

Belgian Competition Authority Publishes Its Notice on Enforcement Priorities for 2022

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On May 16, 2022, the Belgian Competition Authority (BCA) published its long-awaited notice on enforcement priorities for 2022 (Notice).

The BCA explains that, with a view to making the best use of its resources, it will focus its interventions on matters where the expected positive effect of its actions is greatest. One of the factors that will determine its priority focus is the strategic importance of the investigation which will in turn depend on (1) the “impact” of the direct damage caused by the infringement, (2) the strategic importance of the investigation (e.g. where the matter concerns a priority sector, may create a precedent or may provide an opportunity for the BCA to clarify the law), (3) the likelihood that the investigation will yield a “useful result”, and (4) the resources required.

Unsurprisingly, the digital economy, services industry, energy sector, pharma sector and telecom sector remain high on the BCA’s agenda. The agro-food and sports sectors have now been added to that list in line with the growing competition law concerns relating to those sectors.

In addition, the BCA has announced that it will, in the future, set up a special “merger control team”, that it will beef up its enforcement tools (surveys, e-discovery, anonymous whistleblower tools), and that there will be a further strengthening of expertise regarding the implementation of the Law on economic dependency.

Lastly, the Notice refers to the BCA’s desire to tackle new challenges, such as competition in labour markets which follows a trend in other EU countries as well as the US (see, e.g., [here](#) and [here](#) for a summary of the case brought against DaVita and its former CEO, Kenty Thiry that was successfully defended by McDermott) and the application of the competition policy in the context of a green and circular economy in Belgium.

IN DEPTH

Introduction

The Notice starts off by referring to the impact of the COVID-19 pandemic, rising energy prices and the Russian invasion of Ukraine. The BCA remarks that the latter has led to an even further increase

of energy prices given the fact that Russia is an important energy supplier, and that the invasion has led to a brake being put on the supply of raw materials and intermediate goods as well as on the export activities of Belgian companies to both countries. The Notice highlights that these events may influence certain sectors significantly, such as the food, construction and industrial sectors that depend heavily on the international supply of raw materials (including certain metals and minerals). The BCA explains that a “healthy and fair market” provides for the best protection of general economic prosperity both in the sectors experiencing serious difficulties as well as in the sectors in which new opportunities have arisen as a result of this new economic reality.

Strategic Priorities for 2022

Before setting out its “strategic priorities”, the BCA refers to, and summarises, the recent changes made to the Belgian Code of Economic Law (CEL) and the Belgian Criminal Code in March 2022 (for further information on these changes, see our article [here](#)).

The 20 percent increase in the BCA’s budget will be used to recruit personnel and to invest in (1) new IT infrastructure and support, (2) knowledge management and internal processes and more specifically the available enforcement instruments (such as surveys, e-discovery, anonymous whistleblower tools, etc).

The BCA will, in the future, set up a special “merger control team” which will, according to the BCA, lead to the more efficient processing of merger notifications and to increased capacity to deal with investigations into anticompetitive practices (on the basis of *ex officio* investigations). The Notice also explains that there will be further strengthening of the expertise regarding the implementation of the Law on economic dependency (enshrined in the CEL).

The BCA’s increased budget will also allow the BCA to be more active in relation to its informal and strategic policy – and in particular it will lead to an increase / strengthening of already existing collaborations with ECN working groups and national and international regulators. As an example of collaborations with national regulators, the BCA refers to the Price Observatory and the National Bank of Belgium.

Another strategic priority for the BCA will be the sectors positively or negatively impacted by the COVID-19 crisis, in particular where impact is reinforced by the increased digitalisation of society. The BCA makes explicit reference to:

- Distribution markets
- The agri-food value chain
- Financial services
- Healthcare (including distribution of medicines, vaccines and medical equipment)

The BCA explains that competition is the motor of innovation which, in turn, is necessary to develop new, green technologies. As per the Notice, healthy competition encourages companies to use scarce raw materials and resources efficiently and ensures that new innovative products are offered to consumers at affordable prices. A healthy, well-functioning competition policy is therefore an important factor in promoting innovation and technological development to contribute to the further

greening of the Belgian economy. In line with initiatives from other Member States, the BCA will also take additional steps in developing its position on, inter alia, how competition rules correspond with sustainable policy measures and how it can further support that policy, in particular in relation to the application of competition law to sustainability agreements. To this end, the BCA will also provide additional informal advice and interact with various stakeholders as part of its advocacy policy.

