

The new Belgian Competition Act

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On April 26, 2013 the redrafted Belgian Competition Act of April 3, 2013 was published in the Official Journal.

With the amended legislation Federal Minister of Economic Affairs, Johan Vande Lanotte, aims to react faster when abnormal price evolutions occur or when price fixing agreements are suspected. To reach this goal the new Act completely reforms the current Competition Authority and revises the procedural architecture in an ambitious attempt to make it less complex and more efficient by imposing e.g. some strict procedural time-limits. Following an OECD report, Belgium also did an effort to eliminate the loopholes for natural persons. The management of companies will now be facing administrative fines in case of certain infringements. Finally, the bill grants new powers to the reformed Competition Authority in terms of price control, a move that has not passed unnoticed...

At the time of publication of the new Act the date of entry into force still had to be set by Royal Decree. One month later, on May 27, 2013 the first three Royal Decrees were published. Following the publication some of the provisions entered into force and the recruitment process for the new Competition Authority could take a start. One or more Royal Decrees will follow (probably soon) to determine the date of entry into force of the remaining provisions.

A new Belgian Competition Authority

The new Authority will act as an administrative body tackling the delays caused by the current structure and the tribunal nature of the Competition

Council ("*Raad voor de Mededinging*" / "*Conseil de la Concurrence*"). Moreover, the new Authority will be autonomous and thus no longer form part of the Federal Ministry of Economic Affairs.

The clear separation between investigation and decision-making process however will not be touched. Investigations will continue to be conducted by the College of Competition Prosecutors ("*het Auditoraat*" / "*l'Auditorat*"), while decision-making powers will be entrusted to a newly created body, called "Competition College" ("*het Mededingingscollege*" / "*le Collège de la Concurrence*"). The College will replace the current Competition Council.

The College of Competition Prosecutors, presided over by the Prosecutor-General, will decide whether or not to open an investigation, conduct the investigation and draft a preliminary decision. In each individual case the Prosecutor-General will appoint a competition prosecutor and a team of case handlers.

The final decision will be taken by a Competition College, a body established for each case at an *ad hoc* basis. The Competition College is presided over by the President of the Authority. Decisions of the Competition College can be appealed before the Brussels Court of Appeal.

The new Competition Authority will be led by a management committee composed of the President, the Prosecutor-General, the Chief Legal and the Chief Economist and will be referred to as the Directional Committee. The Committee will be in charge of general policy and the setting of objectives.

The inspiration for the Presidential nature of the new regime comes from the French model ("*Autorité de la Concurrence*"). The President will have an important role and combine representative, policy-making and management functions with involvement in the decision-making process, but will not be involved at investigation level.

Procedural novelties

Next to the new enforcement structure, the new Competition Act also introduces some significant procedural changes.

A modified two-phase infringement procedure

Under the current regime incriminated parties only get access to their files at the end of the investigation procedure when the competition prosecutor files his report to the Competition Council. This has caused a lot of delays.

The new infringement procedure will still take place in two rounds. However, the new Competition Act provides for a different two phase procedure whereby incriminated parties will be allowed to intervene at investigation level (and thus during the first round).

Incriminated parties will now receive a statement of objections during the investigative phase and have the right to access the part of the file upon which the statement of objections is based and all non-confidential documents and information. Moreover, they will have the possibility to reply with a defence letter at this stage of the procedure.

Another new feature at investigation level is the required prior authorization of an investigating judge before the competition prosecutor can conduct an on-the-spot investigation.

Based on the data and documents gathered during the investigation, the competition prosecutor will submit a preliminary decision to the President which opens the decision-making phase before the Competition College.

Strict time-limits

At both the investigation and the decision-making level strict time-limits will apply.

Under the current legislation, parties sometimes have to wait 4 to 5 years for a decision due to the

fact that there are no set time-limits. The new Act changes this significantly.

At investigation level, the incriminated parties will now have a minimum term of one month (exact term to be decided by the competition prosecutor) to reply to the statement of objections. One month after receiving the defence brief or, in the absence of replies, after expiry of the time-limit granted, the competition prosecutor has to submit a motivated preliminary decision with the supporting file to the President.

Once the preliminary decision has been received by the Competition College, parties will find themselves at the decision-making level. The incriminated parties are granted two months to reply as from the moment they get access to the entire file. During this period they can add documents relevant to their defence and submit written comments. However, the incriminated parties can only add documents relating to new objections included in the draft decision. The two month time-limit can be extended by the President when deemed appropriate.

