

Dawn raid's illegality does not automatically void the subsequent request for information



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Brussels Markets Courts confirms two-step test for determining the effects of a dawn raid's illegality.

On 7 October 2020, the Markets Court of the Brussels Court of Appeal ("Markets Court") made yet another judgment in a case involving Belgian telecom operator, Proximus (formerly Belgacom), that has already been going for over a decade. In this latest judgment, the Markets Court ruled on the effects of the dawn raid's illegality that was the basis of this case.

The illegal dawn raids

Following a complaint in 2005 by telecom competitor, Base, the Belgian Competition Authority ("BCA") performed dawn raids in January 2006 at Proximus, seeking evidence of an alleged abuse of dominance in the form of a margin squeeze. Based on the data gathered during the dawn raids and in the course of the following investigation, including requests for information, the BCA imposed a fine of € 66.3 million.

Proximus challenged the BCA's decision, claiming that the BCA's dawn raids had been illegal. While the dawn raids had been performed in accordance with the then applicable Belgian law of 1999 on the Protection of Economic Competition, that law simply provided that inspectors had to carry out a mission order issued by the Authority's Auditorate ("Corps des rapporteurs") to perform a dawn raid. In line with a Belgian Court of Cassation judgment of April 2018 on a similar issue, a Markets Court interim judgment of 9 October 2019 found in the case at hand that the dawn raids performed at Proximus in January 2006 were illegal as they had not been authorised by a judge, and as there was no a posteriori judicial control either. The Markets Court therefore ordered the data collected during the illegal dawn raid to be removed from the case file, and that the parties had to take a position on the effects of the exclusion.

Two-step purification: origin of data and indispensability of dawn raid

In the interim judgment of 7 October 2020, the Markets Court confirmed and clarified its earlier case law on how to purify a case file after an illegal dawn raid. According to the Markets Court, a two-step test should be applied:

1. First question: Where does the data come from? There are three possibilities:

- The data does not originate directly or indirectly from the dawn raid: such data can remain in the case file.
- The data originates directly from the dawn raid: such data should be removed from the case file and can no longer be used.
- The data originates indirectly from the dawn raid: then a second question should be asked.

2. If the data originates indirectly from the dawn raid (situation 1.3), then it should be considered whether the dawn raid was indispensable to obtain access to the data.

- If the dawn raid was not indispensable as the same data could have been collected in a different way, then the data can remain in the case file;
- If the dawn raid was indispensable as the same data could not have been collected in a different way, then the data should be removed from the case file and can no longer be used (e.g. in a statement of objections or a subsequent decision).

Interestingly, the Markets Court explained that this two-step purification only needs to be performed towards the data referred to in the BCA's infringement decision. The assessment of the "purified" Decision's validity can only be done on the basis of the evidence referred to in the Decision that did not have to be removed from the case file. It is therefore impossible for the parties to build new arguments based on any information that was not originally referred to in the Decision but that was in the case file and would theoretically survive the two-step test.

Documents transferred in response to a request for information

The Markets Court found that the data regarding Proximus' costs in 2004 came from documents obtained during the dawn raid. As this data thus originated directly from the dawn raid, the Markets Court ruled that it had to be removed from the case file and could no longer be used. Consequently, as the facts alleged against Proximus for 2004 could no longer be established by the BCA, the BCA's Decision has to be partially annulled.

However, the data regarding Proximus' costs in 2005 came from documents transferred to the BCA in response to a request for information following the dawn raid. While Proximus claimed that this data therefore indirectly originated from the dawn raid, the Markets Court considered that there are then two possibilities in such a situation:

1. The dawn raid allowed the BCA to become aware of the existence of information that was until then unknown to the BCA. In that situation, the answers given in response to a request for information to obtain such data, should be considered as indirectly originating from the dawn raid.
2. It was not the dawn raid that allowed the BCA to identify the necessary data. In that situation, the answers given in response to a request for information, should not be considered as indirectly originating from the dawn raid.

In the case at hand, the Markets Court considered that it was not the dawn raid at Proximus that allowed the BCA to become aware of the existence of information regarding the 2005 data. Therefore, even though the 2005 data was transferred in response to a request for information following the dawn raid, the 2005 data did not indirectly originate from the dawn raid. Moreover, the Markets Court considered that, in any case, the dawn raid was not indispensable as the same data could have been collected in a different way.

Effect on the Infringement Decision and the Fine

Despite the fact that the Markets Court found that the BCA's Decision must be partially annulled, for the year 2004, the Markets Court did not order the (even partial) restitution of the fine paid by Proximus. This would require the Markets Court to determine the adjusted fine for an infringement solely in 2005. However, a fine depends on several factors and therefore the fine for 2005 is not simply half of the fine set for 2004 and 2005 together. Moreover, the Markets Court first wants to hear the parties on their remaining pleas in this case. Consequently, the parties can now prepare their arguments on the remaining pleas, and the Markets Court will decide at the end whether or not to send the case back to the BCA for a reassessment of the amount of the fine.