Belgium

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1 Introduction

A recent book titled *Digital Competition Law in Europe* reviewed the work of the European Commission (EC) and a number of Western European national competition authorities (NCAs), namely the UK, French, German, Dutch and Belgian ones. The chapter on Belgium was by far the shortest, with the authors explaining with regard to its NCA:

> The 'BMA-ABC' is not visibly active in respect of issues surrounding digital competition. … To date, its track record has been limited to a single cartel procedure. The BMA-ABC started an investigation in 2016 under both the cartel prohibition and the prohibition of abuse of a dominant position into the most popular real estate site in Belgium, 'Immoweb'.[2]

This statement is not necessarily wrong if one interprets 'digital competition' very restrictively. Indeed, *Immoweb* can be considered the only case concerning *online platforms*. However, these days, every market and every form of competition is to some extent digital. Then again, reviewing every single case by the Belgian Competition Authority (BCA) is not feasible or useful either. This work tries to strike a balance between an overly restrictive and an overly broad view of case law in digital markets.[3]

At the same time, it must be acknowledged that the BCA has not taken up the kind of digital cases that would make international news headlines, in contrast to some of the neighbouring NCAs such as the Dutch Authority for Consumers & Markets (ACM) and the German Bundeskartellamt. Nevertheless, a focus on the work of the BCA is useful, both nationally, to evaluate its work, and internationally, to learn from legal assessments, the value of which is independent from the 'size' of the case.

Therefore, this chapter takes a deep dive into the work of the BCA in digital markets. I take a broader view of 'digital' than some by examining cases both where the market is eminently digital (e.g. search engines) or where the conduct is digital, even in a market not traditionally considered digital (e.g. lotteries). Cases regarding more traditional digital markets such as telecommunications and media are functionally included, but do not constitute this work's focus. Finally, I focus on *conduct* cases (restrictive agreements and abuse of dominance), but merger cases are examined when useful to inform broader points (e.g. regarding market definition and power).

This work is structured as follows. Section 2 reviews institutional aspects of the BCA, and how they (can) inform its work in digital markets. Section 3 then moves onto a substantive assessment. It first deals with the preliminary questions of market definition and power (Section 3.1) and then examines selected issues of anticompetitive conduct (Section 3.2). Those issues are selected based on the BCA's work so far and include self-preferencing, use of data, most favoured nation clauses (MFN clauses/MFNs) and new (*ex ante*) regulation. Section 4 concludes.

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[1] In accordance with the ASCOLA Transparency and Disclosure Declaration, the author has nothing to disclose.
[2] M. Wiggers, R. Struijlaart and J. Dibbits, Digital Competition Law in Europe: A Concise Guide, Kluwer 2019, Chapter 7.
[3] This view is also taken in R. Alderweireldt, J. Froidmont, A. Lepièce and D. Van Liedekerke, Belgium, In: D. Mândrescu (ed.), EU Competition Law and the Digital Economy, Eleven International Publishing 2020, pp. 105–130. The author acknowledges reliance on this work, in particular for case selection.

2 Institutional Aspects: From Advocacy to Case Law in Digital Markets

To understand the work of the BCA, one needs to understand its structure.[4] In contrast to the EC, the BCA has a dual structure: it consists of an investigative service, the Investigation and Prosecution Service ('Auditoraat' or 'Auditorat') and a decision-making body, the Competition College ('Mededingingscollege' or 'Collège de la Concurrence'). Depending on the case in question, the investigative service can adopt a decision itself or has to present its case to the decision-making body.[5] An important role is also played by the President, who is part of the Board and presides over the Competition College. Since the BCA became an autonomous institution in 2013, Jacques Steenbergen has fulfilled this role.[6]

Advocacy is a crucial part of the President's mandate. This is reflected in the law, which charges the President with contributing to national and international competition policy,[7] but also gives them the power to informally opine on questions and disputes regarding the application of the competition rules.[8] This power has been used in the digital sphere. In 2011, the Belgian economy minister urged the BCA to investigate a potential abuse of dominance by Apple, which required iPad users to subscribe to newspapers via iTunes.[9] An informal arrangement was reached with Apple, under which publishers were free to offer iPad users subscriptions outside of Apple's distribution channel.[10]

Interestingly, the obligation to use Apple's distribution channels and in particular its App Store rages on to this day. The EC is investigating "the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps."[11] The ACM is investigating whether Apple violated "the prohibition of abuse of dominance, for example, by giving preferential treatment to its own apps."[12]

These continued investigations highlight the strengths and weaknesses of informal arrangements. One strength is the speed of intervention, which is especially important in digital markets, where a dominant position can be attained quickly (through anticompetitive conduct), after which it can be difficult to restore the pre-existing competitive situation. Further, they allow a small competition authority to punch above its weight. On the other hand, informal arrangements offer less legal certainty, given the lack of precedent. And partially settled issues may return later, requiring a decision rather than opinion.

