LIDC

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

LIDC BORDEAUX 2010
Report of the AEDC (Association pour l'étude du droit de la concurrence – Belgium)

Question A: Competition Law

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

International Reporter: Elisabeth Legnerfält
E-mail: Elisabeth.Legnerfalt@delphi.se

National reporteur : Elise Provost[1]
E-mail : eprovost@doct.ulg.ac.be

Introduction

Preliminary, it ought to be noted that until the reform of the Belgian competition system in 2006, the enforcement record of the Competition Council ("the Council") had been particularly weak.[2] Amongst the limited competition case-law delivered to date thus, only nine cases address the specific issue of vertical pricing practices[3]. As a result, the case-law provides only scant guidance on the substantive principles applicable to cases involving vertical pricing issues. This is all the more true given that, to our knowledge, the Council only

[1] The author would like to thank N. Petit, E. Van Rysselberge, A. Defossez, N. Neyrinck, A. Maes, W. De Vos, J. De Bruyn and K. Mercelis for their invaluable insights and remarks. The content of this report remains the author's sole responsibility.

[2] The Belgian competition law regime has been amended in 2006 (some provisions have been introduced since then), as a result of a deep reform concerning both substantive and procedural aspects. See the two Acts of 10 June 2006 on the protection of economic competition and on the establishment of a Competition Council, as coordinated by the Royal Decree of 15 September 2006. The Law is available at the following address: http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?language=fr&caller=list&cn=2006091567&la=f&fromtab=loi&sql=dt='loi'&tri=dd+as+rank&rech=1&numero=1.
On the enforcement of competition law in Belgium before the reform, see in particular OECD Economic Survey of Belgium, 2005.

[3] For the purpose of this report, « vertical pricing practices » is defined, narrowly, as resale price practices according to which the supplier either influences resale pricing or is being granted information on resale prices of its products.The questionnaire and in particular its introduction, led us to exclude from the scope of the analysis practices relating to exchanges of information on competitors' prices.

issued three decisions on pricing practices in vertical relationships.[4] Importantly, a key explanatory factor for the scarce case-law of the Council in this field hinges possibly on the fact that the Council - as well as potential complainants - views such practices as less harmful than other practices like horizontal agreements and abuses of dominance. The former therefore receive a lower priority rank[5].

Second, a significant number of the cases relevant for this report have been decided by ordinary civil courts ("private enforcement") in the context of "cease and desist" orders proceedings. By contrast to competition authorities, which tend to reason their cases through lengthy decisions, ordinary civil courts deliver much shorter decisions, which inevitably provide less guidance to scholars, firms and their counsels.

1. Legal framework

1.1 What is the legal framework applicable to vertical agreements, i.e. are these agreements licit in general, in part only. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

Vertical agreements fall within the scope of Article 2 of the Law on the protection of economic competition ("LPCE"), which replicates Article 101 Treaty on the Functioning of the European Union ("TFEU").[6] Hence, the first limb of Article 2 LPCE outlaws anticompetitive agreements; its second limb declares them null and void; and its third limb provides for an individual exemption system, should the agreement generate efficiency benefits which outweigh its restrictive effects.[7]

---

[4] Few proceedings regarding such practices are opened and there is an array of decisions on limitation. See the following non-exhaustive list of decisions:
Raad voor de Mededinging, Beslissing, n°2003-P/K-75, 26 September 2003, NV Gielen-Wellens / NV Kuwait Petroleum; Conseil de la concurrence, Décision n°2003-P/K-92, 19 November 2003, CSOOFB/ Draeck Optics, Essilor e.a ; Conseil de la concurrence, Décision n°2008-P/K-38, 13 June 2008, INTERDAMO SA / ITM Belgium SA et SCA Produits régionaux SA ; See Auditorat, Décision n° 2008-P/K-60-AUD, 5 December 2008, Vision Center/APOB ; See Auditorat, Décision n°2008-P/K-66-AUD, 15 December 2008, SPRL Garage du Parc/SA Castrol.

[5] See, Article 45 LPCE. See also, the 2009 LIDC Belgian report, E. Mattioli, Belgian Report, Question A: Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?, 2009.

[6] If one of the parties is a dominant company, those agreements may also fall within the scope of Article 102 TFEU or Article 3 LPCE (the national provision equivalent to Article 102).

[7] *Art. 2. § 1er. Sont interdits, sans qu'une décision préalable soit nécessaire à cet effet, tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser de manière sensible la concurrence sur le marché belge concerné ou dans une partie substantielle de celui-ci et notamment ceux qui consistent à :*
1° fixer de façon directe ou indirecte les prix d'achat ou de vente ou d'autres conditions de transaction;
2° limiter ou contrôler la production, les débouchés, le développement technique ou les investissements;
3° répartir les marchés ou les sources d'approvisionnement;

In addition to this, Belgian competition law provides for three possibilities of collective exemptions.[8] First, Article 5 of the LPCE indicates that under national competition law standards, agreements that meet the criteria set out in the block exemption Regulations of the European Commission are exempted.[9] Second, Article 5 extends the scope of applicability of those block exemption Regulations to factual settings where trade between Member States is not affected (which implies that there is no Commission competence) or where the practice does not prevent, restrict or distort competition on the common market (which means that there is no infringement under EC law) but which would be exempted should European competition law and those Regulations be applicable. Finally, Article 5 states that national block exemption Regulations can be adopted.

As a result of those provisions, and absent a national block exemption Regulation to date, it can be said that under Belgian competition law, vertical agreements are subject to a legal regime similar to the EU standards defined under Regulation 2790/1999. In practice, the system is as follows: vertical agreements are, with some limited exception, not *per se* forbidden. They may nonetheless be held unlawful, should they have an anticompetitive object or generate anticompetitive effects, which are not compensated by pro-competitive efficiencies.

4° appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence;
5° subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.
§ 2. Les accords ou décisions interdits en vertu du présent article sont nuls de plein droit.
§ 3. Toutefois, les dispositions du § 1er. ne s'appliquent pas :
1° à tout accord ou catégorie d'accords entre entreprises,
2° à toute décision ou catégorie de décisions d'associations d'entreprises, et
3° à toute pratique concertée ou catégorie de pratiques concertées qui contribuent à améliorer la production ou la distribution ou à promouvoir le progrès technique ou économique ou qui permettent aux petites et moyennes entreprises d'affermir leur position concurrentielle sur le marché concerné ou sur le marché international, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte et sans toutefois :
a) imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs;
b) donner à ces entreprises la possibilité, pour une partie substantielle des produits en cause, d'éliminer la concurrence.

