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Cartels

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Overview of the law and enforcement regime relating to cartels

Article IV.1 of the Code of Economic Law ("CEL") is the Belgian equivalent to Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Similar to the TFEU, Article IV.1 CEL prohibits agreements between undertakings and concerted practices that have as their object or effect the restriction of competition in the relevant Belgian market, or a significant part thereof. It applies to both horizontal and vertical agreements. If such actions also affect trade between Member States, Article 101 TFEU can be applied simultaneously. Contrary to Article 101 TFEU, Article IV.1 CEL also contains an explicit prohibition for natural persons to conduct negotiations, agree, conclude or coordinate to fix prices, limit production or sales, or allocate markets in the context of the activities of an undertaking or association of undertakings. However, an infringement by a natural person can only be established when, in the same case, there is also a finding that the undertaking infringed Article IV.1 CEL.

The latest amendments to the Belgian competition rules date from 17 March 2022, when the Act of 28 February 2022 transposing the ECN+ Directive entered into force.

Competition law enforcement bodies

Competition law in Belgium is enforced through an administrative and/or civil law procedure. The two main bodies responsible for enforcing competition law are the Belgian Competition Authority and the national courts. The Minister of Economy likewise plays a (modest) role.

1. *Belgian Competition Authority ("BCA")*

   The BCA is responsible for investigation, prosecution and decision-making in relation to anti-competitive practices. Although there is no institutional separation between the investigation and decision phase, other procedural guarantees were put in place to ensure the BCA's impartiality.

   The main organs of the BCA in its current form are the Investigation and Prosecution Service ("*Auditoraat*"/"*Auditorat*") and the Competition College. Whereas the former is responsible for the investigation and prosecution of anti-competitive behaviour under supervision of the Competition Prosecutor General, the latter is responsible for the consequent decision-making and – as the case may be – for the imposition of sanctions. Upon submission of a motivated draft decision by the Investigation and Prosecution Service, the procedure before the Competition College commences. Ultimately, the Competition College decides whether an infringement of competition law is present. If so, it will order its cessation and – if appropriate – impose a fine. The Competition Prosecutor investigating a case can decide to close the investigation with a settlement. It is also possible for the Competition Prosecutor, or, at a later stage in the proceedings,

the Competition College, to declare the parties' proposed commitments binding, without formally ruling upon the existence of an infringement.

2. *Minister of Economy and Minister of Small Businesses*

   Based on Article IV.39 CEL, the Minister of Economy is granted a limited role in competition law enforcement. In particular, it has a positive injunction right, i.e., it can order the Competition Prosecutor General to investigate a certain case. The Investigation and Prosecution Service or (if the case proceeds) the Competition College remains nonetheless at liberty to dismiss the case.

   Furthermore, the Minister of Small Businesses, an appropriate public institution or other public body responsible for the supervision or control of an economic sector can request the Competition Prosecutor General to open an investigation.

3. *National courts*

   Competition law may be privately enforced through national courts (see *infra*), which are competent to assess damage claims brought before them by victims of competition law infringements. They also hear cases where an infringement of competition law is invoked. Typically, that would be the case where one of the parties invokes the nullity of an agreement.

   Within the Brussels Court of Appeals, a number of chambers have now been appointed to constitute a separate section, called the Market Court, which will, among others, be the only court competent to hear an appeal against a decision by the Competition College. Afterwards, only an appeal on points of law remains possible, and can be submitted to the Court of Cassation.

   Finally, in case commitments were made binding by the Competition College, as a result of which there is no longer reason for it to proceed, national courts are still competent to rule upon the presence of an infringement in the past.

Sanctions for cartel infringements

The Competition College can impose fines upon the undertakings concerned when ordering cessation of a restrictive competition practice, as well as accompany the cessation order with a periodic penalty payment (see *infra*). Under certain circumstances, individuals can also be fined by the Competition College. No criminal sanctions are available under Belgian law (except for bid-rigging).

Overview of investigative powers in Belgium

The Investigation and Prosecution Service is charged with investigating anti-competitive practices. Investigations can be initiated either *ex officio*, upon complaint, or upon ministerial request. The BCA's investigative powers resemble the European Commission's investigative powers as enshrined in Regulation No. 1/2003. As discussed below, most cartels are discovered by an *ex officio* investigation following a leniency application.

