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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Belgium**

**- Session II -**

**8 December 2020**

This contribution is submitted by Belgium under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/dmkt](https://oe.cd/dmkt).

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## *Abuse of dominance in digital markets*

### **- Contribution by Belgium\* -**

#### **1. How many abuse of dominance cases has your authority undertaken in digital markets in the last 10 years? Do you expect these cases to become an increasing priority in future years?**

1. Decisions since the establishment of the present BCA in September 2013:
  - MFN clauses on a website for the real estate market (decision of 7 November 2016), the case was closed with commitments,
  - A refusal of an interim measure concerning the market for meteo navigation software (decision of 15 February 2019); the applicant requested the supply of data by a party that only received the data for its own use and had no right to supply third parties (the right holder benefitted of immunity from jurisdiction which explains that the applicant tried another road to receive the meteo data).
2. These cases are likely to be concerned with areas likely to be listed in future notices on priorities. Their frequency will depend on complaints and other indications. Digital economy issues have been raised and are likely to be raised more frequently in merger control cases.

#### **2. Please describe any recent abuse of dominance cases your authority has undertaken in recent years, and in particular the challenges you faced, both analytical and legal, in bringing these cases.**

3. Decisions establishing an infringement or granting provisional measures since the start of the present BCA in September 2013:
  - Excessive pricing when selling surplus reserved capacity on the wholesale electricity market (decision of 18 August 2014); the main challenge was related to the objections concerning an alleged abuse by capacity withdrawal by the constitution of reserves in excess of the legal obligation (objection rejected by the College),
  - Provisional measures concerning the market for international jumping events (decision 27 July 2015); the remedy aimed at avoiding the exclusion of riders and horses because of participation in competing events,
  - Abuse of personal data obtained in the exercise of a monopoly on the lottery market (decision of 22 September 2015); the case was concluded with a settlement imposing a fine,

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- Provisional measures in respect of television rights on cyclocross events (decision 5 November 2015); the main challenge was concerned with the design of the remedy,
- Exclusionary practices on the yeast market (decision of 22 March 2017); the case was concluded with a settlement imposing a fine,
- Provisional measures concerning price squeeze practices on the market for components for electricity meter boxes (decision of 3 September 2018); the main challenge was concerned with the assessment of the relation between intra-group sales, sales to third parties, the impact of a regulatory procurement procedure and the assessment of prejudice,
- Provisional measures concerning the market for the use of radio emission antennas (decision of 22 January 2019); the main legal challenge was concerned with the fact that there was no prejudice yet at the time of the decision and no prima facie case vis-à-vis the applicant, but a high risk of substantial prejudice to the public interest (availability of radio programs including news programs of the public broadcasting company) in case no agreement was reached between the parties,
- Exclusionary practices by the Institute of pharmacists (decision of 28 May 2019); a fairly straightforward attempt of a regulatory institute to restrict market access to for a new entry that offered discounts in a more commercial environment; the case was concluded with a settlement imposing a fine.

### **3. Do you believe that digital markets involve particular challenges in abuse of dominance cases, for example in terms of determining whether a position is dominant, market definition, evaluating effects (e.g. zero price markets) and negotiating remedies?**

4. Yes, in particular with regard to the market definition (geographic markets, the relation between platforms, own platforms and other distribution channels), the calculation of market shares involving zero price markets etc.

### **4. Does your authority have sufficient legislative tools and resources to bring cases based on new theories of harm? Have there been any proposals in your jurisdiction to modify, or make greater use of, abuse of dominance provisions in digital markets?**

5. We do not require additional legislative tools to bring abuse cases, and our lack of resources is not limited to digital cases. It is less concerned with the type of cases than with the number of complex investigations we can run in parallel.

6. There are no new proposals.

### **5. Has your authority considered pursuing new theories of harm associated with abuses of dominance in digital markets, such as self-preferencing, or issues associated with data portability? Why, or why not?**

7. We do not consider self-preferencing to be a new theory of harm. We imposed e.g. remedies with regard to self-preferencing in respect of data access on a cable network for the operator and third party customers in a merger case.

