

Enforcement Priorities of the Belgian Competition Authority for 2023

Like 2021, 2022 was also marked by rising energy prices, resulting in high inflation spikes around the world. While inflation in Belgium was initially mainly driven by price rises in the energy markets themselves, other industries - particularly the food industry - also contributed to this, passing on higher energy and raw material costs to their own market prices. The year 2022 was also marked by persistent global geopolitical tensions, supply issues from China due to the strict covid policy, and an unfavourable financial environment. Against this turbulent economic backdrop, the European Union has strengthened its climate targets and digitalisation continues.

The confluence of these events could lead to major upheavals in certain sectors, such as food, construction and other industrial sectors heavily dependent on international supply of raw materials (including certain metals and minerals). Some sectors may face difficulties in the years ahead as a result of current economic conditions, while new opportunities will arise for others. However, changing circumstances should not be used as an opportunity to allow or tolerate anti-competitive transactions and practices. After all, a healthy and fair functioning of the market remains the best protection of overall economic prosperity.

With its formal and informal powers and enforcement tools¹, strengthened by the transposition of the ECN+ Directive (2019/1) and the increase in the allocated budget, the BCA actively contributes to the functioning of competition in markets with the purpose of improving consumer welfare and supporting economic growth, employment and competitiveness. Although the BCA exercises its powers independently, it always does so in close contact with all interested stakeholders and government bodies, both domestic and foreign.

This note has been prepared in accordance with the remit of the BCA's Executive Committee under Article IV.25 of the Code of Economic Law and identifies the policies (section 2) and sectors (section 3) that will guide priority interventions in 2023.

¹ In this respect, the BCA has three types of instruments at its disposal to promote the functioning of markets: i.) formal proceedings aimed at prosecuting breaches of Belgian and/or European competition law; ii.) merger control; iii.) informal competition policy, which encompasses a wide range of possible interventions. The BCA also acts indirectly by participating in international advisory committees and working groups.

1. Strategic priorities for 2023

A first major challenge² for the BCA is the continued implementation of its capacity building strategy following the transposition of the ECN+ Directive³. The resulting total increase in the BCA's budget amounts to €1.4 million per year, representing a budget increase of around 20%. By 2022, thanks to these additional resources, the BCA has already achieved a number of important pre-determined objectives.

Firstly, the number of staff in the authority's various departments has increased considerably. This increase in staff has made it possible to thoroughly overhaul the authority's internal organisational structure with the intention to make its services more professional. For example, within the prosecution and investigation service, a split was made between two practice groups, with a separate department for merger control and another for infringement cases. In addition, six working groups have been created, specialising in certain types of interventions (cartels and manipulation of public markets, abuse of economic dependence) and in the functioning of more complex sectors (the food industry and distribution, network industries, the pharmaceutical and health sector, the digital industry and implementation of the DMA). The division into these specialised units enables more efficient handling of cases, facilitates the development of knowledge and expertise, and contributes to more targeted and robust interventions. In addition to these content-related specialisations, two support departments have been created, with a team responsible for the development and expansion of detection and enforcement resources, on the one hand, and a registry and management support team, on the other. Over the coming months, this new structure will be gradually put in place and additional efforts will be made to recruit staff, with the aim of reaching a critical size of around 80 people.

In addition, a number of key investments have been made in 2022 as part of the digitisation of the BCA, and a head of 'digital transformation' has been appointed. A first major achievement is the development of an online whistleblowing platform that allows potential breaches to be reported to the authority securely and anonymously. This platform will lower the barriers for stakeholders and facilitate communication between the authority and the whistleblower. In addition, a *cloud* strategy has been put in place to support the operation of key applications, and the development of a new *case management* system has been launched. Further development of these last two tools is a key priority for 2023, as they will make a major contribution to greater automation, smooth monitoring and faster administrative

² Some specific adjustments to the law are still possible in the coming months to improve the effectiveness of the enforcement policy, but no other major revision of the existing framework is expected.