General investigative powers

The prosecutors may request the undertakings, associations of undertakings or natural persons concerned for all necessary information, upon which the undertakings must respond within a certain indicated time limit. If the required information is not provided after such period has elapsed, a motivated decision can be adopted requiring the undertakings to provide the requested information. The prosecutors are furthermore competent to conduct interviews, take written or oral statements, and to make the requisite findings on-site. They may also request and copy all documents or information deemed necessary in order to carry out their investigative duties.

Dawn raids

By far the most intrusive measure is a dawn raid. Prosecutors are empowered to carry out inspections in any premises, means of transport, or other areas of the undertakings concerned where the presence of data relevant for their investigation can reasonably be presumed. Inspections in the private homes of the undertakings' directors, managers and other staff are also possible, and are carried out. Assistance to conduct the inspection can be requested of the police and of experts. The inspections require prior authorisation of an investigating judge from either the Dutch-speaking or French-speaking Court of First Instance in Brussels. Furthermore, a warrant needs to be issued by the prosecutor in charge of the investigation and must specify the subject matter and purpose of the inspection.

During the course of the inspection, the prosecutors may interview persons in charge as well as staff members in relation to the subject matter of the inspection and in relation to the internal organisation of the undertaking in order to facilitate the inspection. The prosecutors may also seize and seal, but in case such actions are carried out at premises other than those of the undertakings concerned, their duration may not exceed 72 hours.

Regarding the examination of electronic documents, the BCA has put forward transparent guidelines they abide by when examining such documents. Accordingly, a *prima facie* examination of the content and structure of the electronic data is made in order to identify the persons and files possibly related to the subject matter. Subsequently, either key terms are used within copies of these files in order to facilitate the selection of individual documents relevant to the investigation, or the data is examined manually on-site. In the first scenario, the documents are selected without examining their content. The list of used key terms is, in any event, provided to the undertaking concerned. In principle, the undertaking's representatives should be present during such selection. Unfortunately, the prosecutors seem to have developed a different practice where only the classification into three categories ("in-scope", "out-of-scope", or "legal-professional-privilege" ("LPP")) is conducted in the presence of the undertaking's representatives, while the selection is made in their absence. Evidently, such a practice does not allow for control over which documents are or are not examined by the prosecutors.

The "in-scope" documents can be examined immediately by the investigation team, while the other documents are sealed pending an examination by an independent prosecutor. It is nonetheless possible that a document is consulted immediately to identify its possible out-of-scope or LPP character.

Sanctions related to the investigation

Failure to comply with certain obligations during the investigation phase may lead to an additional fine of up to 1% of the worldwide turnover for undertakings. Fines can be imposed upon the undertaking when it deliberately or negligently: (i) provides inaccurate, misleading or incomplete information following a request for information; (ii) does not provide information following a request by reasoned decision on time; or (iii) prevents or impedes investigations.

The Act of 28 February 2022 also introduced the possibility for the Competition College to impose a periodic penalty payment of a maximum of 1% of the average daily turnover realised in the previous financial year for each day of delay, in case of failure to: (i) provide complete and correct information in the context of a request for information or notification of a concentration; (ii) provide an explanation in case the deadline of a request for information was not respected; (iii) consent to investigatory measures; and (iv) appear before the BCA for a hearing.

Overview of cartel enforcement activity during the last 12 months

During the last 12 months, the BCA was less active in the context of cartel enforcement compared to the situation pre-COVID-19. Since the beginning of the COVID-19 pandemic, the level of cartel enforcement seems to have been reduced, especially with no dawn raids being conducted by the BCA in 2020 and 2021.

In 2021, the BCA took three decisions relating to Article IV.1 CEL: one re-adoption decision relating to a fine; one commitments decision; and one prohibition decision. By way of comparison: in 2020, the BCA also took three decisions relating to cartels, whereas back in 2019, the BCA took five decisions relating to cartels and carried out dawn raids in two separate investigations.

In 2022 to date, the BCA has already taken one settlement decision.

Re-adoption of the fine: Restrictions of competition committed by the Professional Body of Pharmacists, an association of undertakings

On 8 January 2020, the Market Court annulled a fine of €1 million imposed by the Competition College on the Professional Body of Pharmacists ("PBP").[1] In 2019, the Competition College condemned the PBP for excluding MediCare-Market from the market for services provided by pharmacists and/or preventing the development of MediCare-Market's model through a number of means which were considered to be a restriction of competition by object: legal proceedings; disciplinary actions; and defamatory actions, etc.[2] The Market Court ordered the Competition College to recalculate the amount of the fine as it should have been capped at 10% of the PBP's turnover, excluding the turnover of its members. Finally, on 26 March 2021, the Competition College (this time composed differently) imposed a fine of €245,000 on the PBP.[3]

