

***Market Court of Brussels Court of Appeal Confirms Finding of Infringement of Competition Rules by Professional Organisation of Pharmacists but Directs Belgian Competition Authority to Recalculate Fine***

On 8 January 2020, the Market Court (*Marktenhof/Cour des marchés*) of the Brussels Court of Appeal upheld the decision of the Belgian Competition Authority (the “BCA”) of 28 May 2019 finding that the professional organisation of pharmacists (*Orde der Apothekers/Ordre des pharmaciens* – the “PO”) infringed Article IV.1 of the Belgian Code on Economic Law (“CEL”) and Article 101 of the Treaty on the Functioning of the European Union (see, *Van Bael & Bellis Life Sciences Newsflash* of 5 June 2019 and *Van Bael & Bellis Life Sciences Newsflash* of 24 June 2019). The Market Court also held that the BCA misapplied the rules on the calculation of fines and referred the case back to the BCA for a recalculation of the fine.

The Market Court first explained what it considered to be its powers of judicial review on appeal from decisions of the BCA. According to the Market Court, these powers are limited to ensuring that the BCA (i) observed applicable procedural requirements; (ii) stated the principles on which its decision is based; (iii) accurately set out the facts and their legal qualification; and (iv) made no manifest error of assessment. The Market Court does not act as a regular appellate court.

In the case at hand, the Market Court found that the facts on which the BCA relied to adopt its decision could reasonably have caused the BCA to find that the PO had taken a range of exclusionary measures (including disciplinary proceedings and court proceedings) to thwart the development of Medi-Market, a successful retailer of both medicines and other, less regulated health products.

The Market Court went on to confirm that legitimate public-service obligations cannot serve as a pretext for anti-competitive behaviour. It found that the PO had diverted the task of general interest with which it had been entrusted (*i.e.*, maintaining compliance with the professional rules of ethics) in order to protect a traditional business model of the profession (*i.e.*, the activities of a solo pharmacist) and hamper the development of a new business model implemented by Medi-Market. On that basis, the Market Court dismissed PO’s action to annul the decision of the BCA in its entirety.

At the same time, the Market Court held that the BCA had erred in imposing a fine of EUR 1 million on the PO. According to the Market Court, the former version of Book IV CEL did not allow the BCA to calculate the fine cap of 10% by adding the turnovers of the members of the PO. This is because the former version of Article IV.70 CEL reads as follows: “*the Competition College may impose on each of the undertakings and associations of undertakings concerned, fines not exceeding 10% of their turnover*” (emphasis added).

The Market Court made short shrift of the similarities considered by the BCA between former Article IV.70 CEL and Article 15 of Regulation No 17 implementing Articles 85 and 86 of the Treaty. For the Market Court, it is clear from Article 5 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty that national competition authorities only have the power to impose the fines that are provided for in their national law. Hence, the BCA could only impose the fines provided for by Belgian law. Importantly, the Market Court added that the principle that penalties must be lawful requires that any text providing for a fine must be interpreted restrictively and not by analogy.

The Market Court therefore annulled the fine and referred the case back to the BCA which, in a different composition, will have to calculate a new fine. It is expected that the fine eventually imposed by the BCA will be reduced to around EUR 250,000.

The implications of this judgment are likely to be limited since the new version of Article IV.84 CEL explicitly states that "*the turnover of associations of undertakings shall be the total of the turnover of all the active members on the relevant market*".

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