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4.1 Introduction

This contribution provides an overview of the application of competition and related rules on the grocery retail market in Belgium.¹ Belgian competition law is modelled on European competition law, and some other rules that are applicable to the grocery retail sector are a reflection of European law as well. In the absence of specific Belgian case law, reference will therefore be made to European cases.

4.1.1 Economic Background

According to Eurostat data, more than half of Belgium's farms are specialised in livestock (meat and dairy).² Beef production is aimed specifically at consumption in Belgium, whereas pork meat is to a large extent subject to cross-border trade. Important crops include animal feed (corn), wheat, potatoes and sugar beet, as well as fruit and vegetables.

There are various intermediaries active in the delivery of agricultural produce to processors and consumers, including slaughterhouses and auction houses for fruit and vegetables. The processing of agriculture produce is to a large extent done by multinationals.

The supermarket sector is relatively concentrated in Belgium with three supermarket chains (Carrefour, Colruyt, Delhaize) of roughly equal size accounting for

¹ This contribution is updated until the end of May 2013.

² See http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-SF-09-099.

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approximately 75 % of the market.³ In recent years, discount retailers have gained significant market share.

The larger supermarket chains in Belgium also sell over the Internet (with the consumer either having to pick up the groceries at the store or having them delivered to his home), but Internet sales only make up a very small part of their total turnover.

4.1.2 Legal Background

4.1.2.1 Competition Law

As indicated above, Belgian competition law is modelled on European competition law. It prohibits agreements and concerted practices that have as their object or effect the restriction of competition as well as the abuse of a dominant position. Just like under European competition law, resale price maintenance is prohibited *per se*. There are no provisions in Belgian competition law that are specifically aimed at the retail market, and the retail sector is subject to the general competition law rules.

Note that the Belgian Competition Act of 2006⁴ is currently being replaced by a new Code of Economic Law, the relevant parts of which were published in the Belgian Official Gazette on 26 April 2013.⁵ The date of entry into force of most of the provisions of the new Code of Economic Law, which mainly introduces procedural changes, is still to be determined.⁶

4.1.2.2 Law Against Unfair Trade Practices

In addition to Belgian competition law, Article 95 of the Belgian Act on Market Practices and Consumer Protection of 2010⁷ prohibits any action that is contrary to

³ Their combined market share was 72.8 % in 2011, according to a study by Marketing Map as reported on <http://www.retaildetail.be/nl/case-van-de-week/item/14349-%E2%80%98de-competitie-neemt-sterk-toe-op-de-belgische-voedingsdistributiemarkt%E2%80%99>.

⁴ Act on the Protection of Economic Competition coordinated on 15 September 2006, Belgian Official Gazette of 29 September 2006, p. 50613.

⁵ Act Introducing Book IV “Protection of Competition” and Book V “Competition and Price Evolution” in the Code of Economic Law and Introducing the Definitions proper to Book IV and Book V and the Rules of Enforcement proper to Book IV and Book V, in Book I of the Code of Economic Law of 3 April 2013, Belgian Official Gazette of 26 April 2013, p. 25216 and Act Inserting the Provisions which concern Matters as referred to in Article 77 of the Constitution in Book IV “Protection of Competition” and Book V “Competition and Price Evolution” in the Code of Economic Law of 3 April 2013, Belgian Official Gazette of 26 April 2013, p. 25248.

⁶ Certain provisions allowing for the appointment of officials of the new authority entered into force on 28 May 2013 as a result of the Royal Decree concerning the Entry into Force of Certain Provisions of the Act of 3 April 2013 Introducing Book IV “Protection of Competition” and Book V “Competition and Price Evolution” in the Code of Economic Law and Introducing the Definitions proper to Book IV and Book V and the Rules of Enforcement proper to Book IV and Book V, in Book I of the Code of Economic Law, Belgian Official Gazette of 27 May 2013, p. 33988.

⁷ Act on Market Practices and Consumer Protection of 6 April 2010, Belgian Official Gazette of 12 April 2010, p. 20803.

fair market practices that harms the professional interests of one or more other undertakings. This covers not only anticompetitive practices under competition law but also certain other practices considered to be unfair against other undertakings (such as misleading advertising or inappropriate sale practices).

The Belgian Act on Market Practices and Consumer Protection of 2010 prohibits (re)sale at a loss, whereby sale at a loss is defined as any sale at a price that is not at least equal to the price at which the company has purchased the good or the price that the company would need to pay to restock the good. To determine the purchase price (or price for restocking), rebates that the company received or would receive can be deducted if these rebates are certain and relate to the procurement of the good in question. Rebates that the company received or would receive for other reasons than the procurement of the good in question cannot be taken into account to determine the purchase price of the good.