In this regard, the Act of 28 February 2022 clarifies how a fine should be calculated *vis-à-vis* associations of undertakings. Article IV.84, §4 CEL now provides: "*For associations of undertakings, the turnover is the sum of the turnover of each member of the association active in the market concerned. However, the financial liability of each undertaking in respect of the payment of the fine may not exceed 10% of its turnover in the business year preceding the decision in the case of infringements of competition law and 1% of its turnover in the business year preceding the decision in the case of fines imposed under of Article IV.82, § 1 CEL.*" Previously, the CEL merely stipulated that the Competition College may impose fines of up to 10% of the turnover of the undertakings and associations of undertakings concerned.

Commitments: Buying alliance between Carrefour and Provera

On 28 April 2021, the BCA closed an investigation into a purchasing alliance agreement concluded between Carrefour and Provera, the central purchasing body of the Louis Delhaize Group, which includes the supermarkets Cora, Match, Smatch, Delitraiteur and Louis Delhaize.[4] The agreement concerned the negotiation of purchases of national brand products from approximately 140 suppliers, as well as certain lowest price products originally negotiated by Carrefour.

The Competition Prosecutor General opened the investigation back in May 2019, upon which the Investigation and Prosecution Service conducted dawn raids at the premises of Carrefour and Provera.

According to the preliminary analysis of the Investigation and Prosecution Service, the agreement between Carrefour and Provera entailed a considerable risk of exchanges of sensitive information between the parties, having an impact on the upstream market for the

supply of daily consumer goods and the downstream market for the retail of daily consumer goods. Furthermore, the purchasing alliance could influence the commercial strategy of both Carrefour and Provera.

Carrefour and Provera offered commitments in order to settle the case. The commitments offered by Carrefour and Provera were the following:

- Transfer of Carrefour's entire purchasing department to a separate legal entity, Interdis. This entity is separated from the rest of Carrefour's activities, both physically and with regard to the information infrastructure.
- Stricter controls on the reporting of Provera's purchase figures to Carrefour. The purchase figures will not relate to future information, but will concern estimates for the current or past year. Furthermore, Carrefour and Interdis can only access the information where necessary for the proper functioning of the alliance.
- Limitation of joint negotiations to strictly financial aspects, whereby each party can determine its own commercial strategy independently.

The BCA performed a market test of these commitments. The majority of suppliers interviewed considered that these commitments met the identified competition concerns.

The Competition Prosecutor considered that the commitments offered by Carrefour and Provera were proportionate and sufficient to address the identified competition concerns and, as such, made them binding on the parties. Consequently, the Competition Prosecutor closed the investigation and did not take a position on whether Carrefour and Provera effectively breached competition law.

Prohibition: Caudalie fined for imposing minimum prices and restricting active and passive sales – overturned by the Market Court

On 6 May 2021, the Competition College adopted a prohibition decision *vis-à-vis* certain companies of the Caudalie group ("Caudalie").[5] An investigation into Caudalie's practices was launched in 2017 following complaints by Newpharma and Pharmasimple, two online parapharmacies. Dawn raids were conducted at Caudalie's premises in Belgium and France.

The Competition College found that Caudalie imposed sales restrictions in the context of its selective distribution system, which was set up to preserve Caudalie's luxury brand image. In particular, the Competition College found that:

- Caudalie imposed minimum resale prices on its selective distributors in Belgium, mainly through a *de facto* prohibition on offering higher discounts than the percentage accepted by Caudalie (not only for online sales).
- Caudalie imposed, within the framework of its selective distribution system and its relations with a buyer outside of the system, limitations on passive sales of Caudalie products intended for markets of other Member States. Furthermore, Caudalie restricted passive and active sales to buyers established in a Member State outside of the territory of the selective distribution network.

The Competition College qualified these infringements as restrictions by object.

Caudalie offered commitments to the Competition College to respond to the objections raised and in order for the BCA to declare that there are no longer grounds for action:

- Resale prices: Caudalie undertakes to submit to the Competition College for approval a draft communication addressed to its authorised distributors, clarifying Caudalie's requirements concerning the preservation of its brand image and insisting on the freedom of its authorised distributors to determine resale prices themselves and to apply promotions on its products.

- Active and passive sales: Caudalie undertakes to submit to the Competition College for approval a draft communication addressed to its authorised distributors clarifying the measures Caudalie can take in order to preserve its brand image and to ensure a quality service to consumers without infringing competition rules.

