

Market Court partly annuls Belgian Competition Authority decision on a hub and spoke in cigarettes case

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Following an enquiry initiated in 2017 and dawn raids carried out the same year, the Competition College of the Belgian Competition Authority concluded on 13 April 2022 its investigation into illegal exchanges of confidential commercially sensitive information via wholesalers and imposed a total of 36 million EUR of fines on four cigarette manufacturers :

- British American Tobacco Belgium : fine of 5.7 million EUR,
- Etablissements L. Lacroix Fils : fine of 7 million EUR,
- JT International Company Netherlands : fine of 7.2 million EUR and
- Philip Morris Benelux : fine of 16 million EUR.

The BCA had investigated the companies for illegal exchanges of confidential commercially sensitive information via wholesalers.

No leniency application had been lodged and it is not known how the Authority was informed of the infringement. The case, however, is similar to an investigation conducted in the Netherlands by the Authority for Consumers and Markets that led to a September 2020 decision imposing a total of EUR 82 million in fines on British American Tobacco, Japanese Tobacco International Company Netherlands, Philip Morris Benelux and Van Nelle Tabak Nederland.

The infringement of competition law uncovered by the Belgian Competition Authority concerned the exchange of future prices through their wholesalers between 2011 and 2015. The suppliers were not condemned for a direct exchange of information. The Competition College, however, considered that their absence of objection to this communication of sensitive information by their clients constituted an infringement of competition law since it allowed them to limit the risks of normal competition.

The undertakings challenged the decision before the Market Court.

First, the cigarettes manufacturers contested the existence of the infringement arguing they only exchanged information vertically with their wholesalers and had no direct contact with competitors. Furthermore, they stated that communicating information on competitors in a commercial negotiation between an individual customer and its supplier is legitimate. Finally, they challenged the duration of the infringement and its continuous character.

In its judgment of 15 February 2023, the Market Court confirmed the existence of exchanges of confidential information on future prices between the four undertakings via wholesalers. It also validated the qualification of concerted practices. The Market Court stated that such a qualification entails the existence of a consensus that can be expressed in the form of tacit consent. In this case, it noted that the manufacturers received 112 pieces of information on the prices of competitors and that none of them contested this communication or distanced itself from it. In fact, internal documents revealed that the manufacturers actively sought information, which they took into consideration in their pricing policies.

However, the Market Court partly annulled the BCA's decision due to a lack of reasoning concerning the continuous character of the infringement, the start and end of the infringement and the determination of the fines that must be proportional, adequate and effective.

The case has been sent back to the Competition College, which must now adopt a new decision following the Market Court's ruling.

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