[8] *Art. 5. L'interdiction de l'article 2, § 1er, ne s'applique pas aux accords, décisions d'associations d'entreprises et pratiques concertées pour lesquelles l'article 81, paragraphe 3, du traité CE a été déclaré d'application par un règlement du Conseil des Communautés européennes ou un règlement ou une décision de la Commission européenne.*
L'interdiction de l'article 2, § 1er, ne s'applique pas aux accords, décisions d'associations d'entreprises et pratiques concertées qui n'affectent pas le commerce entre Etats membres ou qui ne restreignent pas, n'empêchent pas ou ne faussent pas la concurrence dans le marché commun et qui auraient bénéficié de la protection d'un règlement au sens de l'alinéa premier, dans le cas où ils auraient affecté ce commerce ou restreint, empêché ou faussé cette concurrence.
L'interdiction de l'article 2, § 1er, ne s'applique pas aux catégories d'accords, décisions d'associations d'entreprises et pratiques concertées qui entrent dans le champ d'application d'un arrêté royal pris en application de l'article 50.

[9] See, Article 3(2) Council Regulation N°1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Article 5 LPCE also states that the national provisions cannot be enforced when an individual exemption has been granted by the Commission.

In this respect, an important distinction must be drawn between so called "restrictions by object", and "restrictions by effect". Both the Council and ordinary courts draw a line between, on the one hand, some vertical practices which are deemed to automatically infringe competition law regardless of their actual effects on the market (restrictions by object),[10] and, on the other hand, some practices which can only be found unlawful upon proof of anticompetitive effects (restrictions by effect). A practice is normally classified as a restriction by object because of robust legal and economic empirical evidence that it will in all likelihood harm competition on the market.

Confronted with a potentially anticompetitive practice, the Council and the national courts will thus first check if the practice falls within the existing restrictions by object defined in EC instruments and case-law. This is for instance the case of resale price maintenance provisions, which are deemed to restrict competition by their very nature, and are thus classified as hardcore restrictions under Regulation 2790/1999.[11] Faced with such practices, the Council and the Belgian courts will not enter into an in depth assessment. Second, if the practice is not classified as a restriction by object, the Council and the Belgian courts will assess its effects on the market.

Whilst the finding of a restriction by object should not prevent the undertakings to claim the benefit of an exemption pursuant to Article 2(3) (*i.e.* efficiencies), this possibility is primarily theoretical. The Council and the courts will be reluctant to salvage a restriction by object on the basis of this provision.

Overall, in practice – and again not unlike the European Commission – the Council has not seemed particularly eager to pursue anticompetitive vertical agreements, and has put a stronger emphasis on other types of infringements under Article 2 LPCE. Moreover, Belgian competition enforcement is still nascent.[12] It thus faces important conceptual debates, and in particular, the question whether its assessment principles should follow a legalistic (forms-based), or on the contrary, an economic approach (effects-based). This tension is well reflected in a number of decisions taken by the Council and the Belgian courts in the field of vertical arrangements, with some decisions following a forms-based approach, and other endorsing a more economic approach.[13]

1.2 Do these principles vary depending on the type of vertical practice considered?

[10] See regarding vertical pricing practices, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco ; see also, Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh.

[11] See for instance, Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.
The new block exemption Regulation provides for the same approach. See, Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 20 April 2010.

[12] See, A. Defossez and N. Petit, La loi belge sur la protection de la concurrence économique - Rapport d'étape après deux années d'application, *Concurrences*, N° 2-2009, n°25825.

[13] See, N. Petit, L'application du droit de la concurrence par les juridictions belges: une analyse tendancielle de la jurisprudence récente, in *Concurrence en droit, belge et européen*, J.F Bellis, Larcier, 2009.

In principle, the Council and national courts abide by the above framework. Hence, those practices which are classified as hardcore restrictions under EU legislation are subject to a stringent regime. Other practices are subject to a fresh look assessment, which consists in examining successively whether the practice is a restriction by object or by effect.

In practice, many vertical practices seem to be treated as restrictions by object and are consequently subject to a forms-based approach. Moreover, even when the practice is deemed a restriction by effect, the Council and the Court might not apply a particularly demanding economic analysis.

1.3 Is there a specific prohibition in your law on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

There is no specific prohibition under Belgian law dealing with all or some particular vertical practices pertaining to prices. Prices applied to end-users may fall within the purview of the national competition rules on unlawful agreements and abuses of dominance (which prohibits unfair pricing by dominant firms) contained in Article 2 and 3 LPCE. In addition, the Law on unfair trading practices, and in particular, Article 94-3 LPCC[14] may apply to certain vertical practices. Yet, the case-law of the Belgian courts conditions the applicability of Article 94-3 LPCC to the proof, in parallel, of an infringement of the LPCE's competition provisions. Consequently, the domestic unfair trading practices legislation cannot be said to prohibit vertical practices, unless there is also an infringement of the national competition rules.[15]

1.4 What is the *de minimis* / notability threshold, if any, applicable to vertical arrangements and practices?

Under Article 2 LPCE, practices are only forbidden insofar as they *appreciably* prevent, restrict or distort competition. This condition is similar to the well-known EU law *de minimis* doctrine. Importantly, hardcore restrictions of competition are deemed unlawful, irrespective of the existence, or not, of appreciable effects on the market.[16]

Neither the LPCE, nor any soft law instrument devises a single, quantitative, threshold for the purposes of assessing whether a given agreement is *de minimis*. In practice, the Council and the Belgian courts rely on an impressionistic approach, which focuses, *inter alia*, on the market shares of the undertakings but also the nature of the practice itself and its economic context.[17]

[14] Article 94-3 of the Loi sur les pratiques du commerce et sur l'information et la protection du consommateur (LPCC) as amended, provides that :« *Est interdit tout acte contraire aux usages honnêtes en matière commerciale par lequel un vendeur porte atteinte ou peut porter atteinte aux intérêts professionnels d'un ou de plusieurs autres vendeurs* ». The numbering has been modified by successive laws. This explains the discrepancy between the numbers in the different cases.

[15] See for instance, Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV. See also, J. Stuyck, L'effet réflexe du droit de la concurrence sur les normes de loyauté de la loi sur les pratiques du commerce, *R.C.J.B.* 2001, pp. 256-269.