The Belgian legislation provides that the prohibition on resale at a loss does not apply in certain circumstances:

- in case of a liquidation or during the official sales periods;
- in case a good can no longer be preserved (goods that reach the end of their shell life);
- in case the product can no longer be sold at a price that is not at least equal to the purchase price, due to external circumstances; or
- in order to align the price to the price at which the same or a competing product is sold by competitors.

It is contested whether the prohibition on resale at a loss is compatible with the European Unfair Commercial Practices Directive.⁸ In an order of 7 March 2013, which resulted from a request for preliminary ruling from the Commercial Court of Ghent, the Court of Justice of the European Union ruled that such a general prohibition of resale at a loss would be contrary to European law in case it pursues objectives relating to consumer protection.⁹ It is clear from the legislative history of the prohibition on resale at a loss in Belgium that the provision at least also pursues other objectives than consumer protection. Whether in addition it also aims at consumer protection is debated.

Draft legislation to amend the rules on resale at a loss is currently being considered by the Belgian government.

⁸ Directive 2005/29/EC of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149, p. 22.

⁹ ECJ, case C-343/12, *Euronics Belgium CBVA v Kamera Express BV and Kamera Express Belgium BVBA*, ECR 2013 (not yet published).

4.1.2.3 Other Laws and Regulations Applying to the Retail and Grocery Sector

There is no specific legislation on the structure of the grocery retail market or the behaviour of large-scale grocery retailers, but certain legislation indirectly affects the ability of large-scale grocery retailers to develop and to take advantage of their size.

First of all, the Act on the Authorization of Trade Establishments of 2004¹⁰ provides that new retail outlets of 400 m² (or the expansion of retail outlets to this size) require an authorisation from the municipality in which they will be located. In case the outlet exceeds 1,000 m², the National Socioeconomic Committee for Retail needs to issue an opinion on the request, taking into account the urban environment of the outlet and also consumer protection and employment. This legislation is sometimes perceived as protecting small and medium-sized retailers from the entry of large-scale (food or non-food) retail multinationals in their municipality.

According to the OECD and the European Commission, this legislation acts as a barrier to entry into local retail markets, but in its 2012 Report on the Price Level of Supermarkets (see below), the Belgian competition authority concludes that the effect of this legislation is limited.

Second, Belgium has relatively strict rules on trading hours, which are furthermore strengthened by agreements between labour unions and retailers (organisations). These rules are often seen as a protection for smaller retailers that do not have the means to offer as extensive opening hours as large retailers.

The Act Against Payment Delays in Commercial Transactions of 2002¹¹ provides that payment terms cannot be manifestly unfair, taking into account all relevant circumstances, good trading practices and the nature of the good or service. This rule can be enforced through actions before the courts, with a possibility for the president of the relevant court to grant an injunction following summary proceedings. Such cases are rare.

There are no specific rules on Internet retail stores, and, to the extent relevant, they are therefore subject to the same regulations as brick and mortar stores.

No price control of grocery products exists anymore since the abolition of the maximum price of bread on 1 July 2004. However, the new Code of Economic Law of 3 April 2013 introduces the possibility for the Belgian competition authority to impose temporary measures for a period of 6 months in case of 'a problem concerning prices or margins, an abnormal price evolution or a structural market problem'.¹² It remains to be seen how this will be applied.

¹⁰ Act on the Authorization of Trade Establishments of 13 August 2004, Belgian Official Gazette of 5 October 2004, p. 70159.

¹¹ Act Against Payment Delays in Commercial Transactions of 2 August 2002, Belgian Official Gazette of 7 August 2002, p. 34281.

¹² Article V.3 and V.4 of the Code of Economic Law.

4.1.3 Market Studies

The Belgian competition authority in February 2012 published a Report on the Price Level of Supermarkets.¹³

This Report was commissioned by the Belgian minister of the economy on March 2011 after the Price Observatory, a body of the ministry of economy, had pointed out that consumer prices for groceries in Belgium were higher than in neighbouring countries (in particular, in the Netherlands and also, to a more limited extent, in France and Germany) and the European average. According to the Price Observatory, inflation for grocery prices was also higher in Belgium than in neighbouring countries.

The Report assessed the scale and the possible causes of the higher grocery prices in Belgium as compared to those in neighbouring countries and the European average. The characteristics of the Belgian supermarket sector were analysed, such as the size of supermarkets in Belgium, the concentration of the sector, its profitability and the ability to open new retail outlets. Also, the costs of the retail sector, in terms of personnel, procurement, tax, etc., were considered. The study also devoted attention to the impact of regulation: competition law, rules on establishment of new outlets, rules on sales at a loss, the regulation of opening hours, social regulation, etc.