Thanks to an increase in its budget, the BCA now also has more resources to “tackle new challenges”, such as competition in labour markets. This follows a trend seen in other EU countries in the last few years. For example, in Hungary, France and Portugal the national competition law authorities have investigated so-called wage-fixing and/or “no poach” agreements (*i.e.* where companies agree not to hire each other’s employees).

The European Commission has not yet taken any enforcement action against no-poach agreements. However, in a speech on October 22, 2021, EU Competition Commissioner Margrethe Vestager referred to the harm caused “*when companies collude to fix the wages they pay; or when they use so-called “no-poach” agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best*”, implying that the European Commission will not shy away from enforcement action in this area.

No-poach agreements have already been a hot topic in the US for several years. One of the latest developments is the antitrust case brought against DaVita and its former CEO, which constituted the first criminal “no poach” trial ever prosecuted by the DOJ. McDermott successfully represented DaVita and its former CEO in this case (for more information, see [here](#) and [here](#)).

- *Recruitment, specialisation & collaboration*
- *Sectors Impacted by the COVID-19 crisis*
- *Focus on the application of the competition policy in the pursuit of a green and circular economy in Belgium*
- *Competition in labour markets*

Priority Sectors for 2022

The BCA has identified the following sectors as being a “priority” for 2022:

The sports sector – new to the list. The BCA highlights the fact that the sports sector has become an important economic sector and refers to its previous enforcement practice in the industry. Going forward, the BCA will, based on expertise already acquired, pay greater attention to enforcement of competition rules in the sports sector, focusing on fair access to sport leagues, the organisation of sports competitions and events, no poaching agreements, and the rise of e-sports and (online) sports betting.

- **Services to businesses and consumers** – and especially where the sector is regulated (e.g. financial services, accounting, quality control). This is in line with the BCA’s 2021 priorities.
- **The pharma sector** – in line with other EU countries’ enforcement focus in recent years as well as the BCA’s own 2021 priorities. In the Notice, the BCA refers to its most recent

enforcement actions in the sector and stresses that it will “pay attention” to all actors in the value chain: prices set by laboratories, the competition between wholesalers and distributors, the innovation and competitive dynamics at the level of the pharmacies, etc

- **The digitalisation of the economy** – also in line with the BCA’s 2021 priorities and where the BCA will be “especially alert” to possible abuses of a dominant position, abuses of economic dependency and for competition law infringements resulting from the digital transformation in several sectors (in particular in the service industry, including services to businesses and government agencies). Sectors characterized by further digitization are, according to the BCA, media and communication, with new developments on both the content and advertising side.
- **The agro-food sector** – new to the list. The BCA refers to the fact that the Belgian food chain has already demonstrated, at various levels, its vulnerability in maintaining a healthy competitive environment. In particular, the BCA refers to an increasing trend for food price inflation which is higher than in any of the neighboring countries.

The BCA will focus on healthy market forces throughout the food chain, and will in particular focus on pricing mechanisms, territorial supply restrictions as well as competitive dynamics in the agricultural sector.

- **The energy sector** – also in line with the BCA’s 2021 priorities. In relation to the energy sector, the BCA refers again to the rising energy prices (in particular for electricity and gas) caused by the economic recovery after the COVID-19 crisis in combination with declining gas reserves and an increase in the price of CO2 rights, further exacerbated by consequences of the Russian invasion of Ukraine. Given the importance of energy for business, the BCA explains that it will ensure that, especially in the current environment of partial phasing out of nuclear energy, gas and electricity suppliers do not take advantage of the tense situation to pursue anti-competitive policies. 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. “Necessary attention” is required to prevent energy companies from making exceptional profits during periods of price spikes (so-called “windfall profits”).
- **The telecom sector** – a “classic” priority for the BCA. In this year’s Notice, the BCA explains that consumers are increasingly opting for bundled offers and are less likely to change operators. Other focus points for the BCA are (1) the further rollout of the 5G network, (2) further consolidations in the telecom market (which will be subjected to close scrutiny), (3) the increased interactions and spillover effect between the digital sector and the telecom sector, with attention also paid to any competitive effects of vertical and conglomerate mergers connecting the two sectors.