In a Joint Memorandum with the ACM and the Luxembourgish Conseil de la Concurrence, the BCA argues for an extension of guidance procedures. The Benelux NCAs note that "[t]he digital economy and other

[4] See Wetboek Economisch Recht (hereafter: Code of Economic Law or CEL), arts IV.16–29.
[5] The Competition College decides on infringement cases that are not settled or closed by the Investigation and Prosecution Service as well as non-simplified merger control procedures.
[6] Before that, from 2007 to 2013, he already served as director general of the directorate general for competition in the Belgian ministry of economic affairs.
[7] Jacques Steenbergen has done so not only through active cooperation with national (e.g. parliament) and supra-/international (e.g. ECN, ICN, OECD) institutions, but also by being a frequent speaker at conferences. See BCA, Annual Report (2019), pp. 28–30.
[8] Code of Economic Law, art IV.19, §1, 5°.
[9] Euractiv, Belgium to launch antitrust probe on Apple's iPad (18 January 2011), available at https://www.euractiv.com/section/competition/news/belgium-to-launch-antitrust-probe-on-apple-s-ipad/ last accessed 10 February 2021.
[10] BCA, Annual Report (2011), p. 12. At present, this arrangement appears formalized in Article 3.1.3(a) "Reader" Apps of the App Store Review Guidelines, available at https://developer.apple.com/app-store/review/guidelines/ last accessed 10 February 2021.
[11] EC, Commission opens investigations into Apple's App Store rules (16 June 2020) IP/20/1073.
[12] ACM, ACM launches investigation into abuse of dominance by Apple in its App Store (11 April 2019), available at https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store last accessed 10 February 2021.

fast-moving markets confront us with the challenge of having a real impact on market behaviour within a time period that meets the legitimate expectations of stakeholders."[13] Therefore:

> We propose to examine the possibility of developing an approach that would allow the European Commission and Member State competition authorities to sidestep the infringement route in a much less formal and fast track commitment procedure, e.g. as a development of the practice under article 10 of Regulation 1/2003 or in line with the Notice on informal guidance.[14]

In 2020, the BCA adopted a new communication regarding the President's informal opinions.[15] Among others, an opinion can only be requested on novel legal questions of societal importance on which there are no pending procedures. Questions on competition law in the digital economy often fulfil the first limb of that test. The opinions are published on the BCA's website, which promotes legal certainty.

However, it remains to be seen whether the BCA will take up more digital cases in the future. Its 2020 Guidance did mark the digital economy as one of its enforcement priorities, referring to the Joint Memorandum discussed above.[16] Of course, the complexity of (certain) digital cases implies they require sufficient resources. On this point, the BCA's President remarked laconically that the authority's "lack of resources is not limited to digital cases."[17] Moreover, given the nature of the products and services involved, digital cases often do not have a local nexus. Therefore, an EU rather than national solution may often be preferable.

The above reasons for not pursuing digital cases were reflected in the *Dialo/Google* decision (2012), in which the BCA's investigative service chose not to examine the complaint of a classified ads website that it was discriminated against in Google's search results.[18] One reason for not taking up the case was the fact that Google's ranking algorithms are global and the BCA is thus not the best placed authority to remedy any problem. Moreover, an investigation would require significant resources, and the EC had already started investigating similar conduct in 2010.[19]

These reasons against taking up digital cases continue to apply. It is an open question whether the updated enforcement priorities change the BCA's calculus.

3 Substantive Assessments in Digital Markets

Now that I have surveyed the more institutional aspects of the BCA's approach to digital markets, the next sections examine the BCA's more substantive assessments. Section 3.1 investigates the preliminary steps of defining markets and establishing market power. Section 3.2 delves into questions of conduct, in particular restrictive agreements and abuse of dominance.

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[13] Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world, p. 4, available at https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities last accessed 10 February 2021 (hereafter 'Joint Memorandum of the Benelux NCAs').

[14] Ibid, p. 5 (the Memorandum reads "allowsthe"—an apparent typo that has been corrected here).

[15] Mededeling van de Belgische Mededingingsautoriteit betreffende de informele zienswijzen van de voorzitter van de Belgische Mededingingsautoriteit, Official Gazette 2020, N. 143, p. 37397.

[16] Het prioriteitenbeleid van de Belgische Mededingingsautoriteit voor 2020, available at https://www.bma-abc.be/nl/over-ons/publicaties/nota-prioriteitenbeleid-2020 last accessed 10 February 2021 (hereafter 'Prioriteitenbeleid Belgische Mededingingsautoriteit 2020'). Such a priority was absent most of the preceding years, see the review of 2014–19 in R. Alderweireldt, J. Froidmont, A. Lepièce and D. Van Liedekerke, Belgium, In: D. Mândrescu (ed.), EU Competition Law and the Digital Economy, Eleven International Publishing 2020, p. 109.