³ The purpose of the ECN+ Directive is to establish rules to guarantee the independence of national competition authorities and to ensure that they have sufficient financial, human, technical and technological resources and the minimum enforcement and fining powers necessary to apply Articles 101 and 102 of the TFEU and to enforce national competition law in parallel with those Articles, so that national competition authorities can be fully effective. The law, which came into force on 17 March, is therefore an important step for Belgian competition law. The main consequences of the new law are, on the one hand, a number of legal changes and, on the other, a significant increase in the BCA's resources. On the legal front, among other things, the search powers of the prosecution and investigation service have been clarified (including the control of digital files and the possibility of continuing to examine documents on the BCA's premises), as have the procedures for applying the leniency procedure and the penalties for infringements, particularly for associations of undertakings. In addition, the law grants new powers to the Market Court and to the FPS Finance in the context of enhanced cooperation between national competition authorities with regard to the enforcement of infringement and sanction decisions. In addition, the ECN+ Directive provides for a number of other changes in the application of Belgian competition law, including the introduction of a merger notification fee. This requires notifying parties to pay a flat-rate *filing fee* of €17,450 for mergers subject to a simplified procedure, or €52,350 for mergers that do not qualify for the simplified procedure.

processing of the various cases. On top of that, a number of new projects will be launched. This includes an in-depth evaluation of the BCA website to improve its functionality and user-friendliness.

The additional resources will also enable the BCA to be more active in terms of informal and strategic policy, advocacy and communication. Today, the BCA is already heavily involved in the various working groups of the ECN network and in regulatory initiatives at the national and international level. These collaborations will be further strengthened in the coming years. There will also be more space for policy preparation initiatives, including a focus on new challenges such as the relationship between macroeconomic parameters and competition, competition in labour markets, and the role of sustainability in competition. Ex-post studies and information gathering⁴ will be taken into account where they can help define appropriate priorities or challenges and improve existing policies. In 2022, the BCA held consultations with the Price Observatory and the National Bank of Belgium with a view to strengthening cooperation with these two institutions. With regard to the Price Observatory in particular, the BCA will analyse the results of the Price Observatory's studies more systematically and specifically provide ad hoc advice to a study on clarifying the differences in consumer price levels between Belgium and its main neighbours. At the same time, the BCA is conducting its own market study in support of the Price Observatory study, which will mainly analyse differences upstream in the food chain.

A second strategic priority is to continue to monitor the application of competition policy in the context of the green economy and the circular economic transition in Belgium. Competition is a key driver of innovation, which is necessary for the development of new green technologies. Strong competition encourages companies to make efficient use of scarce raw materials and resources. It also ensures that innovative new products are offered to consumers at affordable prices. A strong and effective competition policy is therefore an important factor in stimulating innovation and technological developments, thereby contributing to the greening of the Belgian economy. In line with initiatives taken by other Member States, the BCA will also take further steps to develop its position on, among other things, the consistency of competition rules with green policies and how they can further support these policies, in particular the application of competition law to sustainable development agreements. In addition, the BCA will advise and interact informally with various stakeholders as part of its advocacy policy, as it recently did in the context of a sustainability initiative on living wages in the banana sector⁵. Such sustainability initiatives, which mainly consist of partnerships between companies, may require a complex balance between the environmental and sustainability benefits of cooperation on the one hand, and the competitive disadvantages on the other. The starting point for the project being evaluated is to close the gap between real wages on the one hand and living wages on the other. In order to assess whether the agreement on sustainability standards does not have any significant negative effects on competition, several parameters were taken into account, including transparency for participants in the standards selection process, the voluntary nature of participation, the impact on prices and choices, etc. In addition, sufficient guarantees were provided to ensure that the agreement does not have a negative impact on competition. In addition,

⁴ Similar initiatives have already been taken by other authorities. See, among others, the CMA (November 2020) "The State of UK Competition" and the Monopolkommission (2020), Hauptgutachten XXIII chapter 2.

⁵ See [PRESS RELEASE No 11/2023](#) 30 March 2023 The Belgian Competition Authority is examining a sustainable initiative aimed at guaranteeing "decent wages in the banana sector".

sufficient safeguards have been built into the project to prevent the exchange of commercially sensitive information that will preserve participants' individual pricing autonomy. The BCA will continue to provide the necessary resources over the coming months to advise companies and organisations considering similar or other projects on the practical design to ensure a good balance between environmental objectives and the impact on competition.

A third strategic priority is the development of an active enforcement policy in the digital sector. From 2 May 2023, the Digital Markets Act (DMA) will apply in the European Union. The DMA has introduced specific rules aimed at making the digital market more contestable and fair by limiting large online platforms' powers⁶. The identification of platforms that will be subject to the DMA and the application of these new rules will mainly be done at the level of the European Commission. However, Member States also have a specific role to play in protecting healthy market dynamics in the digital sector. The BCA will focus on developing an enforcement policy that takes into account the specific challenges of a medium-sized economy like Belgium, with a particular emphasis on a healthy competitive environment for the development and growth of small tech companies in the services sector. One of the first objectives is to gather the views of the various stakeholders in order to better define the contours of digital law enforcement policy. Competition infringements in the digital economy will also be a priority (see below).

