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The Belgian Competition Authority fines the country's largest yeast producer for resale price maintenance and abuse of dominance (*Algist Bruggeman*)

UNILATERAL PRACTICES, BELGIUM, ABUSE OF DOMINANCE, RESALE PRICE MAINTENANCE, AGRICULTURE / FOOD PRODUCTS , REBATES, SELECTIVE PRICE-CUTTING

Belgian Competition Authority, Algist Bruggeman NV, Decision n° BMA-2017-I/O-07-AUD (settlement), 22 March 2017

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I. The Parties

Algist Bruggeman NV ('Algist') is the largest supplier of yeast products in Belgium. [1] Algist markets itself as a producer of high quality yeast products with a corresponding price positioning.

II. The Facts

In January 2013, the BCA opened an *ex officio* investigation after an informal complaint. In June 2013, dawn raids were carried out at the premises of Algist and one of its distributors. On the basis of the evidence collected, the BCA concluded that Algist had unlawfully secured its price positioning by implementing various cohesive practices and consequently infringed Belgian and EU competition law.

According to the BCA, Algist's core strategy between 2008 and 2013 was to impose minimum resale prices upon its distributors, which subsequently led to the elimination of intra-brand price competition between its distributors.

In order to avoid that competitors would undermine this strategy (i.e., to also restrict *inter-brand* competition) Algist used of the following anticompetitive means - possibly in combination with the exertion of pressure and the threat of sanctions in case of non-compliance - aimed at the exclusion and marginalization of low price brands of fresh yeast:

- a) A selective rebate policy targeting certain bakeries;
- b) Long-term exclusivity agreements with certain bakeries;
- c) Individualised exclusivity, loyalty and target rebates directed towards certain distributors; and
- d) The undermining of the reputation and stimulation to protest a public mention as distributor of a certain low price competitor, Basic Bakery.

After the initiation of settlement discussions between the BCA and Algist, a settlement decision was adopted on 22 March 2017. In exchange for a 10% fine reduction and a shortened procedure, Algist acknowledged that, from January 2008 to June 2013, it had engaged in the anticompetitive practices mentioned above.

III. The Decision

A. Relevant market

Fresh bakers' yeast is a basic ingredient used in the bread making process. The BCA's investigation made clear that the sale and supply of fresh bakers' yeast to semi-artisanal and artisanal bakeries in Belgium is not carried out directly by the producer, but through distributors. In line with the market conditions, Algist delivers fresh yeast to semi-artisanal and artisanal bakeries through an extensive network of local distributors.

Algist's practices were limited to the following types of fresh baker's yeast: stabilised liquid yeast and compressed yeast. In line with the European Commission ('EC'), the BCA holds that both are part of the same distinguished fresh baker's yeast market. [2]

B. Article 101 TFEU and Article IV.1 CEL [3] - Vertical Restraints

The BCA states that Algist infringed Article 101(1) TFEU (and its Belgian equivalent) by engaging in anticompetitive vertical restraints, in particular:

- a) Resale price maintenance ('RPM');
- b) Exclusive customer allocation; and
- c) Long-term exclusivity agreements.

1. Restraints impeding intra-brand competition [4]

RPM. Algist provided its distributors with recommended prices for the resale of fresh yeast to (semi-)artisanal bakeries. The investigation showed that Algist discouraged its distributors to deviate from these recommended resale prices, converting them into fixed resale prices.

Algist required its distributors to ask for permission to deviate from the 'recommended' resale price and grant a discount to bakeries. Rebates - including the actual level of the rebate - were only permitted in individual cases, where bakeries considered switching to competing yeast producers. Only these pre-approved discounts were reimbursed by Algist.

In addition, Algist made use of monthly sales overviews to monitor deviations. These reports informed Algist of the sale volumes sold and discounts granted by its distributors. In case of deviation, Algist was found to have repeatedly approached distributors who did not respect the 'recommended' resale prices and granted discounts without its prior approval.

The BCA holds that such system amounted to RPM, restricting *intra-brand* competition and leading to the elimination of price competition between the different distributors of Algist, as they were no longer incentivised to compete with one another on price. The consequence of such a system is a more stable price level, which allows distributors to achieve higher margins.