[17] OECD, Abuse of dominance in digital markets – contribution from Belgium (2020) DAF/COMP/GF/WD(2020)2, p. 3.

[18] BCA, Decision 2012-P/K-07-AUD, *SPRL Dialo/SA Google Belgium* (17 April 2012).

[19] EC, Commission probes allegations of antitrust violations by Google (30 November 2010) IP/10/1624.

3.1 Market Definition and Power in Digital Markets

One important feature of digital markets is the presence of online platforms. Those platforms can be defined as intermediaries connecting two or more user groups (the 'sides' of the multisided market).[20] A useful distinction can be made between *matching* platforms, which connect two user groups (buyers and sellers) for the purpose of a transaction, and *advertising* platforms, which connect two user groups so that one can serve the other ads. While Amazon Marketplace and the App Store are examples of the former, Google Search and Facebook illustrate the latter. To maximize participation, platforms maintain an uneven price structure, which often means that one of the user groups does not pay any price. Consumers using Google or Facebook, for example, receive the service for 'free'. 'Free' requires quotation marks because these users do provide consideration, in particular their data (on the basis of which ads are targeted) and their attention (to view the ads they are served)—two valuable commodities.

When it comes to market definition in the case of online platforms, various questions arise, but two stand out: how *many* markets should be defined, and can a market for *free* services even be defined? Let us look at how the BCA has answered each question, while putting those answers in their broader context.

Firstly, on the question of how *many* markets need to be defined, the research of Filistrucchi et al. has been defining. They held that in case of advertising platforms, two (interrelated) markets need to be defined, and in case of matching platforms, only one market should be defined.[21] This rule of thumb has also been followed by NCAs and the EC.[22] The EC, for example, has defined a single market for matching platforms such as app stores,[23] while suggesting at least two markets for advertising platforms such as search engines.[24]

The BCA, too, has defined markets in line with this distinction. In *Immoweb* (2016), the BCA's investigative service assessed MFN clauses maintained by a real estate intermediation website (see further Section 3.2.3 below). The investigative service explicitly qualified the real estate website as a 'matching platform' operating in a multisided market, with sellers on one side and buyers on the other.[25] Consequently, it defined a single market for 'online real estate portals'.[26] In cases regarding advertising-funded media, by contrast, the BCA defined two markets: one for the delivery of content (e.g. television), another for the sale of advertising.[27]

Secondly, there is the question of *free* services—can they constitute the basis of a market? The question has a more fundamental aspect (can there even be a market for non-priced services?) and a methodological aspect (how do you go about defining such markets?).

Importantly, most online platforms only offer a free service to *one* user group (e.g. social media users), while charging the other (e.g. advertisers). In case of matching platforms—where a single market is

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[20] See J.-C. Rochet and J. Tirole, Platform competition in two-sided markets, Journal of the European Economic Association 2003(4), pp. 990–1029 for the foundational article.
[21] L. Filistrucchi, D. Geradin, E. van Damme and P. Affeldt, Market definition in two-sided markets: theory and practice, Journal of Competition Law and Economics 2014(2), pp. 293–339.
[22] See e.g. Bundeskartellamt, The market power of platforms and networks (Working Paper 2016), pp. 25–32.
[23] *Google Android* (case AT.40099) Commission Decision, where the EC acknowledges the market for Android app stores is multisided (para 638), serving both OEMs and developers—as well as consumers, but since the abuse was not consumer-facing, this side was largely left out of focus. The EC considered substitutability from these different perspectives (in particular paras 284–294), but ended up defining a single market for 'Android app stores'.
[24] *Google Search (Shopping)* (case AT.39740) Commission Decision, para 159, where the EC acknowledges that "[g]eneral search services and online search advertising constitute the two sides of a general search engine platform" (para 159), but then focuses only on the market for general search services (in which the abuse took place).
[25] BCA, Decision ABC-2016-I/O-31-AUD, *Immoweb* (7 November 2016), paras 9–21.
[26] The BCA relied on Bundeskartellamt, Decision B6-39/15, *Immowelt/Immonet* (20 April 2015). The investigative service also recognized the advertising functionality of online real estate portals (and tested its substitutability with others means of advertising), but found the matching function predominant.
[27] See recently BCA, Decision BMA-2019-C/C-16, *Telenet Group BVBA/De Vijver Media NV* (13 May 2019). The BCA also defined other (e.g. upstream) markets, but those are less important for our purposes.

