodologies to define the geographic markets of the Mestdagh shops, including: (i) the travel times calculated by Intermarché (i.e. the catchment areas); and (ii) the actual footprint of shops using data provided by shoppers' loyalty cards. The Markets Court reiterated that the geographic market definition only provides one (important and indicative) step in the analysis, that requires to be supplemented with a dynamic competitive assessment. A combination of the two different methodologies allowed the BCA to create the framework of the subsequent detailed competitive analysis. Carrefour also did not prove that the BCA would have reached a different outcome if it only considered the second methodology.

In addition, Carrefour asserted that the BCA's assessment of 22 catchment areas where combined market shares would be 25% to 40% or above, was insufficiently motivated. The Markets Court dismissed this plea by referring to the BCA's margin of discretion and noting that Carrefour failed to show an error in the assessment. Finally, the Markets Court pointed out that the BCA was not required to conduct a dedicated analysis of the closeness of competition between the merging entities, to reach its overall conclusion that the transaction would not raise any significant impact on competition.

Hospital concentrations

The BCA's authority to review hospital concentrations remained under attack during 2023 (and the

BCA finally lost the battle in 2024). The debate started with the adoption of a Belgian Act in 2021 that exempted “loco-regional hospital networks” from the scope of Belgian merger control. Importantly, however, since 2020, all hospitals were required to establish and be part of such loco-regional hospital network. The scope of the 2021 exemption remained unclear and was open to interpretation.

The BCA, however, was of the opinion that it should have jurisdiction to review all hospital mergers regardless of whether they are part of a network. In the autumn of 2023, the BCA intended to get rid of uncertainties by [announcing](#) an analytical framework for hospital mergers. This analytical framework was developed simultaneously with the BCA’s investigation of the merger between the *Jolimont* and *Ambroise Paré* hospitals, which led to the BCA’s very first detailed [clearance](#) decision in the sector. The BCA highlighted that the analytical framework would guide it through all current and future deals in the hospital sector, clearly grounding its desired authority. The focus of the BCA’s competitive analysis would go to sustained quality of the care offer in terms of capacity, diversity and accessibility, absence of price effects, and maintained hospital staff working conditions (in a context of scarcity).

However, the BCA’s attempts to establish authority were unsuccessful. The Belgian government continued to voice concerns about the BCA’s review of hospital mergers, with arguments such as that accredited hospitals: (i) are already severely regulated, (ii) are social enterprises that require different competitive treatment; and (iii) should be encouraged to merge as this may lead to more efficient and better-quality care. Shortly into 2024, the Council of Ministers issued a preliminary draft law with an in-principle exemption of the entire hospital sector from the BCA’s merger control competences, with the exception of M&A deals between the largest hospital structures (requiring, for example, each hospital to achieve an individual Belgian turnover of at least €250m for a filing to be triggered). The BCA requested to be heard in the framework of the draft bill, but this request was denied. The law was [adopted](#) in March 2024, thereby ending the BCA’s authority to review small and medium hospital mergers.

Abuse of economic dependence

Since 2020, Belgium prohibits companies from abusing a position of economic dependence. This type of prohibition does not exist under EU competition law, but it does under the national (competition) laws of Austria, Cyprus, France, Germany, Greece, Hungary, Italy, Portugal, Romania, and Spain. In Belgium, the prohibition can be sanctioned by the BCA with fines of up to 2% of their consolidated Belgian turnover. Additionally, companies enduring an abuse of economic dependence can request a Belgian Enterprise Court to order the abusing company to cease the abuse, to remedy the situation, and/or to pay damages.

As a short recap: a company is deemed economically dependent on its supplier or customer, if it has no reasonably equivalent alternative suppliers or customers – which allows the superior supplier or customer to impose conditions that could not be obtained under normal market circumstances. In essence, a position of economic dependence is a situation of relative dominance in a bilateral setting.

As explained in detail in the [2021](#) and [2022](#) editions of this blog post, the initial but growing case law of the Enterprise Courts has not always been consistent, leaving various open questions on the

prohibition's practical application. Proving the existence of a position of economic dependence remains particularly challenging. It requires companies to make a customer or supplier-specific assessment, separate from a dominance assessment on the market as a whole.

The BCA so far mainly left the initiative to private court litigants, yet 2023 marked its first two public appearances regarding the rules.

First BCA Amicus Curiae observations in Tunstall

On 20 March 2023, the BCA published its – reportedly first – *amicus curiae* brief which it had submitted (already in January 2022) to the President of the Brussels Enterprise Court. The brief was provided in the context of an injunction action against Tunstall, a telemonitoring protocol developer provider, by the telehealth platform software developer, Victrix. Victrix argued that Tunstall abused its dominant position by refusing to provide access to its propriety developed and patented protocols. These protocols would allow Victrix to develop tailored software for a new customer, Télé-Secours, a company active in telemonitoring solutions for people living alone who require special aid.

The President of the Brussels Enterprise Court had asked the BCA to submit (non-binding) **written observations** as an *amicus curiae*. While the President did not appear to follow the BCA's observations, its judgment was quashed on appeal – with the Brussels Court of Appeal **opining** in line with the BCA's observations.