The Report concluded that grocery prices were indeed higher in Belgium than in neighbouring countries (food was up to 12.5 % more expensive in Belgium than in the Netherlands).

The following factors were listed as explaining some of the price difference:

- VAT is slightly higher in Belgium than in neighbouring countries.
- Labour costs are slightly higher in Belgium than in neighbouring countries.
- Procurement costs are likely to be slightly higher in Belgium than in neighbouring countries.
- The characteristics of the retail market in Belgium with (1) the low profitability of one of the major retail chains (Carrefour), which prevents it from being aggressive on price, and (2) the “best price” policy of one of the other major retail chains (Colruyt), which reduces the incentive of other supermarkets to reduce prices.

The Report pointed out that the price difference between products in Belgium and the Netherlands was particularly noticeable in branded goods (as opposed to private label products). The Report indicated that suppliers of branded goods may also try to facilitate price discrimination between different countries.

The recommendations of the Report are as follows:

- Consumers should carefully choose between different retailers and between branded products and private labels to get the best deal.

¹³ Available on http://economie.fgov.be/nl/binaries/studie_prijsniveau_supermarkten_tcm325-163021.pdf and http://economie.fgov.be/fr/binaries/etude_niveaux_prix_supermarches_tcm326-163021.pdf.

- Consumer organisations should facilitate the comparison between different types of products (in particular, as regards quality).
- Local authorities should facilitate the opening of additional retail outlets (in particular, discounters).
- Competition authorities should look for possible restrictive practices (in particular, so-called hub-and-spoke infringements and illicit provisions in franchise agreements).
- The statistical services should speed up their analysis of price evolutions (e.g., by using scanner data).
- Employers and employees in the sector should reduce barriers to exit, increase the flexibility in trading hours and revisit the indexation of wages.
- The Belgian legislator should revise the prohibition on sale at a loss, increase the flexibility in franchise agreements and facilitate price comparison by consumers.
- The European authorities should develop tools to compare prices for identical goods in the European Union.

4.2 Competition Law Enforcement

4.2.1 Competition Law Enforcement Against Anticompetitive Horizontal and Vertical Agreements

4.2.1.1 Collusion Among Grocery Retailers

The Belgian competition authority has decided only two cases in relation to the conduct of grocery retailers in the last 5 years.

In the beginning of 2008, the Belgian Competition Council imposed a fine of EUR 29,121 on the Flemish association of bakeries because it had developed and published a bread price index with the aim of influencing the price level of bread.¹⁴ This fine has been annulled on procedural grounds by the Brussels Court of Appeal on 13 February 2013.¹⁵

On April 2011, the Belgian Competition Council decided on a report prepared by the Competition Prosecutors alleging that several Belgian supermarkets had coordinated price increases and exchanged sensitive information through the supplier Ferrero (so-called hub-and-spoke collusion). The Competition Council dismissed the case because it considered that the rights of defence of the companies involved had not been respected during the investigation.¹⁶ Note that a number of cases of the

¹⁴ Decision 2008-I/O-04 of 25 January 2008 in case MEDE-I/O-04/0045 Vlaamse Federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerders (VEBIC), available on <http://economie.fgov.be/ccrm.jsp>.

¹⁵ Judgment of the Brussels Court of Appeal of 13 February 2013 in case VEBIC VZW, not yet published.

¹⁶ Decision 2011-I/O-10 of 7 April 2011 in case CONC-I/O-08-0010B Hausses coordonnées chocolaterie, available on <http://economie.fgov.be/ccrm.jsp>.

Belgian competition authority have stranded in recent years because of procedural challenges.

In 2012, the Competition Prosecutors brought a new case for similar practices involving supermarkets and several suppliers of household, body care and hygiene products. The Prosecutors allege that, in the period between 2002 and 2007, 7 supermarket chains and 11 suppliers coordinated the resale price of some of the products concerned. This case is still pending.

4.2.1.2 Anticompetitive Horizontal Agreements Among Grocery Retailers at the Local Level

In terms of the geographic scope of anticompetitive practices, the Belgian Competition Act (and the new Code of Economic Law) provides that anticompetitive practices need to cover at least a substantial part of the Belgian market for such practices to be prohibited.¹⁷ The Belgian Competition Council has in the past analysed a franchise agreement for one retail outlet,¹⁸ which suggests that this criterion could be fulfilled even by practices at a local level. The Competition Council found in that case that there was no sufficient evidence of anticompetitive practices to grant the interim measures.