defined—the need to define a non-priced market does not arise; in case of advertising platforms—with two markets, one of which has no price—it does. By analogy with its cases in media sectors, the BCA would define a market on the non-paying side, e.g. for general social networks or horizontal search services. The mistaken idea that there cannot be a market for non-priced services has been properly dispelled across the EU.[28]

However, defining non-priced markets comes with methodological difficulties. Obviously, a SSNIP test is not workable when the price of the product in question is zero: a 5% increase would not change the price and thus demand. Yet, while suppliers of zero-priced services do not compete on price, they do compete on other dimensions such as quality. Based on this idea, competition authorities have relied on the alternative SSNDQ test, which seeks to measure shifts in customer demand in response to a quality degradation rather than a price increase.[29] Recognizing that precise quantitative measurements are all the more difficult in case of quality degradations, however, authorities have mostly relied on more qualitative evidence of substitutability such as consumer surveys, internal business documents and views from the industry.[30] Going forward, the BCA's President recognizes that we may need "a different kind of economics" and in particular more behavioural economics, which may be useful to define non-price markets.[31] Given such challenges, the BCA has also called for updated guidelines.[32]

Finally, the BCA is well-aware of the indicators of market power in digital markets, although it did not have many opportunities to apply that knowledge in practice yet. The *traditional* indicators of market power include market share and barriers to entry such as economies of scale. When it comes to market share in digital markets, the BCA has estimated that share based on the number of daily visitors of the platform, rather than more classic measures such as sales volume/value.[33] Regarding barriers to entry, the BCA has identified direct and indirect network effects (and the winner-takes-most dynamic they lead to) as well as access to data as particularly important in digital markets.[34] The dynamic, fast-moving nature of digital market power *can* make market power transient, but that process should be assessed on a case-by-case basis—not assumed.

3.2 Restrictive Agreements and Abuse of Dominance in Digital Markets

Given the relative paucity of cases originating in digital markets handled by the BCA, it is impossible to give a comprehensive account of how the authority *has* assessed—let alone *will* assess—the various kinds of potentially anticompetitive conduct under the provisions relating to restrictive agreements (Article IV.1 CEL/101 TFEU) and abuse of dominance (Article IV.2 CEL/102 TFEU). Still, by combining the limited decisional practice with policy documents and past experience, an incomplete yet informative picture emerges. In what follows, I survey the most relevant and interesting developments, including self-

[28] The EC regularly defines markets for non-priced services such as messaging apps, see e.g. *Facebook/WhatsApp* (case M.7217) Commission Decision, paras 20–34. In Germany, legislators left no room for doubt when they amended their Competition Act to state that free services can constitute a market, see Act against Restraints of Competition, §18(2a) ("The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.").
[29] See e.g. *Google Android* (case AT.40099) Commission Decision, paras 284–322 and 483–566.
[30] On this difficulty, see J. Crémer, Y.-A. de Montjoye and H. Schweitzer, Competition policy for the digital era (Special Advisers' Report 2019), p. 45 ("it is unclear how this test could be made operational in practice without a precise measurement of quality … and without a way to quantify the effects of the quality degradation on the firm's revenues in order to determine whether such a degradation would be profitable").
[31] J. Steenbergen, On competition policy and online markets, European Competition and Regulatory Law Review 2019(1), VII.
[32] Joint Memorandum of the Benelux NCAs, p. 6.
[33] BCA, Decision ABC-2016-I/O-31-AUD, *Immoweb* (7 November 2016), paras 22–27.
[34] See *inter alia* Prioriteitenbeleid Belgische Mededingingsautoriteit 2020; Joint Memorandum of the Benelux NCAs; and BCA, Decision BMA-2019-C/C-16, *Telenet Group BVBA/De Vijver Media NV* (13 May 2019) for an application, in particular regarding the role of data.

preferencing, the role of data (protection), MFNs, and regulatory changes that may help tackle the challenges of digital markets.

3.2.1 Self-Preferencing by Gatekeepers

One idea gaining traction is that certain online platforms, in particular the so-called GAFAM (Google, Amazon, Facebook, Apple, Microsoft) serve as 'gatekeepers' to the online ecosystems they manage.[35] An app developer, for example, has to go through the App Store to reach iPhone users; a business wanting to be found online needs to show up on Google. At the same time, these platforms compete with the businesses on their platform ('suppliers'), e.g. by providing their own apps or specific search services ('verticals'). This can lead to a conflict of interest, whereby the platform has an incentive to preference its own products over those of suppliers, e.g. by algorithmically ranking them higher than competing offers. Such conduct is at the heart of the EC's *Google Shopping* decision and ongoing *Amazon Marketplace* investigation, both under Article 102 TFEU.[36]

The BCA has stated that it "do[es] not consider self-preferencing to be a new theory of harm."[37] Indeed, self-preferencing is only a specific application of vertical foreclosure that raises rivals' costs.[38] The mechanism does not differ much, for example, from retailers producing private label goods and distributing them in competition with goods from suppliers, which it may then have an incentive to discriminate against (e.g. through shelf placement). The BCA has studied this exact mechanism in the supermarket sector, noting its potential pro- and anticompetitive effects.[39] One important difference, however, is that—at least in Belgium—supermarkets are unlikely to be dominant given the existence of at least three national chains and some smaller but significant players.[40] Some of the aforementioned platforms are likely dominant in their respective markets, which may alter the balance between the pro- and anticompetitive effects of self-preferencing.