[16] See, for instance, issued on the basis of Article 101TFUE, Cour d'appel de Bruxelles, 22 avril 1999, S.A. Club Méditerranée /S.A. Actimo Circuit et S.A. Air International. See also Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

[17] See for example, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco; Conseil de la concurrence, Opinion AR 2004/MR/8, 5 November 2004, Wallonie Expo S.A. / FEBIAC A.S.B.L.

Interestingly, the Council and the Belgian courts consider that the European Commission *de minimis* Notice[18] is a useful source of guidance for the purposes of assessing the "appreciability" of a practice under national law.[19] For instance, in 2005, two Council's opinions issued in the context of two preliminary ruling cases before the Brussels Court of Appeal held that the appreciable impact of a practice on the market should be assessed in relation to the *de minimis* Notice.[20] The Brussels Court of Appeal subsequently confirmed that approach.[21] Finally, in 2008, the Antwerp Court of Appeal also held that the European Commission *de minimis* Notice constitutes a source of reference for the assessment of a practice's "appreciability" under Article 2 LPCE.[22]

1.5 Has the competition authority, in your jurisdiction, issued guidelines regarding exchanges of information and/or vertical price agreements?

The Belgian competition authority has adopted no guidelines (and more generally no soft law instruments) in relation to exchanges of information and/or vertical price agreements.

2. Criteria applicable to price related vertical agreements

2.1 Is your law declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

The law itself does not provide for a clear cut prohibition of vertical pricing practices. This being said, price fixing practices are expressly mentioned under Article 2 LPCE as examples of unlawful behaviour.

[19] Unsurprisingly, the Council and the national judges rely on the European Commission Notice to assess the appreciable impact of the practice on competition under Article 101 TFUE. See for instance, Cour d'appel de Bruxelles, 22 avril 1999, S.A. Club Méditerranée /S.A. Actimo Circuit et S.A. Air International ; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV. See also Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV.

[19] Unsurprisingly, the Council and the national judges rely on the European Commission Notice to assess the appreciable impact of the practice on competition under Article 101 TFUE. See for instance, Cour d'appel de Bruxelles, 22 avril 1999, S.A. Club Méditerranée /S.A. Actimo Circuit et S.A. Air International ; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV. See also Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV.

[20] See, Raad voor de Mededinging, Opinion 2003/AR/44, 2 September 2005, NV Power Oil / NV D.D.D.-Invest; and, Raad voor de Mededinging, Opinion 2004/MR/9, 9 September 2005, NV Compagnie Pétrolière du Courtraisis / Maurice Coene.

[21] See Hof van Beroep te Brussel, n°2006/1849, 2003/AR/1444, 7 mars 2006, N.V. Power Oil/ N.V. D.D.D. Invest; Hof van Beroep te Brussel, n°2006/1850, 2004/MR/9, 7 mars 2006, N.V. Compagnie Pétrolière du Courtraisie/ Maurice Coene.

[22] See, Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

In full line with Regulation 2790/1999 and the Commission guidelines on vertical restraints, the Council and the national courts assess a number of price fixing practices under a presumptive, forms-based approach. Vertical fixed pricing and minimum resale price maintenance are thus automatically deemed anticompetitive, regardless of their actual effects on the market.[23] Those practices cover conduct whereby a supplier (i) limits or regulates retailers' ability to grant rebates and (ii) determines its retailers' downstream profit margins. This being said, in the *Laroy-Duvo/Aniserco* case, the Brussels' Court of Appeal promoted a slightly different approach. Faced with a vertical price fixing practice, the Brussels' Court of Appeal indeed went beyond the principles enshrined in Regulation 2790/1999, and sought to examine the legal, factual and economic context of the agreement before reaching the conclusion that the practice violated competition law.[24]

This strict legal regime entails several interesting practical consequences. First, those practices cannot benefit from the automatic "block exemption" safe harbour contained in Regulation 2790/1999. In the *Club Méditerranée/Actimo Circuit* case, the Appeal Court of Brussels held for instance, that the practice of fixing resale prices within a selective distribution excluded the applicability of the exemption Regulation.[25] Second, whilst in principle, firms parties to such practices can seek to invoke objective justifications or efficiencies to benefit from an "individual" exemption, the Council and the national courts will unlikely accept such arguments. In the *Laroy-Duvo/Aniserco* case for instance, the Council dismissed the parties' efficiency arguments, on the ground that such pro-competitive effects *could not* outweigh the anti-competitive effects of resale price maintenance on consumers.[26] Third, resale price maintenance is prohibited in and of itself, regardless of whether the conduct at hand has no "appreciable" effects on competition. Put differently, parties to such practice cannot avail themselves of the *de minimis* doctrine. The Court of Appeal of Antwerp reached this conclusion in the *Frost Invest/Evlier* case, when it considered that imposed resale prices are hardcore restrictions which harm the essence of competition. Consequently, there is no need to analyze whether they appreciably restrict competition.[27]

In sum, although vertical fixed pricing and minimum resale price maintenance are only "presumed" unlawful pursuant to the applicable legislation, in practice such practices seem to fall within a harsh, *per se* prohibition. The Court of Appeal of Brussels confirmed this finding

[23] See in particular, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco. Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh.

[24] See, Cour d'appel de Bruxelles, 22 avril 1999, S.A. Club Méditerranée /S.A. Actimo Circuit et S.A. Air International.

[25] See in particular, Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh.

[26] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco. Further to a review of the European Commission position, the Council in that case stated that certain types of agreements, among which agreements on prices, can only benefit from an exemption in very exceptional cases, noting that the European Commission (under the former notification regime) systematically required resale price maintenance clauses to be removed from the agreement in order to benefit from an exemption. See nonetheless, the stance of the Appeal Court, which was more casuistic in its assessment; Hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.

[27] Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

explicitly in the above-mentioned *Club Méditerranée/Actimo Circuit* case. It stated that a selective distribution network in which the supplier imposes resale price is *per se* forbidden.[28]

By contrast, other vertical pricing practices – such as recommended prices and vertical exchange of information on prices – seem in practice to be subject to a much more lenient legal regime. They are lawful provided that the supplier does not *de facto* impose retail prices on its purchasers (see below 2.3).[29] Should they nonetheless raise competition concerns, they ought most likely to be assessed under an effect-based approach.

[28] See in particular, Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh.

[29] See in particular, Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro ; see also the two following Article 101 TFUE's cases: Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; and Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV; see also, Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

2.2 Are they only agreements pertaining to prices that are considered as illegal? What are the conditions placed on "agreements" to be considered as illegal?