In its 2012 Report on the Price Level of Supermarkets, the Belgian competition authority pointed out that agreements to join a retail network often contain provisions preventing outlets from easily changing network and that the effects of these provisions would need to be analysed in further detail. No public information is available as to whether a more detailed analysis has taken place so far.

4.2.1.3 Resale Price Maintenance and Recommended Resale Prices

Since Belgian competition law needs to be interpreted in line with European competition law, the practice whereby a supplier recommends a resale price to a retailer is as such not prohibited. However, if recommended resale prices are combined with incentives for the retailer to apply the recommended price, this may be perceived as resale price maintenance and therefore prohibited.

The Belgian competition authority has not decided on cases concerning recommended resale prices by suppliers in the last 5 years.¹⁹

In case the company concerned is dominant, resale below cost and the de-listing of suppliers can constitute an abuse of dominant position under Belgian and European competition laws in the sense that they may constitute, respectively,

¹⁷ Article 2 § 1 of the Act on the Protection of Economic Competition and Article IV.1 § 1 of the Code of Economic Law.

¹⁸ Decision 2002-V/M-43 of 13 June 2002 in case CONC-V/M-02/2008 Interdamo S.A./ITM Belgium S.A. et Société Centrale d'Approvisionnement en Produits régionaux S.A., available on <http://economie.fgov.be/ccrm.jsp>.

¹⁹ Note, however, the case of the recommended resale prices of the Flemish bakery association discussed above.

predatory pricing and a refusal to deal. In case the company concerned is not dominant, these practices are not prohibited by competition law.²⁰

4.2.2 Abuse of Dominance

There are no recent cases on abuse of dominance in the grocery retail sector in Belgium. For the rules of abuse of dominance, Belgian competition law follows European competition law.

However, of note is the judgment of the Brussels Court of Appeal of 29 May 2012 ruling that press distributor AMP abused its dominant position by increasing a fee it charged to smaller press retailers because the increase was excessive as compared to the increase of AMP's costs.²¹ Based on this judgment, a price increase can be excessive if it exceeds the cost increase of the supplier.

4.2.3 Abuse of Buying Power, Abuse of Dependency

Belgian competition law needs to be interpreted in line with European competition law and under European competition law the prohibition to abuse a dominant position also applies to undertakings whose possible dominant position is established in relation to their suppliers.²² A dominant position can therefore also exist at the buyer's side.²³

The Belgian Competition Act does not contain a statutory definition of buyer power nor of a dominant position. However, Article I.6 of the new Code of Economic Law introduces the definition of the European Court of Justice in its judgment in case 322/81 *Michelin v Commission*: an undertaking is dominant if it is able to hinder the maintenance of effective competition and can behave to an appreciable extent independently of its competitors and customers or suppliers.²⁴

Just like European competition law, Belgian competition law does not contain a statutory definition of what constitutes an abuse of buying power or an abuse of dependency. However, Article 3 of the Belgian Competition Act (and Article IV.2

²⁰ See, however, the rules on resale at a loss in the Belgian Act on Market Practices and Consumer Protection of 2010 discussed above.

²¹ Judgment of the Brussels Court of Appeal of 29 May 2012 in case Prodipress, Buurtsuper.be and VFP/AMP, not yet published.

²² GC, case T-219/99, *British Airways v Commission*, ECR 2003 II-5917, pt 101.

²³ In fact, increased concerns of the European Commission on the existence of buyer power seem to have informed the inclusion of a market share threshold also at the buyer's level for agreements to benefit from the safe harbors of the Vertical Block Exemption Regulation. See Article 3(1) of Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23 April 2010, p. 1.

²⁴ ECJ, case 322/81, *Michelin v Commission*, ECR 1983 3461, pt 30.

of the new Code of Economic Law), just like Article 102 TFEU, contains instances of abusive behaviour that can also be committed by dominant purchasers, e.g. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (discrimination).

The 2012 Report on the Price Level of Supermarkets did not identify any situations of abuse of buyer power, and the Belgian competition authority has so far not decided on cases concerning abuse of buyer power in Belgium. The director general of the Belgian competition authority stated in May 2013 that the authority is more concerned by the lack of buyer power than by too much buyer power.²⁵

4.3 Merger Control

Changes of control over undertakings need to be notified to the Belgian competition authority if the parties to the concentration have combined turnover in Belgium exceeding EUR 100 million and if at least two parties to the concentration each have turnover in Belgium of at least EUR 40 million.²⁶ If a notification is made pursuant to the European merger regulation, no notification to the Belgian competition authority is required. There are no specific thresholds for merger control in the retail sector.