2. Priority sectors for 2023

The application of competition law makes it possible to react to the behaviour of market players, for example to sanction and deter infringements by imposing fines, but also by imposing corrective measures, including interim measures, or by making commitments offered by companies binding. Commitments can be imposed at any stage of the procedure. This impact is not limited to the direct effect of the procedure on the market in question, but extends to its expected effect on the behaviour of other companies and on the ability to sustain economic growth.

In order to make the best use of its resources, the BCA will concentrate its interventions on cases where the expected positive impact of its actions is greatest, taking into account the resources required to carry out these actions. The full analytical framework is explained in the document annexed to this priority note.

One of the relevant factors is the strategic importance of the investigation. This is the case when the BCA considers the sector where the infringement took place to be a priority. In drawing up this list, the BCA calls on its own expertise and on experience gained from previous investigations, on the results of the Price Observatory's sector review methodology⁷, and on signals from stakeholders, other authorities, research institutes and universities.

⁶ The DMA will prevent large online platforms that act as *gatekeepers* for a large number of users from abusing this function to the detriment of other companies that also want access to the users of these platforms. To this end, the DMA defines a series of specific obligations with which these *gatekeepers* must comply. These common rules for the entire single market will promote innovation, growth and competitiveness, and facilitate the expansion of small platforms, SMEs and start-ups, which will have a single, clear framework at EU level.

⁷ The Price Observatory's horizontal review identifies sectors where there is an increased risk of less effective competition on the market.

Although the BCA pursues competition law violations in all sectors of the economy, the following sectors will be given priority. However, the fact that a case falls within a sector listed in this priority notice does not prevent the BCA from closing the case because it is not an operational priority or does not warrant investigation given the resources available.

- **The food industry**

The food industry is undeniably very important to the Belgian economy and continues to make a significant contribution to the general level of inflation, possibly due to a delay in passing on cost increases. However, the BCA will ensure that anti-competitive practices do not further fuel these price increases, or that anti-competitive acquisitions in the sector that simply have the effect, or even the purpose of facilitating the passing on of costs throughout the chain are not permitted. In addition, the Belgian food chain has already shown itself to be vulnerable at various levels in the past in terms of maintaining a healthy competitive environment. Contracts between the retail sector and its suppliers can in some cases lead to anti-competitive effects between chains or between suppliers, for example when they restrict the freedom of retailers to set their prices, or even the possibility of offering their services online. Fully aware of the particularities of the sector, the BCA will ensure that the market functions properly throughout the food chain, paying particular attention to price formation mechanisms, territorial supply constraints and competitive dynamics in the agricultural sector. As mentioned above, the BCA has offered its cooperation in advising on the preparation of the study on price differentials to be developed by the Price Observatory. In addition, the BCA's economics department will carry out its own market study to support the Price Observatory's conclusions, focusing mainly on price differences between Belgium and neighbouring countries up the food chain.

- **Business and consumer services**

Well-functioning service markets are essential. Many services provide the necessary assistance to consumers or businesses in making other (economic) decisions. Examples include financial services, including banking/payment and insurance services, legal services, accountancy services, security services and quality control providers. Many of these services or professions are regulated for consumer protection purposes. This means that only individuals or companies that meet the necessary conditions can offer the services in question. This quality protection is very important for the user, but it does not necessarily offer the guarantees needed for the market to function properly and may even have a restrictive or distorting effect on the market, as recent studies by the Price Observatory have already indicated⁸. The BCA will monitor compliance with competition law in the various service sectors and will also continue to advocate the revision of professional regulations if they restrict access to and/or the exercise of the profession more than is necessary to guarantee the achievement of public interest objectives.

⁸ Observatoire des prix, " Analyse des prix Rapport annuel 2017 de l'Institut des comptes nationaux : Analyse des forces du marché pour les services juridiques, les services comptables, les services d'architecture et les services d'ingénierie ; Observatoire des prix, " Analyse des prix Rapport annuel 2019 de l'Institut des comptes nationaux " : Partie IV. Analysis of market forces for estate agents in Belgium

- **The energy sector**

Energy is a major cost item, both for consumers and for many economic activities. The prosperity of households and businesses therefore depends to a large extent on the price of gas and electricity sold on the wholesale markets. The first half of 2022, like 2021, was marked by sharp price rises on the electricity and gas markets. Although prices began to fall in the second half of the year, recent developments have shown just how volatile energy markets can be. In addition, global geopolitical tensions remain high, so further shocks to energy markets cannot be ruled out. Given the importance of energy to business, the BCA must ensure that gas and electricity suppliers do not take advantage of the tense situation to pursue anti-competitive policies, particularly in the context of a partial phase-out of nuclear power. The BCA focuses both on the wholesale energy trade, in which producers, traders, energy companies and wholesale customers operate, and on retail supply to consumers and business customers. To this end, the BCA is in close contact with the CREG, the federal energy regulator in Belgium, as well as with the regional regulators. Given the tensions between supply and demand, particular attention should be paid to preventing energy companies from making *windfall* profits during unexpected periods of price peaks⁹.