Not only agreements pertaining to prices are considered illegal. Article 2 LPCE prohibits all agreements that appreciably prevent, restrict or distort competition. Hence, a whole host of other vertical agreements, including exclusivity agreements, market partitioning arrangements and restrictions of resale terms shall also be covered by the prohibition. Similarly to resale price maintenance, some of those agreements are deemed anticompetitive by their object (*e.g.*, market partitioning). Other can only be deemed unlawful following a thorough case-by-case analysis of their effects on the market.

Articles 2 LPCE simply states that it applies to "agreements" between undertakings. There is no further, more specific definition of the concept of "agreement" in the LPCE. In practice, the Council and the Belgian courts seem to follow the EU Commission and the EU Courts' approach to the concept of "agreement".

2.3 What about the situations which are in-between, such as the recommendations / suggestions and the exchange of information?

To date, the Council has never really assessed such "in-between" situations. In the *Chanel-Diprolux* case, this issue was left unanswered, because the Council found that the Commission had previously cleared identical agreements belonging to the same distribution network. It thus relied on the Commission's decision to find that the notified agreement did not infringe competition law. The *Diprolux* decision is therefore of little guidance as regards the Council's approach to those "in-between" situations.[30]

By contrast, the case-law of the Belgian courts provides more guidance on such practices. The Courts seem to assess them pursuant to an effect-based approach. The crux of the concern lies in determining whether the supplier enjoys *de facto* the power to control the retail prices set out by its buyer. If, in practice, it appears that the upstream party controls its purchasers' retail prices, the practice ought to be considered a (indirect) price fixing agreement and is consequently deemed unlawful. As long as the supplier does not have *de facto* control over retail prices,[31] those pricing practices are lawful.

Pursuant to this approach, the Court of Appeal of Antwerp ruled in the *Frost Invest/Elvier* case that a contractual system of recommended prices did not infringe the LPCE.[32] A similar approach prevails in relation to exchanges of information on prices. In the two *BHP Billiton Diamonds* cases, the Court of Appeal of Antwerp stated for instance that exchanges of information on prices amounted to vertical price fixing when, by virtue of retaliation

[30] Conseil de la concurrence, Décision n°2003-E/A-24 du 25 mars 2003, Diprolux S.A.
[31] That statement complies with the European Commission stance, as provided in Regulation 2790/1999.
[32] Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

mechanisms, the supplier enjoyed *de facto* control over the retailers' prices.[33] In the *Chanel/Makro* case, the Court of Appeal of Mons followed a similar reasoning in relation, to exchanges of information on retailers' advertisement expenditures (which might have included price-related information). The Court implicitly held that a contractual provision requiring retailers to submit advertisement activities to the supplier's *ex ante* approval did not infringe the LPCE, unless, in practice, it allowed the later to control the former's pricing policy.[34]

2.4 What about vertical unilateral practices in relation to prices? What is the assessment of vertical unilateral practices in relation to prices?

To the best of our knowledge, there is no case-law on this issue under the LPCE. However, Article 3 LPCE[35] prohibits abuses of dominance in terms similar to Article 102 TFEU. In addition, the Council and the Belgian courts seem to view the scope of application of Article 3 as generally identical to that of Article 102 TFEU. Hence, it can be presumed that similarly to Article 102 TFEU, Article 3 LPCE could potentially cover dominant firms' vertical agreement practices which restrict competition. The *Van Den Bergh Foods* case, in which the General Court sanctioned a dominant firm's vertical agreement on the basis of Article 101 TFEU, and more importantly, 102 TFEU, brings support to this intuition[36].

3. Anti-competitive effects

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

[33] Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV.

[34] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro.

[35] Article 3 states that : « *Est interdit, sans qu'une décision préalable soit nécessaire à cet effet, le fait pour une ou plusieurs entreprises d'exploiter de façon abusive une position dominante sur le marché belge concerné ou dans une partie substantielle de celui-ci.*
Ces pratiques abusives peuvent notamment consister à :
1° imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables;
2° limiter la production, les débouchés ou le développement technique au préjudice des consommateurs;
3° appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence;
4° subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires, qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats ».

[36] General Court, T-65/98, 23 October 2003, Van den Bergh Foods Ltd/ Commission.

The wording of Article 2 LPCE is particularly terse. It thus provides no guidance on the type of anti-competitive effects to be considered for each pricing practice. The same is true of the case-law of the Council and the national courts, which simply seem concerned with the risk that the upstream undertaking sets, directly or indirectly, downstream retail prices. As explained previously, this risk is presumed in relation to vertical price fixing and minimum resale price maintenance. Other, less blatant practices (*e.g.* recommended price), are subject to a case-by-case assessment. Beyond this, the case-law offers no clear precision on the types of economic effects that ought to be ascribed to vertical pricing practices.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

Neither the LPCE nor the case-law provides any clear information on this issue. This being said, the lack of debate around the *per se* prohibition of resale price maintenance in the Belgian case-law exhibits signs that the Council and the courts wholly endorse the EU law approach, which views such practices as detrimental to *inter* and *intra* brand competition.

This intuition is further confirmed by the *Laroy-Duvo* case, where the Council and the Court of Appeal of Brussels considered both the *inter* brand and *intra* brand effects of the impugned practices, when reviewing the parties' efficiency defences. As far as the Council's decision is concerned, most of the discussion seemed related to the *intra* brand effects of resale price maintenance The Council stated in particular that such practices:[37]

- force consumers to pay prices that are not related to the costs incurred by the distributors;
- can lead to a price increase;
- can lead to the protection of less productive companies;
- deprive consumers from the possibility to buy the product at a lower price and to compare products on the basis of prices and it deprives distributors from granting reductions to consumers.

In a slightly different perspective, the Court of Brussels noted that consumers of the pet-food products were captive and the increased prices harmed them.[38] To a certain extent, this statement seems to refer primarily to *inter* brand competition: had consumers not been captive, and thus able to easily switch to a rival supplier, the resale price maintenance practice – even though it led to a price increase *intra* brand – would not have been deemed anticompetitive.[39]

[37] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco.
[38] Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.
[39] It ought to be noted that besides the *Laroy-Duvo/Aniserco* case, no inter-brand aspects were assessed. In particular, the risk of collusion stemming from resale price maintenance practices has not been considered to our knowledge.