Once the Competition College receives the replies of the incriminated parties (or once the time to reply has elapsed), it will schedule a hearing within one or two months. A decision will be rendered within one month of the hearing. This time-limit can only be suspended if a consultation process with the European Commission is required.

Appeal procedure for investigative measures

An important amendment to the current legislation is the possibility to appeal the inclusion in the preliminary decision of certain evidence obtained during the investigation by the competition prosecutor. The measures can only be appealed after issuance of the statement of objections and provided that the contested information has been used by the competition prosecutor to draft his preliminary decision.

Settlement procedure

A complete novelty is the settlement procedure (inspired by the European model) which may be activated at the investigation level before the preliminary decision has been submitted to the President. The College of Competition Prosecutors may propose the undertaking concerned a reduction of maximum 10% of the fine

it intends to impose. Once the undertaking accepts to pay the fine and acknowledges its liability for the infringement of competition law, the case will be considered "closed". Unlike the similar procedure at EU level, settlement decisions are not subject to appeal under Belgian law (the lack of an appeal possibility in transaction procedures seems logical given the voluntary nature of a settlement).

Procedure for interim measures

Short time-limits will also apply to the procedure for interim measures which will now be a one stage procedure being brought directly before the Competition College (the investigation phase has been dropped). Under the current Act the President alone decides.

Any interested person acting as a plaintiff, the College of Competition Prosecutors or the Minister can file a motivated request with the President in order to suspend the harmful competition practices that are subject of the investigation and are likely to cause serious, imminent and irreparable damage to undertakings or to harm the general economic interest.

A date for a hearing will be scheduled within one month after the submission of the request. The Competition College is bound to render a decision within one month from the hearing. If no decision is adopted within this time limit, the request will be considered as rejected.

The time-limits can be extended by a maximum of two weeks.

Personal liability

One of the major novelties is the possibility to impose administrative sanctions on individuals who have directly participated on behalf of undertakings or associations of undertakings in serious violations of competition law such as price-fixing, output restrictions and market sharing. Until now only fine legal entities were subject to fines.

The administrative fines are capped and cannot exceed 10.000 EUR.

Price control

New powers are granted to the Competition Authority in relation to price monitoring.

When the Price Observatory ("*Prijzenobservatorium*" / "*Observateur des prix*") (which forms part of the Ministry of Economic Affairs) detects problems in terms of prices or margins, abnormal price fluctuations or structural market problems, it may consult the parties involved, professional federations and consumer organizations, and consequently report to the Minister and the Authority.

The Competition College may then, in urgent matters and to avoid a situation likely to cause serious, imminent and irreparable damage to undertakings or consumers or likely to harm the general economic interest, impose interim measures (such as e.g. a price cap or a price freeze) for a maximum term of 6 months. These interim measures can be appealed before the Brussels Court of Appeal.

In the event that an interim measure has been adopted, the Minister has to present the Federal Government within six months structural measures to improve the market functioning in the sector concerned. The Act does not impose a time limit on the Federal Government to act.

This aspect of the new legislation is heavily criticized since the involvement of the state in the monitoring of price development disrespects the principle that prices should be the result of competitive market forces.

Conclusion

The introduction of a new Competition Authority and more streamlined procedures with short time-limits will certainly improve the decision-making process in terms of speed, but it is not clear yet if the procedure will be able to meet the qualitative standards as well.

Even if the involvement of the incriminated parties in the investigative phase is an important leap forward with regard to the right of defence, the extremely short time-limit imposed upon the incriminated parties once the competition prosecutor issues the statement of objections, will be a real challenge. Moreover, this minimum period of one month (exact time frame to be set by the competition prosecutor), becomes all the more important since the Act prohibits parties to add evidence during the decision making procedure before the Competition College that was not submitted during the investigative phase,

unless it concerns evidence of a fact or a reply to objections that were unknown by them at the earlier stage.

Quite ambitious as well is the assignment of new powers in price control matters to a brand new Authority. Regardless of the fact that price monitoring is a very sensitive matter in terms of freedom of competition, it might be too soon to confer this task to an entity that still has to be set

up, start building a vision, decide on its policy and priorities,....

If the new competition legislation will indeed successfully achieve its goal and guarantee a better functioning of the free market through on the one hand, making an end to price agreements and abuse of dominance, and on the other hand, prevent the formation of cartels, remains an uncertainty.

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