- **The pharmaceutical and health sector**

The pharmaceutical sector remains a priority for the BCA, as it is in other European countries. Several investigations in this sector have been completed in recent years. In 2022, the Prosecution and Investigation body sanctioned two pharmaceutical wholesalers for their participation in a cartel and imposed fines totalling €29.8 million¹⁰, and in 2021, the College of Competition reviewed the fine imposed on the "Ordre des pharmaciens"¹¹. In early 2023, the Competition College fined Novartis Pharma SA and Novartis AG €2,782,808 for abuse of a collective dominant position¹², and the Caudalie group €859,310 for imposing minimum prices and active and passive sales restrictions. The Covid crisis has only served to reinforce the great importance of this sector. The BCA will be paying close attention to all links in the value chain: prices set by pharmaceutical companies, competition between wholesale distributors, competitive dynamics and innovation at pharmacy level. In the coming months, the BCA will also spend additional attention and resources to further consolidation in the hospital sector.

- **The digitisation of the economy**

The digital economy has attracted the attention of many competition authorities in recent years. A number of initiatives are also being taken at a political level, including the introduction of the DMA, which came into force in the spring of this year. Digital companies are often characterised by

⁹ In 2019, a law passed on 22 April 2019 introduced the Capacity Remuneration Mechanism (CRM). This mechanism is designed to ensure the country's long-term security of supply in the run-up to the definitive closure of nuclear power stations between 2023 and 2025. The mechanism aims to enable selected capacity holders to obtain support up to the amount of their "missing money". However, to prevent participants from making 'windfall profits', it is envisaged that capacity holders will have to repay part of their electricity market revenues if they exceed a certain pre-determined limit representing a price level considered to be (very) high.

¹⁰ Decision ABC-2022-I/O-06- AUD of 18 February 2022 in case CONC-I/O-16/0034- Wholesalers of pharmaceutical products

¹¹ MediCare-Market - Ordre des Pharmaciens, 2021-I/O-05, 26 March 2021.

¹² Decision ABC-2023-P/K-02 of 23 January 2023 in the case CONC-P/K-14/0026 Test-Achats v Novartis and Roche

significant economies of scale, direct and indirect network effects that enhance their potential market power, and the ability to improve their services and algorithms through access to sufficiently detailed (personal) data. The BCA, like other authorities, will be particularly attentive to possible abuses of dominant positions, abuses of economic dependence and breaches of competition law resulting from the digital transformation in several sectors, particularly in the services sector, including services to businesses and public authorities. Sectors particularly characterised by continued digitisation are media and communications, with new developments in both content and advertising. Several new business models aim to provide a competitive response to the increased market power of the international technology giants. Nevertheless, vigilance is needed to ensure that these and other initiatives to capitalise on the digital revolution do not create new restrictions on competition, particularly in the form of the creation of local platforms with high market power.

- **The telecommunications sector**¹³

The telecommunications sector remains a priority for the BCA. Following the recent acquisition of VOO by Orange, three major national players (SMPs) are now active on the Belgian market and the degree of concentration is increasing, at least at national level. The new dynamic created by this transaction will be closely monitored by the BCA. Any further consolidation in the telecommunications markets will also be the subject of an in-depth investigation, in close collaboration with the European Commission and BIPT. Another concern in the telecom sector is the impact of the continued roll-out of the 5G network. The introduction of this network offers a range of new opportunities, particularly for business services. A smooth rollout of the network is therefore very important for the further digitalisation of various industries, but for the same reasons it is also very vulnerable to potential competitive abuse. In addition, the increased interactions and spillovers between the digital and telecom sectors will require increased vigilance, particularly with regard to the effects¹³ on competition of vertical and conglomerate mergers linking the two worlds.

