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Competition Enforcement and Regulatory Alternatives – Note by Belgium

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This document reproduces a written contribution from Belgium submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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Belgium

1. Competition Enforcement and its impact on economic regulation

1.1. Can you provide examples of instances where regulation has followed from attempts to pursue competition enforcement, successful or not?

1. We refer to the contribution by the European Commission.

2. Already in the period of liberalisation of the telecom markets between 1995 and 2000, competition law cases such as the 1996 Atlas and 1997 Unisource decisions have been used as a laboratory for future regulation[1].

1.2. Can you provide examples where competition enforcement (or the possibility of competition enforcement) influenced the type and extent of regulation adopted in your jurisdiction?

3. Except for merger control, it was rather the other way round.

4. When the European Commission asked the NCAs of the Member States in the early stage of the Mastercard case to deal with interchange rates in respect of domestic direct debit , the BCA (and other NCAs) faced a total lack of cooperation because the financial institutions wanted first to know what the Commission decided in respect of cross border direct debit. We agreed with the Minister that under the circumstances a competition case would take much longer than was acceptable, and suggested to use his regulatory powers (but that took in the end also a long time; and we supported in the Visa case the idea that the Commission would deal with both the domestic and the cross border dimension).

1.3. Do competition authorities in your jurisdiction have a role in the design, implementation or removal of regulation, influencing the adoption and content of economic regulation?

5. Telecom legislation requires in conformity with the relevant EU Directives for some decisions of the telecom regulator (BIPT/IBPT) a preliminary opinion by the competition authority[2].

6. We have in the past occasionally been consulted on the design of regulation and gradually somewhat more in the last few years.

7. The government program of the present Government aims at a systematic involvement of the BCA, following recommendations from ourselves and various domestic and international bodies.

[1] Commission decisions of 17 July 1996 on case No IV/35.617 - Phoenix/GlobalOne; and of 29 October 1997 on case No IV/35.830 – Unisource. See further e.g. J. Steenbergen, "(Geliberaliseerde) openbare diensten en EU-reglementering", in *Liber amicorum Walter van Gerven*, Story-Scientia, Antwerpen, 2000, 427-447.

[2] See e.g. the opinions given in application of par. 4, 4/1 et 5 of article 55 of the telecom act of 13 June 2005).

2. Overlaps between Competition Law Enforcement and Economic Regulation

8. Competition law and regulation both aim at a better functioning of market and can be very complementary. As indicated above, regulation sometimes codifies earlier competition law decisions, and competition law allows for the enforcement of regulatory principles against undertakings. Some challenges can be addressed more effectively by regulation, if only because regulations apply *erga omnes*. See e.g. the rules on geo-blocking, roaming and interchange fees[3]. Competition law enforcement develops on a case-by-case basis, especially when competition authorities hesitate to give guidance before they had the opportunity to develop case law. It is therefore no surprise that the expert reports on the way to deal with digital markets do not focus exclusively on competition law but recommend a two-track approach, e.g. with regard to data access and interoperability[4].

2.1. Considering antitrust enforcement, competition advocacy and market studies, are there obligations for coordination between the antitrust authority and sectoral regulators in your jurisdiction? How do they work in practice? Are there voluntary coordination commitments between the antitrust authority and sectoral regulators in your jurisdiction? How do they work in practice?

9. Art. IV.34 and IV.43 Code of Economic Law (CEL) provide for Royal decrees in respect of information exchange with sector regulators. Such agreements exist at present with the BIPT/IBPT (telecom and postal services regulator) en the CREG (energy regulator) [5]. The relevant authorities regularly exchange general information and experiences in respect of market developments and inform each other of potential that may be relevant to the other authority. Relevant authorities are invited to hearings in competition cases (merger control, interim measures and infringement cases).

10. The BCA has had several opportunities to define its position vis-à-vis regulations and regulators[6].

2.2. Are there express or implied limits to the simultaneous application of competition law and regulatory tools in your jurisdiction? If so, which? If there have been recent developments in this regard, could you please describe these

[3] Regulation 2017/920 on roaming, Regulation 2018/302 on geo-blocking, Regulations 924/2009 and 260/2012 and the Mastercard judgment ECJ, 11 September in case C-382/12P on cross-border payments and interchange fees, the Payment Services Directive 2015/2366.

[4] See e.g. the report by the experts appointed by Commissioner Vestager J. Cremer, Y-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era*, DGComp 2019, pp. 9, 10, 82, and esp. 87 and 107 (http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; hereafter 'the Experts' Report').

[5] See e.g. the Royal decree of 10 December 2015 on cooperation with the telecom and postal regulator.

[6] See e.g. the de BCA decision of 31 March 2015 concerning the *Villo !* contract in respect of public procurement and competition law enforcement and the decision of 24 October 2013 in the *Touring-Autoveiligheid* case taking into account the disciplinary powers of the relevant administration when assessing the need for remedies in a merger case.

developments and the role that competition agencies played in bringing them about, if any.

11. There are no express or implied limits.

12. The competition authority and the regulators have each exclusive powers with regard to the application and enforcement of the respective legislation. We and the Belgian Government have consistently defended the view that these legislations pursue different goals and that there is therefore no application of the *ne bis in idem* principle when they each impose sanctions within their respective powers. This has led to litigation and a request for a preliminary ruling by the Cour de cassation to the CJEU (case C-117/20).

2.3. Can you provide examples of cases in your jurisdiction in which a practice breached regulatory obligations and, ipso facto, it became an antitrust infringement?

13. No, but that could be the case.

2.4. Can you provide examples of cases in your jurisdiction where a regulator found the conduct consistent with the regulatory framework, while the competition authority investigated the same conduct and found a competition law infringement?

14. No, but that could be the case.

2.5. Can you provide examples of economic regulatory duties or schemes influencing the design or the identification of antitrust remedies imposed by the authority at the end of an investigation? For example, have there been instances where the competition authority adopted as a remedy the respect of a regulatory obligation (for example a required rate of return on sales)?

15. Three examples:

- In the above mentioned merger control decision of 24 October 2013 in the *Touring-Autoveiligheid* case, the Competition College did not impose a remedy because possible abuses could be sanctioned by the relevant regulator.
- In the interim measures decision of 8 January 2020[7] the Competition College defined a remedy in order to allow the regulator to conclude its assessment of an infrastructure sharing agreement and inform the Investigation and prosecution service (Auditorat) of its findings.
- And more generally but for the same reasons, the BCA has consistently decided that it had with regard to public procurement cases jurisdiction in respect of collusion between bidders, but not in respect of the procurement procedure because we consider that it is governed by a *lex specialis* pursuing similar objectives as the competition rules and providing for a specific set of legal remedies.

[7] Beslissing nr.BMA-2020-V/M-03

2.6. If so, was it necessary to identify additional justifications for the remedy, or was it sufficient referring to the regulatory obligations?

16. It was sufficient to refer to the regulatory obligations and available remedies.

2.7. Other comments

17. The confidentiality rules are the key factor when organizing the cooperation between the BCA and regulatory authorities. That is why the competition act always explicitly provided for cooperation agreements allowing for the exchange of confidential information (at present articles IV.34 and IV.43 CEL).