Customer allocation. Algist attempted to establish exclusivity for its distributors by discouraging them from supplying customers which had been allocated to another Algist distributor. If a distributor would serve customers allocated to another distributor, Algist would offer the latter additional rebates or would refuse or lower the rebates granted to the former.

Additionally, if a distributor would include low price yeast brands in its portfolio, Algist would reallocate that distributor's customers to another of its distributors.

2. Restraint impeding inter-brand competition [5]

Long-term exclusivity agreements with bakeries. Non-compete clauses were incorporated in individual agreements concerning the use of liquid yeast in small formats (Kastalia) and the sale of yeast dosing equipment installations. The clauses did not only concern the mentioned products but targeted all yeast requirements of the concerned bakery.

Those agreements contained long-term exclusivity obligations for, respectively, 1-5 years and 5-15 years. The non-compete clauses were automatically renewed when the minimum purchase requirement was not reached. [6] Moreover, it was contractually determined that in case of early termination, bakeries owed additional compensations in the form of removal costs as well as damages. This raises the switching cost a client needs to bear when changing supplier and aimed at tying the client to Algist for the full duration of the contract.

The BCA holds that such agreements could lead to the foreclosure of (potential) competitors. Especially, taking into account Algist's high market share, the duration of the exclusivity agreements and the high costs in case of early termination. In addition - and as indicated below-, the long-term exclusivity agreements were also found to amount to an abuse of a dominant position.

3. Non-applicability of Article 101(3) TFEU and Article IV.1 §3 CEL

Without an extensive analysis, the BCA holds that there were no elements which could justify the fulfilment of the cumulative conditions of Article 101(3) TFEU and Article IV.1 §3 WER.

C. Article 102 TFEU and Article IV.2 CEL - Abusive exclusionary practices (impeding *inter-brand* competition)

Early 2008, Basic Bakery entered the Belgian market for fresh yeast with an Enzyme-yeast branded as 'Extra'. Being confronted with a growing number of distributors wishing to add 'Extra' to their product portfolio, Algist reacted by engaging in a number of anticompetitive practices, aimed at the exclusion and marginalisation of low price yeast products.

Algist was found to have abused its dominant position by:

- a) Granting selective rebates to bakeries;
- b) Concluding long-term exclusivity agreements with bakeries;
- c) Granting individualised exclusivity, loyalty and target rebates to distributors; and
- d) Engaging in derogatory practices directed towards Basic Bakery.

Dominant position. The BCA found that Algist held a dominant position on the Belgian market for fresh yeast due to its constant plus 60% market share. In addition, Algist's market share was found to be at least twice that of the second biggest player on the relevant market.

Besides, the BCA notes that the market was characterized by the following significant entry and expansion barriers:

- a) The need for a well-established distribution network;
- b) Brand awareness and loyalty; and
- c) Switching costs for distributors that enjoy quantity rebates.

Individualised exclusivity and loyalty rebates with respect to distributors. The rebates - or other indirect forms of compensation, such as free yeast supplies and no passing-on of price increases - were determined on an individual basis. Only distributors that considered adding low price yeast products to their product portfolio were eligible for rebates.

Since there was no justification for granting such rebates, other than excluding low price yeast brands out of the distributor's portfolio, the BCA holds that such rebates are restrictive for competition.

Individualised retroactive loyalty-inducing target rebates with respect to distributors. Distributors which acquired (*quasi*) 100% of their purchases of fresh yeast of the previous year from Algist were eligible to enjoy year-end rebates. The rebates were awarded retroactively for all purchases of the past year.

The BCA holds that - considering the volume requirements and the reference period of one year - the rebates increased distributor's costs for switching supplier, and consequently enhanced the distributors' loyalty to Algist. The BCA concludes that such rebates are restrictive for competition.

Long-term exclusivity agreements with bakeries. As indicated above, the long-term exclusivity contracts were also found to amount to an abuse of dominant position.