The Competition College accepted these commitments and made them binding on Caudalie, which had to submit the draft communications to the Competition Prosecutor General by 6 July 2021. The commitments were accepted as a mitigating circumstance and the Competition College granted a 5% reduction of the basic amount of the fine. The total fine imposed on Caudalie amounted to €859,310.

On 14 June 2021, Caudalie filed an application with the Brussels Market Court to suspend and annul the decision of the Competition College.

On 30 June 2021, the Market Court ruled on the application for suspension.[6] Interestingly, the Market Court *ex officio* referred to Article 47 of the EU Charter of Fundamental Rights, which concerns the right to an effective remedy and to a fair trial. Pursuant to the commitments, Caudalie had to submit the draft communications to the Competition Prosecutor General by 6 July 2021, whereas the Market Court could only rule on the merits of the case by November 2021. As such, the Market Court held that the immediate execution of the Competition College's decision would create irreversible consequences for Caudalie, and that Caudalie could not be deprived of the rights enshrined in Article 47 of the EU Charter of Fundamental Rights. Therefore, the Market Court allowed the suspension of the Competition College's decision.

On 1 December 2021, the Market Court ruled on the application for annulment.[7] In this regard, Caudalie argued that the Competition College committed errors of law by accepting and making Caudalie's commitments binding, in addition to the finding of an infringement and the imposition of a fine. Furthermore, Caudalie argued that the manifest illegality of the commitments invalidates the decision finding the infringement, as well as the calculation of the fine. The Market Court considered that Caudalie submitted the commitments with the purpose of the BCA declaring that there would no longer be grounds for action, as provided by Article IV.52, §1, 7° CEL. The Market Court held that the commitments proposed by Caudalie cannot be automatically imposed in a different legal context – implying the finding of an infringement and the imposition of a fine – as the BCA cannot substitute itself for the party being prosecuted to modify its commitments. As such, the BCA unlawfully accepted Caudalie's proposed commitments and made them binding, on the basis of Article IV.52, §1, 2° CEL (whereas Caudalie submitted the commitments by virtue of Article IV.52, §1, 7° CEL). The Market Court therefore quashed the decision of the Competition College.

Hybrid settlement: Febelco and Pharma Belgium-Belmedis sanctioned for participation in a cartel

In February 2022, the Investigation and Prosecution Service adopted a hybrid settlement decision *vis-à-vis* two pharmaceutical wholesalers, Febelco and Pharma Belgium-Belmedis, for their participation in a cartel violating the Belgian and European competition rules.[8] Febelco received immunity from fines as it disclosed the existence of the cartel. Pharma Belgium-Belmedis was fined €29.8 million, after having received a 40% reduction for adducing evidence with significant added value and a 10% settlement reduction. A third company, CERP, was also subject to the investigation but chose not to enter into settlement discussions. Therefore, the procedure against this undertaking is still ongoing.

Febelco and Pharma Belgium-Belmedis acknowledged their involvement in two separate infringements, one relating to transfer orders and the other to flu vaccines.

Infringement pertaining to transfer orders

With regard to the distribution of pharmaceuticals, laboratories can make use of the transfer order system. This system enables laboratories to offer large quantities to pharmacists, while the orders are managed by wholesalers. In practice, a pharmacist orders products at a price proposed by the laboratory, but a wholesaler of his choice prepares and executes the order from his own stock of products. The wholesaler is the owner of the products and manages the stock at its own risk and expense. The wholesaler also takes care of the distribution, invoicing, and collection of the payment.

In this regard, Febelco and Pharma Belgium-Belmedis agreed to apply the same commercial conditions for the distribution of pharmaceutical products through the system of transfer orders. In particular, both companies agreed to charge the same prices *vis-à-vis* laboratories and offer the same services. The companies' objective was to limit direct sales from laboratories to pharmacies and fix margins.

Infringement pertaining to flu vaccines

Every year, pharmacists can order certain quantities of flu vaccines through a system of pre-sales. Febelco and Pharma Belgium-Belmedis agreed to apply the same commercial conditions for the sale of flu vaccines to pharmacists during the pre-sale periods. The companies agreed not to offer rebates and not accept any returns of unsold vaccines which were ordered during the pre-sale period. Furthermore, both companies agreed on the duration of the pre-sale period.

