

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 2 on Competition and Regulation****Independent Sector Regulators – Note by Belgium****2 December 2019**

This document reproduces a written contribution from Belgium submitted for Item 3 of the 68th OECD Working Party 2 meeting on 2 December 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

Please contact Mr Chris PIKE if you have any questions about this document

[Email: Chris.Pike@oecd.org]

JT03453797

Belgium

1. The relation with regulators

1. The BCA has formal cooperation agreements (Royal decrees) allowing the exchange of confidential information (with the exception of information obtained from ECN authorities or leniency applicants) with the energy sector regulator (CREG)¹ and with the telecom and postal sector regulator (BIPT/IBPT)².
2. It has also had the opportunity to define its position outside the scope of the organised and partially mandatory³ cooperation with sector regulators⁴.
3. Regulators are assumed to have a legitimate and sufficient interest when they ask to intervene in procedures before the BCA⁵.
4. And also when they do not ask to intervene, the BCA invites the relevant regulators to hearings as privileged third parties : they are heard and may, in the absence of a cooperation decree that allows for the exchange of confidential information, stay, unless parties object.

2. Competition law and sector regulation

5. The BCA has in its decision practice :
 1. referred to applicable regulation and the enforcement powers of the relevant regulator, e.g. when assessing the risk that the merged entity might abuse its acquired market position⁶,
 2. considered that it has no jurisdiction when legislation has a similar objective of regulating competition and provides for a different set of legal remedies with different time limits, such as public procurement law in respect of the bidding

¹ Royal decree of 3 December 2017, *Moniteur belge*, 15 December 2017.

² Royal decree of 8 May 2014, *Moniteur belge*, 14 July 2014.

³ See e.g. Avis N° 2014-A/A-01 of 26 May 2014 given in application of par. 4, 4/1 et 5 of article 55 of the telecom act of 13 June 2005

⁴ See e.g. the BCA decision of 24 October 2013 in the *Touring-Autoveiligheid* case concerning the driving license tests.

⁵ Art. IV.50, 2 CEL (infringement cases) and IV.65, §4 CEL (merger control procedures).

⁶ See e.g. the BCA decision of 24 October 2013 in the *Touring-Autoveiligheid* case concerning the driving license tests.

process and the granting of contracts - but it considers to have jurisdiction in respect of collusion between bidding parties⁷,

3. has imposed in its competition law assessment of a merger control case on a cable operator with a dominant position the obligation to grant networks access to the viewer data concerning their network, in so far as compatible with the GDPR rules given the fact that viewers are client of the cable operator, but without defining what the impact of the privacy rules might be⁸.
6. However, the fact that it may in some cases be appropriate to defer to regulators, does not mean that regulatory concerns cannot also be competition concerns. The BCA qualified e.g. in two merger control decisions media plurality as a consumer choice, and therefore as a competition concern⁹. And when a dominant player distorts competition by ignoring regulation, that can, especially when the company systematically ignores applicable regulations and this is not prevented, stopped or sanctioned by a regulator, in our opinion also constitute an abusive practice under competition law¹⁰.
7. We make a distinction between the establishment of infringements of a regulation requiring regulatory policy making, and the assessment of the impact of infringements on competition.

⁷ BCA decision of 31 March 2015 concerning the *Villo !* bike sharing contract (involving among others *Clear Channel*, *JC Decaux*, and the city of Brussels).

⁸ BCA decision of 13 May 2019 concerning the Telenet/De Vijver merger transaction.

⁹ See the BCA decisions of 25 October 2013 on the establishment of the *Mediahuis* joint venture and of 4 August 2015 on the acquisition of magazine titles by *De Persgroep Publishing*.

¹⁰ See e.g. decision of the Bundeskartellamt of 7 February 2019 in the German Facebook case https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html. See on data privacy in Commission control cases S. Esayas, 'Data privacy in European merger control', *ECLR* 2019, 166 et seq.