Selective price rebates with respect to bakeries. Algist granted selective price rebates or free yeast supplies to bakeries who were considering switching or had already switched to low price yeast brands. The investigation uncovered that this behaviour started in 2008 - when Basic Bakery entered the market - and aimed at preventing market entry from this low price yeast supplier.

In exchange, bakeries had to continue purchasing compressed yeast from Algist or switch to an installation for stabilised liquid yeast from Algist. These rebates were individually determined taking into consideration the quantity of the purchases and importance of the bakery.

The BCA concludes that such conduct, seen together with the other practices, amounts to an abuse of dominance.

Undermining reputation of Enzyme-yeast. [7] Algist distributed internal reports, questioning the quality of Enzyme-yeast, the type of yeast distributed by Basic Bakery. These reports were the result of an internal investigation and were not complete nor supported by the findings of official instances.

According to the BCA, the purpose was to create uncertainty amongst the distributors and bakeries regarding the quality of Enzyme-yeast. The BCA qualifies such behaviour as derogatory since it could negatively influence the structure of the market by dissuading distributors and/or bakeries to purchase Enzyme-yeast.

The BCA holds that such conduct, seen together with the other practices, amounts to an abuse of dominance.

Mentioning as distributor of Enzyme-yeast. Preliminary, the BCA notes that foreclosure not only occurs where it is rendered impossible for a competitor to enter the market, but also when it is rendered more difficult to enter.

Algist encouraged distributors to object to their inclusion in the list of Enzyme-yeast distributors published by Basic Bakery. The BCA holds that this goes beyond competition on the merits as this conduct could have a negative impact on the market structure since distributors are an essential link in the distribution of yeast to (semi-)artisanal bakeries.

The BCA holds that such conduct, seen together with the other practices, amounts to an abuse of dominance.

IV. Comment

It is the first time the BCA considers derogatory practices by a dominant company to constitute an abuse. Earlier, the French Competition Authority found derogatory practices by dominant telecom and pharmaceutical companies to constitute an abuse if they were capable of negatively affecting the structure of the market. [8]

The test applied by the BCA - to determine whether such practices are anticompetitive - is to ascertain whether the behaviour *could* negatively influence the structure of the market. In other words, it is not necessary to prove that the behaviour had an actual anticompetitive effect but it suffices that it *could* have had such effect.

Given the use of such a vague benchmark, it will be interesting to observe how this test will be applied by the BCA - and potentially other NCAs - in subsequent cases dealing with derogatory practices. Will a (purely) hypothetical negative effect on the market structure be enough? Or should the effect be probable and/or appreciable?

Finally, the BCA holds derogatory practices to be abusive only if taken together with other infringements. It remains open, whether the BCA in the future will consider derogatory practices as an abuse of dominance *an sich*.

[1] Algist operates through a chain of subsidiaries - L.H.B. NV and Compagnie des Levures Lesaffre SA (*France*) - under its ultimate parent company Lesaffre et Compagnie SA (*France*).

[2] Case M.4980, 23 September 2008, *ABF/GBI Business*. The BCA agrees with the EC that, because of the low demand-side substitutability, three separate markets must be distinguished: (i) the market for dry yeast; (ii) the market for compressed yeast and stabilised liquid yeast (comprising compressed yeast and liquid yeast in small formats going from 22l to 300l containers); and (iii) the market for liquid yeast (in bulk).

[3] CEL: The Belgian 'Code of Economic Law'.

[4] *Intra-brand*: competition between different distributors of the same brand.

[5] *Inter-brand*: competition between different brands.

[6] Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, article 5.1, second paragraph: “*a non- compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.*”

[7] The BCA refers to the practice of the French Competition Authority concerning the undermining of a competitor’s reputation. Décision n° 07-D-33 du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l’accès à Internet à haut débit, para 77-78, <http://www.autoritedelaconurrence.fr/pdf/avis/07d33.pdf> ↗; Décision n°13-D-11 du 14 mai 2013 relative à des pratiques mises en œuvre dans le secteur pharmaceutique, para 368, with reference to case-law of the CJEU, <http://www.autoritedelaconurrence.fr/pdf/avis/13d11.pdf> ↗

[8] *Ibid.*