3.2.2 Access to and Use of Data

In addition to self-preferencing (through ranking algorithms and otherwise), the access to and use of data is a growing concern. As mentioned in the previous section, the BCA recognized data as a potential source of market power in digital markets. However, it can also be a source of anticompetitive conduct and in particular abuse of market power, both of an exclusionary and an exploitative nature.[41]

Firstly, data can be used in an exclusionary manner. For example, an online marketplace may rely on the data it gathers on its sellers' products and sales to then produce and sell competing products. This is a form of self-preferencing, which is part of the aforementioned Amazon investigation.[42] Once more, an analogy

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[35] See Joint Memorandum of the Benelux NCAs, pp. 5–6.
[36] *Google Search (Shopping)* (case AT.39740) Commission Decision and EC, Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (10 November 2020) IP/20/2077.
[37] OECD, Abuse of dominance in digital markets – contribution from Belgium (2020) DAF/COMP/GF/WD(2020)2, p. 3, describing how it "imposed e.g. remedies with regard to self-preferencing in respect of data access on a cable network for the operator and third party customers in a merger case" (presumably referring to BCA, Decision BMA-2019-C/C-16, *Telenet Group BVBA/De Vijver Media NV* (13 May 2019), see discussion under next section).
[38] See T. Krattenmaker and S. Salop, Anticompetitive exclusion: raising rivals' costs to achieve power over price, The Yale Law Journal 1986(2), pp. 209–293.
[39] BCA, Prijsniveau in supermarkten (Study 2012), pp. 88–91.
[40] Moreover, the online interface offered by online platforms may offer more effective and certainly more subtle opportunities for exclusion than those of supermarkets.
[41] Great reliance on data and the algorithmic processing thereof can also have important consequences for the assessment of restrictive agreements. For example, it may make markets more transparent, which can increase the risk of collusion. However, given the lack of cases dealt with by the BCA in this area, the focus is on abuse of dominance.
[42] EC, Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (10 November 2020) IP/20/2077.

can be made with supermarkets, which also have access to large amounts of data on their retailers, which can be used to outcompete them.[43]

In *The Great Circle* (2019), the BCA had to rule on a case concerning access to data.[44] The Great Circle sought access to raw meteorological data from the Royal Meteorological Institute, which it needed to operate its maritime navigation software SQUID. The refusal to supply was allegedly discriminatory, given that the Institute did furnish The Great Circle's competitors with such data. However, the BCA rejected the request for interim measures, given that The Great Circle could not establish a *prima facie* case. In particular, it was unclear whether the Institute had a dominant position on the relevant market for the commercial supply of digital meteorological information. The data was not perceived to be *unique*—a measure that other NCAs also rely on to decide questions of data access.[45]

In the earlier *Nationale Loterij* case (2015), the issue was not access to but rather the use of data.[46] The National Lottery, which held a statutory monopoly for public lotteries, increasingly had to compete against undertakings in the related market for sports betting. In doing so, however, it relied on advantages of its statutory monopoly. In particular, it used consumer data gathered through its monopoly activity (including e-mail addresses) to promote its competitive activity. In addition, it requested data on competitors from the distributors of its lottery tickets. The BCA's investigative service found that the cross-use of data may have distorted competition in the sports betting market and thus constituted an abuse of dominant position.

Secondly, data-related practices can be exploitative. Of primary importance here is the *Facebook* decision by the Bundeskartellamt, in which it found that Facebook abused its dominant position by combining the data gathered on users via its main social network with data collected via its other properties (Instagram and WhatsApp) and other websites (*inter alia* those that integrate its 'like' or 'share' application programming interfaces).[47] However, the BCA appears unlikely to follow its example. In the first place, exploitative cases are significantly more difficult to bring than exclusionary cases, even more so when they relate to data rather than price.[48] The recent amendment of Belgian competition law (see Section 3.2.4 below) may, however, change this. In the second place, data exploitation cases raise questions regarding the interaction of competition and data protection law. The EC has held that "privacy-related concerns flowing from the increased concentration of data … do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."[49] While the Bundeskartellamt views things differently, the BCA appears more likely to follow the EC's line.