Finally, it ought to be noted that some rulings of the Belgian courts entirely leave aside the question whether a particular practice restricts *inter* and/or *intra* brand competition. Those rulings view as automatically unlawful any restriction on the retailer's *freedom* to set its price, regardless of its effects. The *Frost Invest/Elvier* judgment brings a good illustration of this. The Court of Appeal of Antwerp stated in this case that price fixing practices infringed the essence of competition, as a result of which they should be prohibited.[40]

[40] See for instance, Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.

3.3 Is also the anti-competitive intent of the vertical agreement considered?

The reviewed cases provide no relevant information on that question. However, because of the convergence rule under Article 5 of Regulation 1/2003, there are good reasons to believe that the Council and the Belgian courts will promote principles congruent with the European approach. Under this interpretation, a finding of infringement is not contingent on proof of anticompetitive intent.

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practise encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case-law and/or legal doctrine.

As mentioned under question 2.3, such acts are only taken into account in relation to "in-between" practices such as recommended prices and exchanges of information. As a matter of principle, those practices as *per se* legal. However, they may be found unlawful if, on the facts, the supplier imposes retail prices upon its purchasers, through for instance coercive (*e.g.*, sanctions) or incentive (*e.g.*, bonuses) schemes.[41] Such an assessment is compliant with the European Commission view on price-related vertical practices.

4. Pro-competitive effects

4.1 Does the national competition act recognise justifications in relation to these vertical practices regarding prices? Has the relevant case-law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

Vertical pricing practices that infringe Article 2(1) LPCE can be salvaged under Article 2(3) LPCE when they contribute to (i) improving the production or distribution of products, (ii) promoting the economic or technical progress or (iii) improving the competitive position of small and medium-sized companies. To trigger the application of this individual exemption mechanism, three additional conditions must be satisfied. First, consumers must receive a fair share of the abovementioned improvement. Second, the practice must not impose on the parties restrictions which are not indispensable to the attainment of these objectives. Third, the parties must not enjoy, as a result of the practice, the possibility of eliminating competition in respect of a substantial part of the products in question.

[41] See, Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro; Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV.

In principle, all potentially anticompetitive vertical pricing practices – including hardcore restrictions of competition – can benefit from the exemption enshrined in Article 2(3) LPCE.[42] However, resale price maintenance seems to be *de facto* excluded from the benefit of Article 2(3) LPCE. The Council and the Belgian courts are manifestly skeptical that such practices can ever benefit to consumers. In the *Laroy-Duvo/Aniserco* case for example, the Council scathingly dismissed arguments to the effect that resale price maintenance could generate qualitative efficiencies to the benefit of consumers (servicing improvements).[43]

By contrast, the Belgian courts have mentioned pro-competitive effects in relation to "in-between" practices. For instance, in the *BHP Billiton Diamonds* cases, the Court of Appeal of Antwerp indicated that exchanges of information on retail prices helpfully enabled the supplier to assess the market performance of its products.[44] In the same vein, the Court of Appeal of Mons stated in the *Chanel/Makro* case that in the luxury sector, the rule of prior approval of retailers' advertisements activities helped improve the coordination and efficiency of promotional efforts within the distribution network.[45]

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

The Council and the Belgian courts have had to rule on the question whether vertical pricing practices improved the distribution of products. In this particular area, their decisional practice has acknowledged the existence of three types of pro-competitive effects: (i) enhancement of ancillary services; (ii)improvements of information on consumers' choices ; and (iii) improvements in the promotion of the products.

In the *Laroy-Duvo/Aniserco* case, the parties claimed that resale price maintenance provided retailers with incentives to offer enhanced pre-sale services to consumers. The Council however dismissed this claim, and found that resale price maintenance could not benefit consumers. On the facts, the Court of Appeal ruled that consumers did not benefit from the alleged services as the product did not require such high-level retail services.[46] The ruling of the Court of Appeal thus implies that resale price maintenance may deliver acceptable servicing efficiencies to consumers, in relation to other types of products.

---

[42] See in particular, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco ; Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.

[43] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco.

[44] Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV.

[45] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro. See also, Conseil de la concurrence, Décision n°2003-E/A-24 du 25 mars 2003, Diprolux S.A.

[46] See Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco; Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.

The two *BHP Billiton Diamonds* cases are also interesting here. As already noted, in these cases the Appeal Court of Antwerp stated that the disclosure of information on retail prices was crucial to enable the supplier to assess the success of a product on the market.[47]

Finally, in the *Chanel/Makro* case, the Court of Appeal of Mons pointed out that the rule of prior approval of retailers' advertisements activities had been recognized by the European Commission as allowing the supplier and its distributors to efficiently coordinate their promotional efforts in the field of luxury goods.[48]

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organisation**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

See our remarks under question 4.2.

4.4 Does the national competition act and case-law take into consideration other justifications?

To the best of our knowledge, neither the LPCE, nor the case-law takes other justifications into consideration.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

[47] See, Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV. See also Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV.

[48] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro. See also Conseil de la concurrence, Décision n°2003-E/A-24 du 25 mars 2003, Diprolux S.A.

The burden of proving the existence of redeeming efficiencies bears on the parties to the agreement. In a ruling handed out in 2009 on the basis of EU competition law (in relation to a non-compete obligation), the Belgian Supreme Court stated that it is for the undertakings seeking the application of Article 101(3) TFEU to prove that its conditions are fulfilled.[49] A similar approach prevails under national competition law. In 1998, the Court of Appeal of Brussels stated in the *Laroy-Duvo/Aniserco* case that the burden of proving the applicability of Article 2(3) LPCE was incumbent on the parties claiming the existence of pro-competitive justifications.[50]

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case-law?

The case-law of the Council and of the Belgian Court provides no guidance on this issue.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

The Council and the Belgian Courts have never (i) defused Article 2(1) LPCE; or (ii) applied Article 2(3) LPCE on the basis of pro-competitive justifications. In the above-mentioned cases, the Council and the Belgian Courts either found that the pro-competitive justifications did not fulfil the requirements for applying Article 2(3) LPCE;[51] or that the practice did not, in and of itself, restrict competition under Article 2(1) LPCE. [52] Overall, pro-competitive effects have at best had a cosmetic influence on the decisional practice of the Council and the Belgian courts.

4.8 In your opinion, do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

[49] Cour de Cassation, C.08.0029.N/13, 15 mai 2009, Brasserie Haacht.
[50] Hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.
[51] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco; Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.
[52] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro ; Conseil de la concurrence, Décision n°2003-E/A-24 du 25 mars 2003, Diprolux S.A. ; Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV.