- **Public procurement**

When the government wishes to commission certain services, supplies or works from companies, it must comply with public procurement regulations. One of the aims of these strict regulations is to promote freedom of access, equal treatment and transparency, thereby creating a level playing field for all interested candidates. The amounts that enter the economy through these procurement procedures are far from negligible. The European Commission estimates the value of public procurement per Member State at around 14% of gross domestic product¹⁴. For Belgium, this represents more than €70 billion in 2022. *Big rigging* or collusion between companies when submitting bids - for example, in the form of market sharing - can run counter to the objectives of public procurement procedures. By doing so, interested bidders eliminate competition, resulting in

¹³ The FPS Economy's horizontal screening identifies a series of sectors that merit particular attention, including telecommunications (NACE 61): Price Observatory (2022), "Market functioning in Belgium and changes in margins", with, among the service sectors, wireline telecommunications (6110) as the sector with the highest composite indicator and wireless telecommunications (6120) as one of the sectors where net margins have been strengthened.

¹⁴ https://single-market-economy.ec.europa.eu/single-market/public-procurement_en;

This percentage is in line with the 15% estimate used by the OECD; see OECD (2007), "Bribery in Public Procurement: Methods, Actors and Countermeasures".

higher costs for contracting authorities, to the benefit of their own revenues. In early 2017, the BCA already proactively published a guide¹⁵ for public authority purchasers through which the authority wanted to make an active contribution to protect competition in the award of public contracts. However, the dissuasive effect of such a guide is only really effective if tough measures are also taken against companies that - despite these warnings - are still guilty of breaching competition law. This is why the BCA will also focus on new detection tools, in cooperation with other competition authorities, and will give priority to certain *bid rigging* cases. A particular focus of attention in public procurement procedures is *bid rigging* in the construction sector. For several years now, the construction sector has featured in the Price Observatory's market study¹⁶ as one of the sectors presenting a high risk of distortions of competition, in the various links of the chain, from production to wholesale and retail, and rental. Given the importance of the sector and the worrying indications from the Price Observatory, the BCA will be particularly vigilant with regard to possible infringements in public procurement procedures.

In terms of the type of infringements that the BCA will detect, it will need to strike a balance between prosecuting obvious offences (hard-core infringements) on the one hand, and more complex and/or innovative cases on the other.

30 May 2023

Appendix: Analytical framework for identifying priority infringement cases

¹⁵ Belgian Competition Authority (2017), "Collusion in public procurement: A guide for public purchasers".

¹⁶ Among other things, the latest 2022 survey confirmed that the manufacture of lime and plaster has the highest composite indicator, and that the manufacture of bricks, plaster articles for construction and cement also emerge from the analysis as sectors of concern. In addition, the study shows that the manufacture of clay construction materials, lime, plaster and cement shows a significant margin difference in favour of Belgium compared to the average of neighbouring countries, both in terms of level and trend. Several service and trade sectors in the construction sector also show an increase in the net margin, particularly in the development of construction projects, as well as in the wholesale of wood and construction materials, the retail of hardware, paint and glass, and the wholesale of construction machinery.

Appendix: Analytical framework for identifying priority infringement cases

In order to make the best use of its resources, the Belgian Competition Authority will concentrate its interventions where the expected positive impact of its actions is greatest, taking into account the resources required to carry out these actions. It must strike the right balance to achieve this:

- between relatively straightforward cases, where the most obvious offences are prosecuted, and more complex or innovative cases with added value for case law;
- between cartels, vertical restraints, abuse of a dominant position and abuse of economic dependence;
- between cases that can be resolved in a relatively short time and those that require a longer investigation period;
- between different economic sectors, to ensure a balance between, on the one hand, strategic sectors from a macroeconomic point of view and, on the other hand, other sectors of less strategic importance, but to which competition law also applies.

As is the case for other competition authorities, the BCA takes 4 factors into account when assessing the importance of a case:¹⁷

- **Impact** - The Authority will assess the direct damage caused by the infringement complained of in the sector where the infringement took place, not only in terms of the price charged but also in terms of the impact on the quality of the product or service provided to consumers. It will also take into account various indirect effects, such as the deterrent effect of other infringements in related sectors and the impact on the value chain where the infringement complained of affects its functioning.
- **Strategic importance** - The opening of an investigation into an alleged infringement may be of strategic importance to the BCA where it considers that the sector in which the infringement took place is a priority (see the list of priority sectors for 2023 above), or where it wishes to clarify an interpretation of the law and the case may have precedent value. However, if the Authority considers that other institutions are better placed to deal with the specific problem, its strategic importance will be lower.
- **Risks** - The BCA will be less inclined to invest resources in the investigation of an offence where there is a significant risk that the investigation will not produce a useful result.
- **Resources** - The BCA will also take into account the resources required to initiate or continue an investigation, and this will determine the setting of the calendar of the investigations.

¹⁷ See in particular "[OFT Prioritisation Principles](#)".