Of course, that does not mean the BCA is oblivious to questions of data protection. The primary example is its *Telenet/De Vijver Media* decision, in which the BCA approved—with commitments—a merger between a content provider and a distributor. One concern was that Telenet would use the viewing data it gathered as a content distributor to improve its offering as content provider, to the detriment of competing providers. Telenet relied on the General Data Protection Regulation (GDPR) to argue against a potential commitment to share viewing data with competing content providers.[50] Interestingly, the BCA considered this not just an issue of data access but also one of self-preferencing, depending on whether the data was gathered via Telenet's own channels, or whether it was gathered via other channels in its role as

[43] BCA, Prijsniveau in supermarkten (Study 2012), pp. 88–91.
[44] BCA, Decision ABC-2019-V/M-10, *SPRL The Great Circle/l'Institut Royal Météorologique* (15 February 2019).
[45] See in particular Autorité de la concurrence and Bundeskartellamt, Competition law and data (Joint Report 2016), pp. 18 (data can meet the conditions of the refusal to supply doctrine if it is "truly unique and … there is no possibility for the competitor to obtain the data that it needs to perform its services.").
[46] BCA, Decision BMA-2015-P/K-27-AUD, *Stanleybet Belgium NV et al./Nationale Loterij NV* (22 September 2015).
[47] Bundeskartellamt, Decision B6-22/16, *Facebook* (6 February 2019). Note that the decision is still under appeal.
[48] For a discussion that includes the *Facebook* decision, see Friso Bostoen, Online platforms and pricing: adapting abuse of dominance assessments to the economic reality of free products, Computer Law & Security Review 2019, pp. 273–80.
[49] *Facebook/WhatsApp* (case M.7217) Commission Decision, para 164.
[50] BCA, Decision BMA-2019-C/C-16, *Telenet Group BVBA/De Vijver Media NV* (13 May 2019), pp. 207–210. It argued viewing data constitutes personal data, and that sharing such data would infringe various GDPR provisions.

distributor.[51] To address both concerns, commitments were imposed under which Telenet was forced to give other content providers access to data *and* was limited in the way it could use data gathered via the channels it distributed.[52] Furthermore, the BCA has cooperated closely with the Belgian telecommunications regulator in the past,[53] and could extend such cooperation to the Belgian data protection authority.

3.2.3 Most Favoured Nation Clauses

The most prominent efforts of the BCA in digital markets relate to MFNs implemented by online platforms.[54] In 2016, the BCA participated in a monitoring exercise of MFNs in the hotel sector, and also dealt with a case on MFNs in the real estate sector.

Together with the EC and nine other NCAs, the BCA was involved in a monitoring exercise in the hotel sector, [55] the results of which were published in 2017.[56] NCAs had been investigating MFNs agreed between hoteliers and online platforms since 2010. The general approach was to prohibit *wide* MFNs, which oblige hotels to offer their rooms on platforms such as Booking.com at the lowest prices (and best availability) relative to *all* other sales channels. By contrast, *narrow* MFNs, which allow hotels to offer lower room prices on other platforms and offline but prevent them from publishing lower prices on their own websites, were generally allowed.[57] The heads of the European Competition Network (ECN)—who commissioned the report—held that the enforcement efforts were "go[ing] in the right direction" but decided to keep the online hotel booking sector under review.[58]

Also in 2016, the BCA's investigative service intervened in the real estate sector.[59] Immoweb, the main real estate platform, included MFN clauses in its contracts with software developers, who in turn intermediated between the Immoweb and real estate agencies by listing their offers. According to these MFNs, the developers had to ensure the financial conditions of their offers on Immoweb were equally or more favourable than those accorded to other partners. These clauses restricted competition between real estate platforms: given that real estate offers could not be more favourable than those posted on Immoweb, competing platforms had no incentive to implement lower commission fees (as those would not affect the final price). The BCA suggested the MFNs infringed Article 101 TFEU and—given Immoweb's apparent dominance—also Article 102 TFEU (and Belgian equivalents). While a preliminary assessment thus showed anticompetitive/illegal conduct, the case was closed when Immoweb committed to withdraw the MFNs and not reintroduce them for a period of five years.

