

New Belgian Competition Act Enters Into Force

The new Belgian Competition Act of April 3, 2013 (the “Act”) is scheduled to enter into force in the coming days.¹ While substantive antitrust and merger control principles remain unchanged, the Act contains significant institutional and procedural innovations inspired by the objective of increasing the effectiveness of competition law enforcement. It remains to be seen whether these changes will bring about the intended effects, as the implementation of various provisions of the Act continues to raise questions.

I. New Belgian Competition Authority

The Act replaces the former Competition Council and Directorate-General for Competition by a single, autonomous, administrative body called the Belgian Competition Authority (“BCA”).

- **Unified authority.** The former Competition Council was characterized by a dual structure, with decisions adopted by an independent administrative court. The BCA will now exercise both prosecutorial and decisional powers through functionally differentiated organs within a single administrative body.
- **Composition.** The BCA is composed of: (1) the President (Jacques Steenbergen); (2) the Auditorate, headed by the Auditor General (Véronique Thirion), which largely retains its previous – primarily investigative – powers and will be in charge of preparing draft decisions; (3) the Competition College, in charge of issuing decisions, composed of the President and two Assessors who will be appointed on a case-by-case basis; and (4) the Management Committee, consisting of the President, the Auditor General, the General Counsel (Joachim Marchandise), and the Chief Economist (Alexis Walckiers). The Management Committee is responsible for setting policy priorities and issuing guidelines.

II. Antitrust Proceedings

The Act significantly alters the course of antitrust proceedings, as follows:

- **Stricter deadlines.** The Act provides for tight deadlines in an attempt to reduce the duration of proceedings (*e.g.*, two months for the parties to submit written observations on the Auditor’s draft decision or one month from the oral hearing for the College to issue a decision). The binding nature of these deadlines remains uncertain, however, as they are not expressly sanctioned and may be difficult to comply with in complex cases.

¹ The Act integrates Belgian competition rules into the Belgian Code of Economic Law by introducing a “Book IV on the Protection of Competition” and a “Book V on Competition and Price Evolutions.”

- **Interim measures.** The Act aims to streamline interim measure proceedings. In short, the College is supposed to hear the parties within one month from the filing of the request for interim measures and to issue a decision within one month from the oral hearing (or the request is deemed to have been rejected). In turn, the Auditorate is no longer required to submit written observations, although this remains possible.
- **Settlement decisions.** The Act provides for settlement decisions whereby, similar to the EU cartel settlement process, parties need to acknowledge their responsibility for an infringement and accept the proposed fine in return for a 10% fine reduction. Unlike at EU level, such settlements under the Act are also available for abuses of dominance. Belgian settlement decisions are not open to appeal.
- **Fines and leniency for individuals.** The Act provides for the possibility to impose fines on individuals involved in hardcore cartels, *i.e.*, agreements with competitors on (1) price fixing; (2) output or sales restrictions; and/or (3) market allocations. The amount of the (administrative) fines can range from 100 to 10.000 euros. Individuals can be granted immunity of fines in case they acknowledge the infringement and cooperate with the investigation (typically by providing evidence). The grant of immunity to individuals does not exclude the grant of immunity to the undertaking on behalf of which they have acted. It remains to be seen how vigorously individual liability will be sought in the future and which categories of individuals will be targeted. The interplay of individual liability and fines with labor law principles will also require careful consideration.
- **Appeal.** Final decisions of the College can be appealed before the Brussels Court of Appeal, which has full jurisdiction in the antitrust field. The Court's competence to substitute contested findings with its own judgment is expressly confirmed. Unfortunately, the Act does not fully reflect the recent *Belgacom* judgments of the Constitutional Court and the Brussels Court of Appeal with respect to appeals against decisions of the Auditor on the use of evidence seized during inspections. In short, it fails to effectively prevent the Auditor from taking cognizance of information (including legal advice) collected unlawfully in the course of investigations.

III. Merger Control Proceedings

The Act does not significantly alter merger control proceedings, subject to the following:

- **Simplified procedure.** The duration of simplified merger control proceedings is shortened to fifteen working days (instead of twenty working days).
- **Appeal.** While the Brussels Court of Appeal exercises full jurisdiction when reviewing the College's antitrust decisions, the Act limits the Court's jurisdiction in merger control cases to a control of legality (*i.e.*, it may only uphold or annul the contested decision in full or in part).

IV. Price Evolutions

The Act entitles the Price Observatory, which monitors price evolutions, to report to the BCA “problems” regarding prices or margins, abnormal price evolutions, or structural market issues. To remedy these “problems”, the College can impose interim measures for a maximum period of six months, after hearing the undertakings concerned at short notice and subject to appeal before the Brussels Court of Appeal. If the College imposes such interim measures, the competent Minister is then required to present a plan to the government involving structural changes to the sector in question, within six months. This innovation creates considerable uncertainty, as it is unclear what type of situations will qualify as “problems” likely to give rise to interim measures.

While the new Belgian Competition Act’s objective to reduce the duration of competition law proceedings is welcome, it remains to be seen whether and how the innovations contained therein will be able to meet that objective. Moreover, the implementation of a number of provisions is likely to raise procedural questions involving important due process issues, which will need to be clarified in the coming months.

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Should you have any questions on the above or otherwise, please feel free to contact [Robbert Snelders](#), [Dirk Vandermeersch](#), or [Damien Gerard](#) in the firm’s Brussels office, or any of our partners and counsel listed on our website at <http://www.clearygottlieb.com>.

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