## 6. What is the view of your authority regarding the effectiveness of abuse of dominance cases in addressing competition concerns in digital markets relative to other competition policy tools?

8. Abuse of dominance cases are and remain a key instrument in respect of competition concerns in digital markets. But more is needed.

9. In their joint Memorandum of 2 October 2019 the three competition authorities of the Benelux countries advocated what follows:

### “2. Ex ante guidance for digital and other fast-moving markets

10. The digital economy and other fast-moving markets confront us with the challenge of having a real impact on market behaviour within a time period that meets the legitimate expectations of stakeholders.

11. When infringement cases concern novel issues we need e.g.:

- an early identification and case allocation and fast track cooperation in related cases as envisaged in the ECN ‘early warning’ procedure,
- complemented by enhanced up-front information exchange within the ECN at the earliest possible stage concerning investigations that may lead to broader media attention,
- a further optimization of accelerated procedures such as single or multiple Member State competition authority settlements and commitments,
- an optimization of interim measures procedures,
- and more generally a use of any technique that may bring forward the useful effect of such procedures, e.g. by communicating on dawn raids<sup>1</sup>.

12. But this will not be sufficient:

#### *Guidance papers*

**Competition authorities must develop the ability and willingness to offer guidance ex ante on specific issues<sup>2</sup>**, also before they (and the courts) developed the relevant case law. Guidance papers cannot be expected to have an impact on new developments if they come after the market has waited for years for infringement decisions and their confirmation or annulment in court.

(...)

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<sup>1</sup> While the BCA considered in the past that it could only communicate by not denying that a dawn raid took place, it changed this policy at the suggestion of the Belgian association of competition lawyers now issues a press release in order to create a level playing field for leniency applicants indicating the sector. See e.g. press release 21/2018.

<sup>2</sup> Crémer et al. (2019), op. cit. p. 126. See also the conclusions in the above mentioned letter of Minister Keijser, pp. 10-11.

*Case-by-case guidance letters*

(...)

**We propose to examine the possibility of developing an approach that allows the European Commission and Member State competition authorities to sidestep the infringement route in a much less formal and fast track commitment procedure, e.g. as a development of the practice under article 10 of Regulation 1/2003 or in line with the Notice on informal guidance.**

(...)

The introduction of such procedure may not require a legislative change. But it might require a change of culture and the willingness to abandon in some cases the possibility or even probability to establish an infringement in order to give priority to a faster outcome that will not only provide specific guidance to the parties involved but also to others.

### **3. The introduction of an ex ante instrument providing for imposed remedies without the establishment of an infringement**

15. One drawback of the current enforcement toolkit is that ex-post enforcement can be too slow in digital and other fast moving markets. When such markets are characterised by winner-takes-most dynamics, strong network effects, high barriers to entry due to data collection and consumer lock-in, there is a risk that ex-post enforcement comes too late to keep markets competitive and contestable. Therefore, the ACM and the BCA support the proposal of the Netherlands' Secretary of State for Economic Affairs and Climate Policy to introduce an ex-ante intervention mechanism to prevent anti-competitive behaviour by dominant companies acting as gatekeeper to the relevant online ecosystem.

*Ex-ante tool to prevent competition problems*

16. We envisage a tool that allows the European Commission and Member State competition authorities to impose proportionate remedies on dominant companies in order to prevent competition problems, rather than relying on after-the-fact enforcement. The ability to impose these remedies resembles the powers that the CMA has to impose remedies following market studies and the powers of the Member States' telecom authorities to impose remedies on companies with significant market power. These remedies will be behavioural in nature. Examples are platform access, data portability, data-sharing and non-discriminatory ranking. Rather than broad-stroked regulation, these remedies should be proportionate and tailored to specific situations.

(...)

*Non-punitive in nature*

17. The non-punitive nature of the tool could facilitate a constructive dialogue with the dominant company as it is not accused of any wrongdoing, and will not face fines and damage claims if it accepts the findings of the competition authorities' assessment. For the same reason, it may also lead to the voluntary acceptance of reasonable commitments at an earlier stage, avoiding long drawn-out legal battles with a strong emphasis on procedural defence that come with punitive sanctions.

(...)"