To bring a meaningful answer to this question, our analysis is confined to the practices which the Council and the Belgian courts traditionally consider anticompetitive pursuant to the LPCE, *i.e*. resale price maintenance. As already explained, the Belgian Council and courts are reluctant to take into account their pro-competitive effects. They rely rather on a (*de facto*) *per se* prohibition. Although, the parties can in principle argue that their practice delivers pro-competitive effects that outweigh its anticompetitive effects, the Council and the Courts are reluctant to consider that resale price maintenance practice brings benefit to consumers. This decisional practice is in line with the approach of many other jurisdictions, in Europe and elsewhere.[53]

Recently, however, the *Leegin* ruling of the United States Supreme Court[54] and the review of the rules applicable to vertical agreements in the EU[55] have revived discussions over the legal regime of resale price maintenance. Some lawyers and economists argue that resale price maintenance generates no obvious anticompetitive effects, and/or that it delivers significant efficiency benefits, which to date have wrongly been underestimated.

In our opinion, the vast body of diverging literature on the effects of resale price maintenance calls into question the strong, stable *per se* prohibition rule that prevails in Belgium and elsewhere. In situations of economic uncertainty, a wise approach is to avoid using presumptive legal mechanisms (be they illegality or legality presumptions), on pain of multiplying Type I – false convictions – and Type II – false acquittals –enforcement errors. At best, those considerations plead in favour of a rule-of-reason approach to resale price maintenance.[56]

With this in mind, it ought to be noted that the current legal regime of resale price maintenance might soon change in the different Member States. In the context of the review of Regulation 2790/1999, officials from the European Commission have departed from the current stringent approach, and acknowledged that resale price maintenance could deliver welfare-enhancing effects. Should this new approach be confirmed, it will likely influence the decisional practice of the Council and the Belgian courts. Moreover, at the 2008 OECD roundtable on resale price maintenance, a Belgian delegate declared that resale price maintenance might in some specific cases be pro-competitive (in relation to the luxury goods market).[57]

5. Sanctions:

[53] See in particular, the opinions expressed in the OECD Policy Roundtable on Resale Price Maintenance; See OECD Policy Roundtable, Resale Price Maintenance, 2008.
[54] Supreme Court, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 28 June 2007.
[55] See, Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 20 April 2010.
[56] See for instance, on the definition of the relevant standards, D.S. Evans, How Economics Can Help Courts Design Competition Rules: An EU and US perspective, *World Competition*, 28(1), 2005, pp. 93-99.
[57] See, OECD Policy Roundtable, Resale Price Maintenance, 2008, p. 267.

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

Infringements of the Belgian competition rules may give rise to administrative sanctions, in the forms of fines (up to 10% of the annual turnover) and/or periodic penalties (up to 5% of the average daily turnover).[58]

In practice, the Council has imposed very few sanctions on firms violating the competition rules, and where it has, the magnitude of those sanctions has remained limited, as compared to the practice of other national competition authorities.[59] Of course, it is true that the Council has only dealt with few cases since the passing of the new legislation, so that the number of decisions inflicting fines is limited. In addition, it is also true that firms active in Belgium operate on a relatively small market[60], as a result of what fines for competition law infringements are necessarily modest. Finally, the LPCE provides for a specific procedure which allows firms to avoid administrative penalties in exchange for the early submission of commitments.[61]

This notwithstanding, however, the Council's fining practice remains in stark contrast with the case-law of most other competition authorities. In other jurisdictions, the amount of fines has steadily increased over the past years, and in some countries, has really skyrocketed. By contrast, the Council seems to follow no such consistent trend of elevating fines for competition law infringements.

Lately, a debate has been growing in Belgium on the need to introduce criminal sanctions for competition law infringements in parallel to administrative penalties. This debate follows discussions within other countries, where administrative sanctions have proven ineffective to deter firms from entering into anticompetitive practices. Strangely enough, this discussion

---

[58] See, Article 63 LPCE : *« Lorsqu'elle prend une décision visée a l'article 52, 1°, la chambre du Conseil de la concurrence qui connaît de l'affaire peut infliger, à chacune des entreprises et associations d'entreprises concernées, des amendes ne dépassant pas 10 % de leur chiffre d'affaires, déterminé selon les critères visés à l'article 86. En outre, elle peut, par la même décision, à la demande de l'auditeur, infliger à chacune des entreprises et associations d'entreprises concernées, des astreintes pour non-respect de sa décision, jusqu'à concurrence de 5 % du chiffre d'affaires journalier moyen, déterminé selon les critères visés à l'article 86, par jour de retard à compter de la date qu'elle fixe dans la décision.*
Ces amendes et astreintes peuvent en outre être infligées en cas d'application des articles 52, 1°, 3° et 4°, et 53, § 2, et en cas de non-respect des décisions visées aux articles 58, § 2, 1°, et 59, § 7 ».
Article 51 states that : « *Après réception du rapport de l'auditeur, la chambre du Conseil qui connaît de l'affaire peut constater, par décision motivée : 1° qu'il existe une pratique restrictive de concurrence et ordonner la cessation de celle-ci, s'il y a lieu, suivant les modalités qu'elle prescrit;*(…) ».
Article 86 LPCE provides that « *Le chiffre d'affaires visé aux articles 63 et 64 est le chiffre d'affaires total réalisé au cours de l'exercice social précédent sur le marché national et à l'exportation. Il s'entend au sens du titre VI du Livre IV du Code des sociétés relatif aux comptes annuels consolidés des entreprises.* (…) ».

[59] See for instance, A. Defossez and N. Petit, La loi belge sur la protection de la concurrence économique - Rapport d'étape après deux années d'application, *Concurrences*, N° 2-2009, n°25825.

[60] See in particular, G. Bleser, J. Steenbergen, M. S. Gal, C. Webb, Conference : Small economies and competition policy - A fair deal ?, Concurrences, n° 3-2008, n°19943.

[61] See, Article 53 LPCE.

arises in Belgium absent any empirical evidence – the Council has not fined many infringements – that the LPCE system of administrative sanctions is ineffective.