Expected developments

On 1 October 2021, the Investigation and Prosecution Service submitted a reasoned proposal for a decision concerning the tobacco companies Philip Morris Benelux, Établissements L. Lacroix Fils, JT International Company Netherlands and British American Tobacco Belgium.[9] In 2017, the Investigation and Prosecution service opened an investigation *vis-à-vis* these companies and conducted dawn raids. In its reasoned proposal, the Investigation and Prosecution Service alleges that the companies concerned exchanged information on their future prices through wholesalers. In particular, the tobacco companies communicated their future prices to their wholesalers, through which they also received information on the future prices of their competitors. The Competition College now needs to decide on the case.

According to press reports from 2020, the BCA is investigating whether a number of security companies (e.g. G4S, Securitas, Seris) have engaged in price fixing.[10]

In 2019, the BCA also conducted dawn raids in the pharmaceutical sector.[11] The BCA is still investigating alleged practices of restricting, impeding and hindering the access or expansion of biosimilar drugs.

The BCA is also investigating a complaint against certain car insurance companies and INFORMEX, a company that, amongst other things, offers a digital claims platform for car insurance companies.[12] In the context of this investigation, the BCA sent a request for information to car experts in 2019.

Key issues in relation to enforcement policy

As in most jurisdictions, the BCA has the discretionary power to decide whether it will pursue cases brought to its attention "in light of the available resources and priorities".

In order to provide more information on the BCA's enforcement priorities, the BCA announces its priority policy for the following year in an annual document. For 2021, the BCA intended to undertake action within the following eight sectors (mainly coinciding

with its priority policy in the preceding years): digital economy; provision of services to businesses and consumers, in particular regulated professions; distribution, including its relationships with suppliers; energy; pharmaceuticals; logistics; public procurement; and telecommunications.[13] In addition, the BCA set three strategic priorities for 2021: the growing power of digital platforms; the BCA's new competence regarding abuse of economic dependency; and the green and circular economy in Belgium.

In its priority policy document, the BCA also referred to the positive impact of the COVID-19 crisis on several sectors. Whereas some sectors were hard hit by temporary closures, the COVID-19 crisis also created new business opportunities. The BCA stated that it would pay close attention to make sure markets operate in a robust and fair way.

Regardless of its priority policy, the BCA will investigate all serious competition law violations it deems necessary. In practice, the BCA will pursue both cases brought to its attention (through leniency applications or complaints) and cases initiated *ex officio*. The likelihood that a complaint might lead to a full-on investigation is nonetheless higher when it concerns a priority sector.

As to the nature of the infringements primarily pursued by the BCA, no general trend can be identified. However, the BCA clearly scrutinises the distribution sector (including its relationships with suppliers), as evidenced by the commitments decision concerning Carrefour and Provera, and the prohibition decision concerning Caudalie. In the prohibition decision concerning Caudalie, the Competition College explicitly noted: "*Several studies have highlighted the differences in price levels, particularly in supermarkets, between Belgium and its neighbouring countries, and the fact that territorial supply restrictions (TSCs) contribute to organising and maintaining differences in supply price levels and therefore in consumer prices. The same conclusion applies to resale price maintenance (RPM) practices, and the two types of practices are mutually enhancing. The BCA must in this context note that TSCs and RPM are among the significant explanations for the fact that the Belgian consumers cannot benefit from what he is entitled to expect from a well-functioning internal market. It is for these reasons and with reference to the relevant studies that the relationship between retailers and their suppliers has been a priority for the BCA throughout the relevant period.*"[14]

Moreover, it is clear that the BCA has a focus on the pharmaceutical sector as evidenced by dawn raids in the sector, the decision against the PBP and the settlement decision concerning Febelco and Pharma Belgium-Belmedis. Furthermore, on 22 July 2020, the BCA published a paper about its position on the application of merger control to regional hospital networks. This paper was issued in the context of the Act of 28 February 2019, which obliged hospitals to organise themselves into regional hospital networks. According to the BCA, hospitals qualify as undertakings within the meaning of competition rules and even in this highly regulated sector, there may still be some competition between hospitals in terms of offering care services. The BCA considered that hospitals should not be excluded from merger control. However, on 18 March 2021, a new law was adopted which excludes regional clinical hospital networks formed pursuant to the Act of 28 February 2019 from merger control by the BCA. Nevertheless, the BCA still remains responsible for enforcing anti-competitive practices by hospitals with hospitals which do not belong to the same hospital network, as well as abuses of a dominant position.

In October 2019, the BCA issued a guidance paper on information exchanges in the context of associations of undertakings. The guidance paper states that it should be read in conjunction with the decisional practice and the Guidelines of the European Commission on

the applicability of Article 101 TFEU to horizontal cooperation agreements. The guidance covers sections such as periodic overviews of markets, price comparisons, information on the anticipated development of markets and formulae for the calculation of costs and pricing structures.