4.3.1 Market Definition in the Grocery Retail Sector

The Belgian competition authority systematically identifies the relevant market in grocery retail mergers as the market for the sale of daily consumer goods. Only outlets that sell a full range of daily consumer goods (food products, beverages, pet food, tobacco and domestic non-food goods) to the end consumer as their main activity are included in this market.

Until 2002/2003, the Belgian competition authority explicitly distinguished between retail outlets of different size (small retail outlets v supermarkets v hypermarkets). In more recent decisions, the authority seems to consider the entire grocery retail market as a whole, without distinction as to the format and the size of the outlet (presumably based on the wider geographic market definition discussed below).²⁷

²⁵ Statement of Jacques Steenbergen, director general of the Belgian competition authority, at the GCR Live's 4th Annual Competition Law, Consumer Goods and Retail conference of 14 May 2013, as reported on <http://globalcompetitionreview.com/news/article/33490/buyer-power-enforcers-concern>.

²⁶ Article 7 § 1 of the Act on the Protection of Economic Competition. See also Article IV.7 § 1 of the Code of Economic Law.

²⁷ The reasoning is made explicit in decision 2002-C/C-67 of 11 September 2002 in case CONC-C/C-02/0041 SA Onveco et SA Ets Fr. Colruyt/SA Diswel, SA Disbo, SA Disroche et SA Boucherie Pasquasy, available on <http://economie.fgov.be/ccrm.jsp>.

There is no statutory definition of product markets or of the kind of test that needs to be used to define product markets.

The Belgian competition authority has pointed out that the retail market for daily consumer goods can be defined locally, according to the catchment areas of each store. Until 2002/2003, the authority also explicitly analysed competition at this local level. However, in more recent decisions, the authority always concluded that the relevant geographical market for grocery retail was national due to the overlaps between the catchment areas of different stores and because of the existence of national commercial policies at the main supermarket chains.²⁸

There is no statutory definition of geographical markets or of the kind of test that needs to be used to define geographical markets.

4.3.2 Procurement Markets

In addition to the retail market, the authority in retail mergers also considers the procurement markets on which grocery retailers purchase their products. These procurement markets are defined from a supply-side perspective, such that, for example, beverages and fruit belong to different markets. These markets comprise sales not only to grocery retailers but also to other distributors (hotels, restaurants, specialised distributors, etc.).

The procurement markets for groceries have also been defined as national in scope.

4.3.3 Merger Control and the Growth of Grocery Retail Networks

The Belgian competition authority has so far not considered the concentration of grocery retail networks in Belgium to be problematic.

4.3.4 Countervailing Buyer Power as a Mitigating Factor for the Concentration of Suppliers

In one case, the Belgian competition authority has taken into account the buying power of grocery retail chains as a factor in a merger between suppliers. The parties to a 2012 merger between vegetable, fruit and flower auction houses argued that their transaction was partially motivated by the increased concentration of their customers (which include retail grocery stores and also specialised distributors and exporters). The Belgian Competition Council accepted the increased concentration

²⁸ *Ibid.*

on the demand side as one of the elements to conclude that the transaction would not result in any anticompetitive effects.²⁹

4.3.5 Merger Remedies

In case it considers that a transaction would result in a significant impediment to effective competition on the Belgian market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, the authority can make an approval decision subject to divestitures or behavioural remedies.

However, so far, the Belgian competition authority has not imposed any remedies in grocery retail sector concentrations.

4.4 Conclusion

Belgian competition law enforcement has been in a state of flux recently due to the procedural reforms that are being introduced by the new Code of Economic Law. Before introducing any further legislative changes in this field, it will be important to see how the new competition authority will take up its role.

However, it can be expected that the new system will place an additional burden on the Brussels Court of Appeal in terms of guaranteeing undertakings' rights of defence. The Brussels Court of Appeal is already short of adequate means today, and the reform risks increasing this bottleneck. This situation will need to be alleviated, through either budgetary or legislative means.

Outside of competition law, there are a number of regulations (e.g., on resale at a loss) that are not entirely in line with the spirit, if not the letter, of European law. It is recommended that these regulations are amended to ensure a uniform playing field across Europe.

²⁹ Decision 2012-C/C-30 of 30 November 2012 in case MEDE-C/C-12/0018 Mechelse Veilingen CVBA/Coöbra CVBA, available on <http://economie.fgov.be/ccrm.jsp>.