In 2018, the Belgian regulatory landscape regarding MFNs shifted again. This time, not the BCA but the Belgian parliament intervened, adopting a law regarding "the freedom of tariffs by hoteliers in contracts

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[51] Ibid, pp. 228-229, referencing CFI, case T-201/04, *Microsoft v Commission*, EU:T:2007:289 and *Google Search (Shopping)* (case AT.39740) Commission Decision.
[52] BCA, case MEDE-C/C-19/0006, *Liberty Global / De Vijver Media* – Voorstel Verbintenissen (8 mei 2019), Section F.
[53] Based on Koninklijk besluit betreffende de samenwerking tussen het Belgisch Instituut voor Postdiensten en Telecommunicatie enerzijds, en de Belgische Mededingingsautoriteit anderzijds, Official Gazette 2014, N. 198, p. 53403.
[54] On this topic, see F. Bostoen, Most favoured nation clauses: towards an assessment framework under EU competition law, European Competition and Regulatory Law Review 2017(3), pp. 223–236.
[55] BCA, Resultaten van de monitoring in de hotelsector (6 April 2017), available at https://www.belgiancompetition.be/en/node/5779 last accessed 10 February 2021.
[56] EC, Monitoring exercise carried out in the online hotel booking sector by EU competition authorities (Report 2017), available at https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf last accessed 10 February 2021.
[57] Among others, narrow MFNs prevent free-riding by hotels. The Bundeskartellamt is an exception, as it also prohibited *narrow* MFNs in the case of Booking.com. It justified this diverging position by pointing to the specific nature of the German market and the failure of Booking.com to substantiate its efficiency claims, see OECD, Hearing on across platform parity agreements – note by Germany (2015) DAF/COMP/WD(2015)56, pp. 9–10.
[58] EC, Outcome of the meeting of ECN DGs (17 February 2017), available at http://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf last accessed 10 February 2021.
[59] BCA, Decision ABC-2016-I/O-31-AUD, *Immoweb* (7 November 2016), paras 9–21.

concluded with platform operators for online reservation".[60] As its name implies, this law prohibits platform operators from restricting in any way—e.g. through MFNs—the price-setting freedom of hotel owners (when the property is located in Belgium).[61] However, it goes further than most NCAs by prohibiting not only *wide* but also *narrow* MFNs, albeit it only in *one* sector.

This interaction between competition law enforcement and *ex ante* regulation is also increasingly observed at EU level. The recent EC proposal for a Digital Markets Act (DMA) is the most prominent example of this dynamic.[62] This proposal too includes a provision on MFNs. In particular, it obliges certain platforms ('gatekeepers') to "allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper".[63] Given its reference to "third party online intermediation services", this ban would be limited to *narrow* MFNs, but it would apply horizontally to *all* sectors.

3.2.4 Abuse of Dominance Without Dominance—and Even Without Abuse

A growing number of policymakers and scholars are concerned that the current provisions on abuse of dominance are insufficient to remedy harms in the digital economy. Some rely on institutional reasons, zooming in on the speed of intervention, and argue for the increased use of interim measures, among others.[64] Unlike the EC, it must be noted that the BCA has repeatedly used its powers to impose interim measures.[65] Others call for substantive reform, arguing that the requirements of (proving) market power and abuse lead to underenforcement. In Belgium, policy has been shifting on both fronts.

Firstly and most importantly, in 2020, the Belgian law on abuse of economic dependence entered into force.[66] This law is stricter than the EU's abuse of dominance provision, as allowed under Article 3(2) of Regulation 1/2003.[67] In particular, the law does not require *absolute* market power but only 'economic dependence', which is—or should be—easier to prove. Economic dependence is a form of *relative* market power, defined as:

> A position of subjugation of one undertaking to another—characterized by the absence of a reasonable equivalent alternative, available within a reasonable period, and under reasonable conditions and costs—that allow the latter undertaking to impose conditions that it could not have obtained under normal market circumstances.[68]

Undertakings are prohibited from abusing such positions of economic dependence when they affect competition on (a substantial part of) the relevant Belgian market.[69] Given its recent entry into force, the new provision remains largely untested. However, a similar French provision—which served as inspiration

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[60] Wet betreffende de tariefvrijheid van exploitanten van toeristische logies in de contracten afgesloten met platform-operators voor online reservatie, Official Gazette 2018, N. 188, p. 62710.
[61] Ibid, arts 3–6.
[62] EC, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020)842.
[63] Ibid, art 5(b). The DMA proposal includes a number of other obligations/prohibitions, including on app stores. Unlike the MFN prohibition, those are not self-executing but are "susceptible of being further specified" (art 6).
[64] For the Belgian provisions on interim measures, see Code of Economic Law, arts IV.26, §3, 12° and IV.71–73.
[65] See T. De Meese and E. Wijckmans, Voorlopige maatregelen door de Belgische Mededingingsautoriteit: stand van zaken na 5 jaar *prima facie*-vaststellingen onder Boek IV van het Wetboek economisch recht, Tijdschrift voor Belgisch Handelsrecht 2018(8), pp. 799–817.
[66] Wet houdende wijziging van het Wetboek van Economisch Recht met betrekking tot misbruiken van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen ['Law amending the Code of Economic Law with regard to abuses of economic dependence, abusive clauses and unfair commercial practices between undertakings'], Official Gazette 2019, N. 115, p. 50066; Koninklijk besluit tot wijziging van de boeken I en IV van het Wetboek van economisch recht met betrekking tot misbruiken van economische afhankelijkheid, Official Gazette 2020, N. 228, p. 59654.
[67] Council 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, OJ 2003 L 1, p. 1.
[68] Code of Economic Law, art I.6, 12bis°.
[69] Ibid, art IV.2/1. See further J. Blockx, Belgian prohibition of abuse of economic dependence enters into force, Journal of European Competition Law & Practice 2021 (advance access).