First, the BCA submitted that, in principle, a situation of economic dependence requires an existing or past contractual relationship. The Enterprise Court had disagreed and concluded that a (sufficient) relationship already existed by the mere fact that Tunstall was able to prevent Victrix from offering the specific telemonitoring software to its customers, due to its refusal to license the Tunstall protocols to Victrix while no appropriate alternatives were available to Victrix. While acknowledging the existence of debate in the legal doctrine, the Brussels Court of Appeal confirmed the BCA's position that Victrix could not be economically dependent on Tunstall in absence of a pre-existing contractual relationship.

Second, the BCA submitted that a situation of “indirect economic dependence” is not covered by the prohibition. Again, the President of the Enterprise Court diverted and found that Télé-Secours (as a customer of Victrix) was also victim of an abuse of economic dependence resulting from Tunstall's refusal to license to its supplier Victrix. The Court of Appeal finally found that Télé-Secours was not itself economically dependent on Tunstall's protocols given the availability of reasonable alternatives. This implicitly discarded the theory of an indirect abuse of economic dependence.

The case is not yet over, as an appeal before the Belgian Supreme Court (*Hof van Cassatie/Cours de Cassation*) is pending.

Opening of proceedings in the agricultural sector

On 28 November 2023, the BCA **announced** a formal investigation into a possible abuse of

economic dependence in the agricultural sector. Its preliminary investigation revealed serious indications of a possible infringement by a large purchaser of an (undisclosed) agricultural product. According to the BCA, the structure of the agricultural sector is characterised by, on the one hand, a high concentration of purchasers, while, on the other hand, a highly fragmented supply from farmers. The cumulative effect of the possible economic dependence of farmers active in the production of the product concerned is likely to affect competition on the Belgian market.

The BCA's decision to launch its first formal inquiry into a potential abuse of economic dependence within the agricultural sector is not surprising. [Parliamentary debates](#) regarding the rules on economic dependency expressly highlighted the relevance of the prohibition for the agricultural sector because farmers are often *“suppliers to large companies [...] so that it is virtually, if not totally, impossible for them to escape their contractual obligations towards their co-contractor”*.

Outlook

As we progress into the new year, it appears that the pace of developments in Belgian competition law and policy maintains its speed into 2024:

- **New BCA President:** Since January 2024, the BCA finally appointed a new President, after long political deliberations due to Belgium's strict native language requirements. The appointment of Axel Desmedt (a former member of the Council of the BIPT, lawyer and in-house legal counsel) marks the completion of a full overhaul of the BCA's leadership. Together with the appointments of a new Prosecutor General (Damien Gerard) and Chief Economist (Griet Jans) in 2021, the BCA's new leadership is expected to maintain an ambitious policy agenda.
- **New BCA powers to support the European Commission's competences under the DMA:** Thanks to the [Act of 29 March 2024](#), the BCA has gained a more prominent role in supporting the Commission's competences under the EU's Digital Markets Act (“DMA”). The BCA received additional powers, ranging from rights to open an investigation into gatekeepers suspected of non-compliance of its DMA obligations, to receive information on intended transactions by gatekeepers, to receive complaints under the DMA, or to request the Commission to open a market investigation, etc.
- **New BCA powers to carry out prior investigation measures:** Amendments to the Belgian competition law from the [Act of 5 November 2023](#), allow the BCA to carry out specific investigatory measures (such as requesting information and conducting interviews) already at early stages, i.e. before opening a formal antitrust investigation or during pre-notification in merger control cases. These new powers aim at enhancing efficiency and streamlining the BCA's focus to the most complex and harmful cases.
- **Belgian foreign investment (FI) screening regime in full swing:** Since 1 July 2023, the long-awaited Belgian FI screening regime is in force. The Belgian Inter-federal Screening Commission (“ISC”) already received more than 45 notifications of investments of which it cleared 35 unconditionally after a Phase 1 review. Three investments escalated to an in-depth Phase 2 investigation. It is anticipated that 2024 will shed light on the substantive areas of focus of the ISC.
- **Updated collective redress actions rulebook:** In April 2024, Belgium's federal Parliament adopted a [bill](#) to align Belgium's existing rules on collective redress actions with the EU's [Representative Actions Directive](#). Key amendments include an expansion of the permissible

grounds for initiating actions for collective redress, certain suspensions of the limitation periods for individual actions, and a possibility for group representative entities from other EU Member States to bring collective redress actions in Belgium. This may help increase the number of collective actions in Belgian courts, which so far proved very low (only 11 actions since its introduction in 2014) compared to neighbouring countries.

** 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. The authors are grateful to Eléonore Trignon for her invaluable assistance.*

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

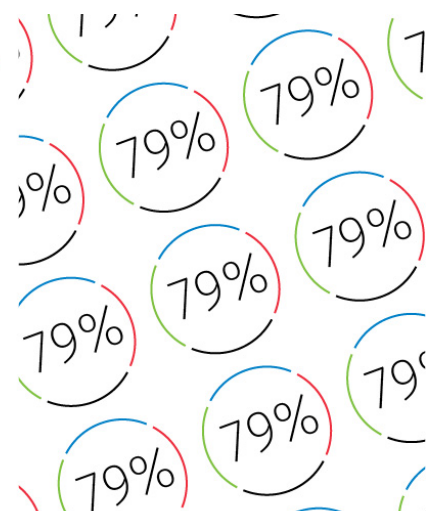
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, May 14th, 2024 at 9:00 am and is filed under [Belgium, Competition Law 2023](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.