Leniency/amnesty regime

As in most jurisdictions, Belgian competition law provides for a leniency regime similar to that of the European Commission. An undertaking is able to obtain immunity for, or reduction of, the fine it would normally risk, if it contributes to proving the prohibited practice and in identifying its participants, either by providing intelligence the BCA did not yet possess or by proving a prohibited practice the existence of which was not yet established. Prior to the Act of 28 February 2022, Belgium's leniency regime was enshrined in (i) Article IV.54 CEL, which only outlined the basic conditions and formalities of the Belgian leniency programme, and (ii) the BCA's leniency guidelines, which set out the specific conditions in order to qualify for immunity from, or reduction of, fines, and which are identical to the guidelines of the European Commission. The Act of 28 February 2022 brought about an important change in this respect: the CEL now sets out the full conditions and formalities of the leniency programme in line with the ECN+ Directive, such as the rules around immunity and leniency applications submitted by undertakings or associations of undertakings, marker requests, summary applications and immunity applications submitted by natural persons. The new Act also introduces immunity for criminal prosecution for companies that have engaged in bid-rigging.

The leniency regime can be considered a relatively important aspect of cartel enforcement in Belgium. Over several years, there have been considerably more leniency applications than third-party complaints or *ex officio* investigations. For instance, the total number of complaints in relation to restrictive practices (therefore including cartels as well as abuses of dominance) in 2014 was six, compared to a total of 17 leniency applications (in 10 cases). Similarly, a total number of four complaints were lodged in 2015, compared to eight leniency applications. In all four cartel decisions in 2015–2017, one undertaking was granted full immunity. Some of the other undertakings consequently obtained a fine reduction of between 50% and 20%, depending on their contribution and timing. Now the trend appears to have shifted, with complaints being more often at the source of an investigation. In 2018, three leniency applications were submitted and three investigations were pending following a complaint. In 2019, only one leniency application was submitted, whereas the BCA investigated seven cases following a complaint or a specific request. In 2020, the BCA received four leniency applications and four complaints.

Administrative settlement of cases

In 2021, one investigation was concluded with a settlement decision. In any given investigation (but prior to submitting its draft decision to the Competition College), the Investigation and Prosecution Service may propose a time limit within which the parties can communicate their readiness to hold settlement talks. If so, the prosecutor can open a settlement procedure *vis-à-vis* the parties concerned and will communicate which objections could be substantiated against them. The parties concerned are given access to all non-confidential versions of the documents and information to which the prosecutor refers or intends to refer in the grievances, as well as an inventory of the investigation file. If a settlement turns out to be a possibility, the prosecutor will draw up a draft settlement

decision. The undertakings in question can then file a statement of settlement, wherein they admit their involvement, assume responsibility for the quoted infringement and accept the proposed fine. The settlement is "rewarded" by a reduction of 10% of the initially calculated fine. The settlement procedure ends with a settlement decision of the Investigation and Prosecution Service.

The settlement procedure is clearly distinct from the leniency procedure, both in law and in practice. They may also be combined, as a result of which the relevant fine reductions will be combined.

Third-party complaints

According to Articles IV.39 and IV.43 CEL, complaints can be submitted to the Competition Prosecutor General by anyone who demonstrates a legitimate interest. There is no obligation to initiate a formal investigation procedure, but a formal dismissal decision nonetheless must be adopted. The Investigation and Prosecution Service is free to dismiss complaints based on its priority policy and the available means (see *supra*). In addition, complaints may be dismissed as unfounded, inadmissible or due to their prescription. When the Investigation and Prosecution Service is considering dismissing a complaint, it may decide to hear the complainant. In case of dismissal, the complainant is notified and provided with the possibility to consult the procedural file and bring an appeal before the President of the Competition College.

Informal complaints are also possible. They will be analysed and inquired into by the Investigation and Prosecution Service if so requested by the Competition Prosecutor General. Contrary to formal complaints, informal complaints can remain unanswered. Interestingly, whereas formal complaints are communicated to the undertakings concerned, informal complaints are not. As a result, if the Investigation and Prosecution Service decides to investigate upon an informal complaint, a request for information will be sent to the undertakings without necessarily indicating the specific reasons for its sudden interest. Undertakings can therefore be tempted to be less careful in responding to such requests.

Civil penalties and sanctions

As stated above, the Competition College can impose a fine upon the undertakings concerned when ordering cessation of a restrictive competition practice, capped at 10% of their respective worldwide turnovers. Furthermore, the Competition College can accompany the cessation order with a periodic penalty payment, capped at 5% of the average daily worldwide turnover.