for the Belgian one—has been used effectively in the digital economy.[70] Based on said provision, a French court ordered Amazon to modify its clauses with third-party sellers on its Marketplace.[71] Even though the Belgian provision was not adopted with the digital economy in mind, it could thus play a role there.

Once you have done away with the (absolute) market power requirement, why stop there? Why not do away with the abuse requirement as well? A proposal in that direction has indeed been launched, although it is obviously more complex than these tongue-in-cheek questions suggest. In the aforementioned Joint Memorandum, the Benelux NCAs support "[t]he introduction of an ex ante instrument providing for imposed remedies *without the establishment of an infringement*".[72] This proposal was put forward by the Dutch Secretary of State for Economic Affairs,[73] and previously endorsed by the ACM.[74]

The driving concern behind the initiative is—once more—the slow nature of *ex post* enforcement, which becomes particularly problematic in fast-moving digital markets. The envisaged instrument would allow NCAs to impose non-punitive, behavioural remedies such as platform access, data portability, data-sharing and non-discriminatory ranking.[75] The instrument would closely follow the interpretation of dominance and abuse in the context of Article 102 TFEU, but NCAs would not actually have to find an infringement. Rather, the mechanism would be one akin to "the powers that the CMA has to impose remedies following market studies and the powers of the Member States' telecom authorities to impose remedies on companies with significant market power."[76]

In 2020, the EC launched a proposal for a 'new competition tool' that aligns with the requests of the Benelux NCAs. Under that tool, however, the EC would be the main enforcer, with more of a cooperative role reserved for NCAs.[77] In the end, that initiative was abandoned in favour of the aforementioned DMA, which gives the EC an even more central role.[78] Given the current focus on the DMA, a regulatory initiative in line with the Benelux NCAs' demands appears unlikely at this point, unless their respective national policymakers come up with an equivalent.

4 Conclusion

In conclusion, the track record of the BCA in digital markets is fairly limited, at least if one only examines its case law. When one considers the authority's broader contributions to competition policy, a richer picture emerges. That picture shows a modern, cooperative NCA with in-depth knowledge of digital competition, but—it must be acknowledged—fairly few opportunities to put that knowledge into practice. One can make educated guesses about the BCA's apparent reticence to intervene in digital markets. Resources are certainly part of the equation, together with an—in my view correct—belief that some digital issues are best dealt with at the EU level.

However, its new enforcement priorities, which include the digital economy, may prelude a more active role. This should be welcomed, given that we know from experience that NCAs can have a meaningful impact on competition in the digital sphere. This is illustrated by the Bundeskartellamt's *Amazon* case, in

[70] Code de Commerce, art L420–2.
[71] Tribunal de commerce de Paris, case 2017050625, *Ministre de L'Economie et des Finances/Amazon* (2 September 2019). For a discussion, see Friso Bostoen, Abuse of relative dominance in the platform economy: a French court finds Amazon's contracts with third-party sellers significantly imbalanced, CoRe Blog (12 November 2019), available at https://www.lexxion.eu/en/coreblogpost/amazon-case-france/ last accessed 10 February 2021.
[72] Joint Memorandum of the Benelux NCAs, p. 5 (own emphasis).
[73] Secretary of State for Economic Affairs and Climate, Letter to the President of the Second Chamber (17 May 2019), available at https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z09936&did=2019D20357.
[74] ACM, Extension of enforcement toolkit to increase effectiveness in dealing with competition problems in the digital economy (6 August 2019), available at https://www.acm.nl/sites/default/files/documents/ex-ante-tool_0.pdf.
[75] Joint Memorandum of the Benelux NCAs, p. 5–6 ('Rather than broad-stroked regulation, these remedies should be proportionate and tailored to specific situations.').
[76] Ibid, p. 5.
[77] See EC, New Competition Tool (Inception Impact Assessment) Ares(2020)2877634.
[78] EC, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020)842.

response to which Amazon amended its terms for Marketplace sellers *globally*.[79] Moreover, the work of NCAs, when limited to its national territory, can serve as a regulatory experiment that—when successful—can be replicated or extended by other NCAs or even the EC. Building on acquired knowledge, the BCA can certainly play a role here, be it through more informal guidance or more formal interventions.

[79] Bundeskartellamt, case B2-88/18, *Amazon* (17 July 2019).