In this context, the Belgian Government has proposed amendments to the LPCE so as to introduce sanctions against individuals guilty of "*severe*" infringements of Article 2 LPCE. The Belgian Government has not been particularly clear as to the types of sanctions that would be imposed for such violations: jail sentences, other criminal penalties, and/or disqualification rules. By contrast, it is clear that the areas of abuses of dominance and mergers (*i.e.* rules of procedure) will be excluded. Albeit vertical practices in general should not be concerned, vertical pricing practices which constitute hardcore restrictions could constitute severe infringements, falling within the scope of the provision.[62]

[62] See in particular, the position of the Competition Commission, an advisory body in the field of competition; Commission de la concurrence, CCE 2010-023, 4 February 2010, Avis sur l'introduction de sanctions pénales dans le droit belge de la concurrence.

5.2 Are the above practices subjects to sanctions as well?

Yes. Under the current national competition law regime, all practices falling within the scope of Articles 2 and 3 can be subject to administrative fines and periodic penalty payments.

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the kind of sanctions considered or the application of sanctions?

The Belgian legislative framework is remarkably silent on the factors that ought to be taken into account for the setting of fines. The LPCE only refers to a turnover threshold above which the Council cannot set fines and periodic penalties. To date, there are no guidelines on the determination of fines under the LPCE.

To fill this gap, and arguably to provide guidance to firms and their counsels, the Council[63] indicated that it may rely on (i) the criteria set out in the 2004 national Communication on sanctions (no longer in force);[64] and (ii) the assessment principles enshrined in the Guidelines of the European Commission on the method of setting fines.[65]

Pursuant to those soft law instruments, the Council focuses on the seriousness of the practice to set fine. In this regard, two criteria are of particular importance: the nature of the practice itself and the position of the undertakings. Absent decisions of the Council imposing fines for vertical pricing practices, it is impossible to tell whether the specificity of such relationships has any influence on the calculation of fines.

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

We are not aware of any example of fines imposed to firms for unlawful vertical pricing practices. In 1997, in the *Laroy-Duvo/Aniserco* case, where the Council found a restriction of competition, it ordered the undertakings to end the practice and imposed a € 6200/day periodic penalty payment to ensure that they would comply with its decision.[66] In the

[63] See for example, Conseil de la concurrence, Décision n°2008-I/O-13, 4 April 2008, Bayer AG - Ferro (Belgium) SPRL - Lonza S.p.A et Solutia Europe S.A. ; see also Conseil de la concurrence, Décision n° 2009-P/K-10, 26 May 2009, Base/BMB.

[64] See, Lignes directrices de 2004 pour le calcul des amendes (M.B. du 30 avril 2004, Ed. 2, pp.36261 - 36264).

[65] European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

[66] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco. The Court of Appeal decided in an intermediary judgment to suspend the periodic penalty payment until a final decision would be reached. In its final decision, it stated that the Council correctly ordered to end the

Mermans/VCR case, the Council did not impose any administrative sanction upon the parties. It only ordered them to put an end to the notified agreement.[67]

In other areas of Belgian competition law, the Council has inflicted fines. This is in particular the case of horizontal cartels, which have been subject to significant fines.[68] This is also the case of unlawful practices of associations of undertakings.[69] However, the fines imposed to associations of undertakings have been extremely meagre in general.[70]

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

The national competition rules are general in scope and do not distinguish between vertical and horizontal behaviour. In practice, the limited number of infringement cases related to vertical pricing issues reveals that the Council does not see those cases as an enforcement priority.

Moreover, as mentioned above, the formalistic approach which prevails under Belgian law bears testimony to the fact that – unlike other competition authorities which increasingly take into account the specificities of vertical agreements through a case-by-case approach – little attention is given in Belgium to the specificities of vertical practices.

This situation is open to criticism. If the Council, for prioritization-related reasons, reneges on enforcing the LPCE against unlawful vertical pricing conduct, ordinary courts, firms and their counsels, are left without appropriate guidance to assess such practices, and as the case may be, will fail to fully grasp their specificities. These practices will thus remain hardcore restrictions of competition, which ordinary courts will assess with particular severity, despite pronouncements by Belgian competition officials that such practices sometimes generate pro-competitive effects. In addition, the lack of Council's interest in those practices may not be compliant with the enforcement policy sets out at the European level. The European Commission traditionally considers that national competition authorities may be well-suited

---

restrictive practice under the threat of a periodic penalty payment. See, Hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.

[67] Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh.

[68] See in particular, Conseil de la concurrence, Décision n°2008-I/O-13, 4 April 2008, Bayer AG - Ferro (Belgium) SPRL - Lonza S.p.A et Solutia Europe S.A. (€ 500 000).

[69] Under the previous law, fines could not be imposed to such associations. The 2006 rules modified the regime in that respect as well.

[70] See in particular, Raad voor de Mededinging, Beslissing nr. 2008-P/K-45, 25 July 2008, Review BVBA/Associatie van Interieurarchitecten van België vzw (no fine); Conseil de la concurrence, Décision n° 2008-P/K-43, 7 July 2008, ISC c/ FAB et ses membres et Test-Achats c/ auto-écoles de Belgique (€ 6990) ; Raad voor de Mededinging, Beslissing nr. 2008-I/O-04, 25 January 2008, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (€ 29121).

to assess vertical practices, and in particular vertical practices on prices, which essentially impact local and national markets. Hence, it has rarely investigated such practices in the recent years. The Council's rare interventions against vertical pricing practices may then eventually leave unpunished unlawful behaviours and create legal uncertainty.

6.2 Is the case-law evolving? Towards which tendency? On which points is an evolution of the situation advisable?

The recent case-law of the Belgian courts does not exhibit any sign of evolution. The same is true of the decisional practice of the Council, which has not dealt with any vertical pricing practice in the last few years.

This being said, a migration of the Belgian case-law towards a more economic approach of vertical pricing practices cannot be excluded in the future. As noted earlier, Belgian competition law is still in its infancy.[71] The 2006 reform, which was marked by the passing of the LPCE, already yields positive results in terms of enforcement effectiveness and homogeneity.[72] Dynamics of regulatory competition amongst national competition authorities and cooperation within the European Competition Network may, in the midterm, prompt the Council to move towards a more sophisticated, economic-based approach in relation to vertical pricing practices.

In addition, and as already pointed out, the fact that the Council only issued few decisions regarding such practices may already be regarded as a sign that it is no longer incline to deem vertical pricing practices anticompetitive by object (and that it intends to focus on other practices that inflict greater harm to consumer welfare). The views of the Belgium delegate at the 2008 OECD roundtable corroborate this intuition.[73]

To conclude, it is finally worth stressing that Belgian competition law is interpreted and enforced in compliance with European competition law. Prospects of migration towards a more economic approach/rule-of-reason system are thus highly dependent (i) on the policy orientations which the European Commission promotes in the new legal framework for vertical restraints[74] but also (ii) on the future case-law of the Court of justice of the European Union.