According to the BCA Guidelines on the calculation of fines, the Competition College will follow the "2006 Guidelines on the method of setting fines" of the European Commission, with a few (evident) alterations. In 2020, the BCA updated its guidelines, mainly to ensure consistency with the Act of 2 May 2019.

The aggravating or mitigating circumstances that might increase or decrease the fine are identical to those listed in the Commission's guidelines. However, in relation to the aggravating circumstance of repetition, only infringements that have been the subject matter of a Commission decision, or a decision by a national competition authority in one of Belgium's neighbouring countries or the United Kingdom, are taken into account.

The draft decision, including the fine claimed by the Investigation and Prosecution Service, is sent to the parties simultaneously with its submission to the Competition College. In

case parties are prepared to settle, the potential amount of the fine the Investigation and Prosecution Service is considering to propose is communicated earlier, along with the grievances that could be substantiated against them.

In relation to the imposition of administrative fines upon individuals, a fine of €100 to €10,000 can be imposed for negotiating, agreeing, concluding or coordinating, on behalf of an undertaking with one or more of its competitors, to fix prices, limit production or sales, or allocate markets.

The Act of 28 February 2022 brought about changes regarding the criminal penalties for bid-rigging. Previously, Article 314 of the Belgian Criminal Code stipulated that bid-rigging was to be sentenced with jail time of between 15 days and six months and with a monetary fine of €100 to €3,000. That provision is now extended to clarify that immunity is available – and thus that these penalties are not to be imposed – when the infringer has submitted an immunity application with the BCA in relation to the same facts and has handed over any relevant information in relation to the circumstances of the bid-rigging infringement and the parties involved to the public prosecutor.

Right of appeal against civil liability and penalties

Parties can lodge an appeal against a cartel decision taken by the Competition College, including against the fines imposed therein. Such an appeal must be lodged with the Market Court section of the Brussels Court of Appeal and is a "full merits" appeal regarding both the facts and the law. The Court assesses the situation as it existed at the time of the decision, based on the investigation file and formulated grievances of the Investigation and Prosecution Service. It may not inquire into additional facts or evidence, nor reformulate the initial grievances.

The Court may substitute the cartel decision of the Competition College with its own decision, including a negative statement that no infringement is present. When the Court concludes that an infringement of Article 101 TFEU is present (contrary to the BCA decision), it can only annul the relevant decision without rendering a substitute decision. Furthermore, in relation to an appeal against the fines imposed, it can be inferred that the Court is free to decrease the fine based on reasons of expediency, proportionality or legitimacy. However, it can be inferred that if it considers the fine too low, its only option is to annul the decision of the Competition College.

With regard to interim measures, the Court held that it cannot substitute itself for the Competition College ordering such measures, even if it considers that the latter has committed an error of law or a manifest error of assessment of the facts in finding that there was no *prima facie* infringement.[15]

An appeal cannot be lodged against a settlement decision (see *supra*). As a result, and given that cases are often concluded through a settlement procedure, there is not a lot of case law on this matter.

Two appeals in relation to the fine calculation are worth mentioning. In 2014, the Court of Appeal ruled that the principle of *ne bis in idem* might be relevant if another national competition authority has already imposed a fine, taking into account the Belgian turnover. In those cases, the BCA is in principle not precluded from imposing a fine in relation to the effects on the Belgian market. The Court nonetheless stated that the BCA had to calculate the fine in relation to the Belgian market, and could not therefore impose a lump sum penalty.[16]

In 2020, concerning the PBP case (see *supra*), the Court of Appeal clarified how the maximum amount of the fine should be calculated with regard to associations of undertakings.

The maximum amount should relate to the association's own turnover, excluding the cumulated turnover of its members. As the BCA took into account the total turnover of the PBP's members, the Court ordered the BCA to recalculate the amount of the fine. As a consequence, the Competition College (this time differently composed) ultimately imposed a fine of €245,000 on the PBP.

