

The Belgian Competition Council bans a price-coordination mechanism in the retail bakery markets (VEBIC)

Belgique, Ententes, Resale price maintenance, Effect on interstate trade, Fixed price system, All business sectors

I. Parties

VEBIC is a professional association which comprises as its members all the Flemish provincial associations of bakers. Amongst the various activities it carries out on their behalf, VEBIC publishes a magazine entitled "Passie".

II. Facts

Until 1 July 2004, the price of breads in Belgium was set by a binding regulatory instrument. When, as a result of liberalisation measures, the price regulation mechanism was abandoned, VEBIC decided to set a "bread price index" which purportedly sought to inform VEBIC's members of the evolution of various costs (raw materials, energy, labour, etc) and, in turn, helped them calculate the price of bread. The index and its components were regularly communicated to VEBIC's members through the magazine "Passie" and other events. VEBIC's Members were encouraged to pass-on any costs increase to consumers and, accordingly, to raise the retail price for breads.

III. The decision

Shortly after the entry into force of the liberalisation measures outlined above, the Belgian ministry of economics (which had previously received complaints from consumers) asked the Competition Council ("the Council") to investigate whether Flemish bakers were not unduly prevented to set prices freely, as a result of anticompetitive agreements. The Council terminated its investigation in 2007 and issued a decision in early 2008. Dealing first with the issue of the rules applicable to VEBIC's activities, the Council found that its conduct did not affect trade between Member States. VEBIC was only active on the Flemish territory (the northern region of Belgium). In addition, foreign firms carrying out activities in Belgium were not required to be members of VEBIC. Thus, there was little, if any, cross-border competition and harm to competition was confined within a limited geographical area. Logically, the Council concluded that EC competition rules and, in particular, Article 81 EC, are not applicable. The case was therefore only examined under the Belgian Competition Act ("BCA").

Turning to the competitive assessment of the bread index price, the Council first held that VEBIC constituted an "association of undertakings" in the meaning of Article 2 of the BCA. The Council subsequently went on to state that whilst the exchange of information on costs through a professional association such as VEBIC was not necessarily anticompetitive - a statement which we believe must be carefully circumscribed to the facts of the present case - the bread price index went far beyond that. In a nutshell, VEBIC's members were accurately and swiftly informed of any increase in costs. Moreover, the cost variations were systematically disclosed in combination with the former binding public price (under the regulatory mechanism outlined above), thereby disclosing an updated aggregated price. VEBIC's members were therefore discouraged to individually compute their own bread price - and induced to mirror the evolution of the price index disclosed by VEBIC. The bread price index thus coordinated the bakers' pricing decisions on the market. Since,

according to the Council, price coordination is akin to naked price fixing, VEBIC's conduct constituted a per se violation of Article 2 of the Belgian Competition Act, regardless of its actual effects on the market.

IV. Comments

In our opinion, the Council's decision does not break new ground. On the contrary, the decision is reminiscent of well-known ECJ rulings. Non-binding decisions of associations of undertakings which purport to coordinate the behaviour of their members infringe competition rules (see ECJ, November 8th, 1983, *Iaz International Belgium v. Commission*, Joined Cases 96/82, 97/82, 98/82, 99/82, 100/82, 101/82, 102/82, 104/82, 105/82, 108/82 and 110/82, [1983] ECR 3369 and ECJ, January 27th, 1987, *Verband der Sachversicherer e.V. v. Commission*, Case 45/85, [1987] ECR 405).

Should VEBIC have simply provided an instrument assisting bakers in performing individual calculations, it would not have been found guilty of anticompetitive behaviour (Commission Decision 69/438 of June 5th, 1996, *Fenex*, OJ L 181 of July 20th, 1996, 28-36).

We believe, however, that the Council's decision witnesses the features of a new era for Belgium's competition policy. For decades, the enforcement record of Belgium's competition authorities has remained weak and cryptic. The present decision, in targeting what economists label a "mass-market", conveys the signal that Belgian's competition officials are now committed to enforcing competition rules pro-actively, in order to deliver "real added value" for the consumers (see Nicolas Petit, Jacques Steenbergen, *Un avocat à la tête de l'autorité belge de concurrence*, *Concurrences*, n°176; 3-2008).

NB. See also

Jacques Derenne and Mariëtte Swart, *The Belgian Competition Council issues first fine under the 2006 Competition Act for recommended prices*, *e-Competitions*, n°176; 15515

Henri Piffaut and Stéphane Dewulf, *The Belgian Competition Council fines € 29,000 a professional association for the publication of a price index (VEBIC)*, *25 e-Competitions*, n°176; 16736

Nicolas Petit | Law Faculty - IEJE (Liege) | nicolas.petit@ulg.ac.be
Robbe Verbeke | IEJE, Law University (Liege) |