[71] See in particular N. Petit, L'application du droit de la concurrence par les juridictions belges: une analyse tendancielle de la jurisprudence récente, in *Concurrence en droit, belge et européen*, J.F Bellis, Larcier, 2009.
[72] Nevertheless, some voices call for further changes in order to increase the Council's independence and reduce the backlog of old cases which forces the College of prosecutors to prioritize cases. See in particular, the OECD position in its Economic Survey of Belgium 2009
[73] See OECD Policy Roundtable, Resale Price Maintenance, 2008, p. 267.
[74] See Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 20 April 2010;; see also the Commission Guidelines on Vertical Restraints, 20 April 2010.

References

Case-law of the Belgian courts

Supreme Court

- Cour de Cassation, C.08.0029, 15 mai 2009, Brasserie Haacht/ B.M.

Courts of Appeal

- Hof van Beroep te Brussel, n°1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat
- Cour d'appel de Bruxelles, 22 avril 1999, S.A. Club Méditerranée /S.A. Actimo Circuit et S.A. Air International
- Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro
- Cour d'appel de Bruxelles, n°2005/4405, 2004/MR/6, 23 June 2005, Emond Laurent / Brasserie de Haacht
- Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV
- Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV
- Cour d'appel de Bruxelles, n°2005/7309, 2004/MR/8, 10 November 2005, Wallonie Expo S.A. / FEBIAC
- Hof van Beroep te Brussel, n°2006/1849, 2003/AR/1444, 7 mars 2006, N.V. Power Oil/ N.V. D.D.D. Invest
- Hof van Beroep te Brussel, n°2006/1850, 2004/MR/9, 7 mars 2006, N.V. Compagnie Pétrolière du Courtraisie/ Maurice Coene
- Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA

Decisional practice of the competition Council

- Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco
- Raad voor de Mededinging, Beslissing, n°98-RPR-6, 8 December 1998, NV Gebroeders Mermans/NV Van Cauwenbergh
- Conseil de la concurrence, Décision n°2003-E/A-24, 25 March 2003, Diprolux S.A.
- Raad voor de Mededinging, Beslissing, n°2003-P/K-75, 26 September 2003, NV Gielen-Wellens / NV Kuwait Petroleum

- Conseil de la concurrence, Décision n°2003-P/K-92, 19 November 2003, CSOOFB/ Draeck Optics, Essilor e.a
- Conseil de la concurrence, Opinion AR 2004/MR/8, 5 November 2004, Wallonie Expo S.A. / FEBIAC A.S.B.L.
- Raad voor de Mededinging, Opinion, n° 2003/AR/44, 2nd September 2005, NV Power Oil / NV D.D.D.-Invest
- Raad voor de Mededinging, Opinion, n°2004/MR/9, 9 September 2005, NV Compagnie Pétrolière du Courtraisis / Maurice Coene
- Raad voor de Mededinging, Beslissing, n°2008-I/O-04, 25 January 2008, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers
- Conseil de la concurrence, Décision n°2008-I/O-13, 4 April 2008, Bayer AG - Ferro (Belgium) SPRL - Lonza S.p.A et Solutia Europe S.A.
- Conseil de la concurrence, Décision n°2008-P/K-38, 13 June 2008, INTERDAMO SA/ ITM Belgium SA et SCA Produits régionaux S.A.
- Conseil de la concurrence, Décision n°2008-P/K-43, 7 July 2008, ISC c/ FAB et ses membres et Test-Achats c/ auto-écoles de Belgique
- Raad voor de Mededinging, Beslissing, n°2008-P/K-45, 25 July 2008, Review BVBA/Associatie van Interieurarchitecten van België vzw
- Auditorat, Décision n°2008-P/K-60-AUD, 5 December 2008, Vision Center/APOB
- Auditorat, Décision n°2008-P/K-66-AUD, 15 December 2008, SPRL Garage du Parc/SA Castrol
- Conseil de la concurrence, Décision n°2009-P/K-10, 26 May 2009, Base/BMB

Other official sources

National

- Lignes directrices de 2004 pour le calcul des amendes (M.B., 30 April 2004, Ed. 2, pp.36261 - 36264)
- Communication du Conseil de la concurrence sur l'exonération totale ou partielle des sanctions pécuniaires dans les affaires portant sur des ententes (M.B., 22 October 2007, pp. 54708 – 54713)
- Commission de la concurrence, CCE 2010-023, 4 February 2010, Avis sur l'introduction de sanctions pénales dans le droit belge de la concurrence

European

- European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 1st September 2006
- Commission Regulation (EC) No 2790/1999 of on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, 22 December 1999
- Commission Guidelines on Vertical Restraints, 13 October 2000
- General Court, T-65/98, 23 October 2003, Van den Bergh Foods Ltd/ Commission
- Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 20 April 2010.
- Commission notice, Guidelines on Vertical Restraints, 20 April 2010.

International

- OECD Economic Survey of Belgium 2005
- US Supreme Court, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 28 June 2007
- OECD Policy Roundtable, Resale Price Maintenance, 2008
- OECD Economic Survey of Belgium 2009

Articles, reports and chronicles

- J. Stuyck, L'effet réflexe du droit de la concurrence sur les normes de loyauté de la loi sur les pratiques du commerce, *R.C.J.B.* 2001, pp. 256-269
- D.S. Evans, How Economics Can Help Courts Design Competition Rules: An EU and US perspective, *World Competition*, 28(1), 2005, pp. 93-99
- G. Bleser, J. Steenbergen, M. S. Gal, C. Webb, Conference : Small economies and competition policy - A fair deal ?, Concurrences, n° 3-2008, n°19943
- E. Mattioli, Belgian Report, Question 1: Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?, 2009
- A. Defossez and N. Petit, La loi belge sur la protection de la concurrence économique - Rapport d'étape après deux années d'application, *Concurrences*, N° 2-2009, n°25825
- N. Petit, L'application du droit de la concurrence par les juridictions belges: une analyse tendancielle de la jurisprudence récente, in *Concurrence en droit, belge et européen*, J.F Bellis, Larcier, 2009

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

Information on this report:

Country: Belgium
National reporteur: Elise PROVOST
Place of work: University of Liège
E-mail: eprovost@doct.ulg.ac.be