The Court was quite active in overturning decisions taken during the investigation phase. As such, there have been cases wherein the Court ruled dawn raids conducted by the Investigation and Prosecution Service illegitimate, primarily because no prior authorisation of an investigating judge was required under the previous legislation, and means of appeal were uncertain.[17] In 2020, the Court confirmed that the invalidity of an investigation (which in this case was conducted on the basis of the previous legislation) does not automatically lead to the full or partial annulment of the decision.[18] The origin of the data relied on should be in this case considered. If the data could have only been obtained through the illegal investigation, the data must be removed from the case file. Previously, the Court – as confirmed by the Court of Cassation[19] – also ruled on the illegitimacy of seizing documents containing advice of in-house counsels or based on a "fishing expedition" without predetermining their relevance to the subject matter.[20]

Cross-border issues

To date, neither the BCA, nor national courts, have attempted to exert their competition law jurisdiction extraterritorially. Decisions are therefore limited to the infringing facts related to (a part of) the Belgian territory.

Cooperation efforts within the European Competition Network should be mentioned, however. In particular, the BCA has already assisted in several inspections of the European Commission, conducted multiple inspections upon request of other national authorities, and answered numerous questions of other national authorities. In the Caudalie investigation (*supra*), the BCA requested the French Competition Authority to carry out an inspection on its behalf at the premises of Caudalie in Paris and Saint-Jean-de-Braye. Otherwise, the BCA rarely seems to ask assistance of other national authorities itself. Regardless, cartels have already been successfully prosecuted in the past, (partly) based on information provided by the European Commission.[21]

As mentioned above, Belgium finally transposed the ECN+ Directive through the Act of 28 February 2022, which entered into force on 17 March 2022.

Developments in private enforcement of antitrust laws

As in most EU jurisdictions, private enforcement is still a developing area rather than a significant source of competition law cases. Private enforcement of Belgian or European competition law through national courts is nonetheless an existent feature. However, more prominent in this regard are actions attempting to achieve the annulment of an agreement contrary to competition law (as opposed to *third-party* enforcement actions).[22]

By the Act of 6 June 2017, Belgium finally transposed the EU Directive on antitrust damages actions ("Damages Directive"). The Act entered into force on 22 June 2017. Any procedural rules introduced by this Act will not be applied to claims for damages filed before 26 December 2014. The Belgian Act is mainly in line with the Damages Directive, with a few interesting deviations, including the impact of voluntary damage payments on the fine calculation by the BCA, and the fact that the definition of a cartel also includes hub-and-spoke cartels.

Endnotes

1. Brussels (Market Court), 8 January 2020, 2019/MR/3.
2. BCA Decision of 28 May 2019, Case CONC-I/O-16/0011, No. ABC-2019-I/O-14.
3. BCA Decision of 26 March 2021, Case CONC-I/O-16/0011, No. ABC-2021-I/0-05.
4. BCA Decision of 28 April 2021, Case CONC-I/O-19/0013, No. ABC-2021-I/O-06/AUD.
5. BCA Decision of 6 May 2021, Cases CONC-PK-17/0038 and CONC-PK-18/0001, No. ABC-2021-P/K-09.
6. Brussels (Market Court), 30 June 2021, 2021/MR/1.
7. Brussels (Market Court), 1 December 2021, 2021/MR/1.
8. BCA, Press Release of 18 February 2022, No. 7/2022.
9. BCA, Press Release of 1 October 2021, No. 20/2021.
10. https://www.vrt.be/vrtnws/nl/2020/06/16/maakten-beveiligingsfirma-s-onderling-prijsafspraken-in-ons-land/.
11. BCA, Press Release of 8 October 2019, No. 32/2019.
12. https://www.bma-abc.be/nl/over-ons/actualiteit/verzoek-om-inlichtingen-auto-experts/.
13. BCA, Priority Policy of the BCA for 2021, 10 March 2021.
14. BCA Decision of 6 May 2021, Cases CONC-PK-17/0038 and CONC-PK-18/0001, No. ABC-2021-P/K-09, pp. 191–192, §92.
15. Brussels Court of Appeal, 23 September 2020, 2020/MR/1.
16. In relation to the flour cartel, see Brussels Court of Appeal, 12 March 2014, No. 2013/MR/6.
17. Court of Cassation, 22 January 2015, AR C.13.0532.F.
18. Brussels Court of Appeal, 7 October 2020, 2009/MR/3-8.
19. Court of Cassation, 22 January 2015, AR C.13.0532.F.
20. Brussels Court of Appeal, 5 March 2013, 2011/MR/3, not published.
21. See, e.g., BCA Decision of 30 August 2013, Case CONC-I/O-05/0075 – Cimenteries, No. 2013-I/O-24.
22. See, e.g., Brussels Court of Appeal, 28 April 2010, TBH 2011, vol. 8, p. 808; Antwerp Court of Appeal, 2 December 2013, No. 2010/AR/1938, TBM 2014, vol. 4, p. 335.



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