

# **The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties**

## **National report for Belgium<sup>1</sup>**

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### **1. Introduction**

The entry into force of Book IV of the Code of Economic Law<sup>2</sup> on 6 September 2013, introduced several fundamental changes to Belgian competition law.

One of the main innovations of Book IV of the Code of Economic Law is the simplification of the structure of the Belgian Competition Authority. The former tripartite structure<sup>3</sup> was transformed into a single administrative body that investigates and decides upon infringements of competition law. Within this newly created administrative body, a distinction is made between the College of Competition Prosecutors (headed by the Prosecutor-General) which holds the investigative powers of the Belgian Competition Authority and the Competition College which holds the decision-making powers.<sup>4</sup> The Competition College is presided over by the President of the Belgian Competition Authority.<sup>5</sup>

Apart from these institutional changes, Book IV of the Code of Economic Law also brought about some important changes to the Belgian transactional framework by introducing a formal settlement procedure. According to the legislator, this would enable the Belgian Competition Authority to close infringement proceedings faster, which is considered both to the advantage of the undertakings concerned (as it will help them avoid the insecurity and costs of lengthy proceedings) and of the enforcement of Belgian competition law in general.<sup>6</sup>

This report will focus on the compatibility of the settlement procedure and other transactional resolutions under Belgian law with due process and fundamental rights. In the first part of the report, an overview will be given of the transactional resolutions available under Belgian competition law in the framework of restrictive agreements and abuse of dominance (see Section 2.1). Subsequently, the fundamental and procedural rights of the parties to such

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<sup>1</sup> This report presents an overview of the law as at 30 April 2014.

<sup>2</sup> Code of Economic Law of 28 February 2013, *Belgian Official Gazette* 29 March 2013, p. 19,975. Book IV was inserted into the Code of Economic Law by Act of 3 April 2013, *Belgian Official Gazette* 26 April 2013, p. 25,216.

<sup>3</sup> On the one hand, alleged infringements of competition law and proposed mergers were investigated by the College of Competition Prosecutors, with the assistance of the Directorate-General for Competition. On the other hand, the Competition Council, which was totally separate from the College of Competition Prosecutors and had the characteristics and competences of an administrative court, took the final decisions relating to the investigated infringements and proposed mergers.

<sup>4</sup> Please note that, despite the fact the Competition College formally holds the decision-making powers, Book IV of the Code of Economic Law also granted certain decision-making powers to the College of Competition Prosecutors (e.g. decisions in the framework of settlement procedures, decisions regarding confidentiality of the investigation file and decisions in the framework of the simplified merger procedure).

<sup>5</sup> Articles IV.16 ff Code of Economic Law.

<sup>6</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 5.

transactional resolutions and of third parties will be discussed (see Section 2.2). In a second part, the report will deal with remedies and the enforcement thereof in the framework of Belgian merger control proceedings (see Section 3).

## **2. Transactional resolutions of restrictive agreements and abuse of dominance**

### **2.1. Overview of transactional procedures**

Under Belgian competition law, there are currently three types of transactional procedures which may be used in the framework of restrictive agreements and/or abuse of dominant position, i.e. a settlement procedure (see Section 2.1.1); a commitment procedure (see Section 2.1.2); and a leniency programme (see Section 2.1.3).<sup>7</sup>

#### **2.1.1. Settlement procedure**

The Belgian settlement procedure is inspired by the settlement procedure introduced under European competition law in May 2004.<sup>8</sup> However, unlike under European competition law, the Belgian settlement procedure may be applied in the framework of an investigation by the Belgian Competition Authority in cases concerning restrictive agreements, as well as in cases concerning abuse of dominance.<sup>9</sup> In this sense, the Belgian settlement procedure seems to be more inspired by the French settlement procedure.<sup>10</sup>

The initiative to open a settlement procedure always needs to be taken by the Competition Authority itself and more in particular by the College of Competition Prosecutors. However, this does not prevent an undertaking or association of undertakings from approaching the Prosecutor informally to see whether or not a settlement could be considered. At any moment during the investigation, but in any case before a draft decision is submitted to the President of the Competition Authority, the College of Competition Prosecutors may, upon the proposal of the Prosecutor heading the investigation, decide whether or not a case is suitable for a settlement procedure.<sup>11</sup> In general, the legislator deemed that a case should be open for a settlement if the Prosecutor has sufficient information to establish a well-defined infringement and considers that the added value of an additional investigation does not outweigh the time and resources that such an additional investigation may cost.<sup>12</sup>

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<sup>7</sup> In practice, the Belgian Competition Authority may also decide to informally settle a case before an investigation has been opened and thus without resorting to any of the aforementioned transactional procedures. It is clear that, under such circumstances, the undertakings concerned will not be able to benefit from the procedural and fundamental rights granted to the parties in the framework of a normal transactional procedure. As this informal settlement procedure is not recognized by Book IV of the Code of Economic Law, it will not be further discussed in this report.

<sup>8</sup> Regulation No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *OJ* 2004 L 123, p.18.

<sup>9</sup> Article IV.51 Code of Economic Law.

<sup>10</sup> L. DE MUYTER and N. NEYRINCK, "Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie", *T.B.M.* 2012, p. 109, §21.

<sup>11</sup> Article IV.51 Code of Economic Law. It follows from this that once the Prosecutor has closed the investigation and has submitted the draft decision to the President of the Belgian Competition Authority, the settlement procedure will no longer be available.

<sup>12</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 13.

If the College of Competition Prosecutors is of the opinion that a case is suitable for a settlement procedure, it will fix a deadline<sup>13</sup> for the undertaking or association of undertakings whose conduct is subject to investigation to indicate in writing that it is prepared to engage in settlement discussions with the Competition Authority.<sup>14</sup> The College of Competition Prosecutors is under no obligation to take into consideration answers received after the deadline, but may still do so.<sup>15</sup>

When an undertaking or association of undertakings indicates that it is prepared to engage in settlement discussions, the College of Competition Prosecutors communicates its intention to proceed to a settlement to the undertaking or association in writing. The College of Competition Prosecutors also identifies the objections it believes it can hold against the undertaking or association of undertakings. At the same time, the College of Competition Prosecutors grants access to the evidence used to support these objections, as well as to all non-confidential versions of documents and information received during the investigation. Finally, the College of Competition Prosecutors must also indicate the minimum and maximum fine it intends to propose to the Competition College for the infringement in its draft decision.<sup>16</sup>

Settlement discussions will then take place between the College of Competition Prosecutors and the undertaking or association of undertakings concerned and the College of Competition Prosecutors will examine the necessary documents and information. If after these discussions a settlement still seems to be '*possible*'<sup>17</sup>, the College may fix a deadline for the undertaking to make a so-called settlement statement. The College of Competition Prosecutors is under no obligation to take into consideration statements received after the deadline. The settlement statement must, in any case, contain an acknowledgment by the undertaking of its involvement in, and its responsibility for, the quoted infringement, as well as an acceptance of the proposed sanction.<sup>18</sup>

If the settlement statement of the undertaking or association of undertakings contains a reproduction and acceptance of the infringement identified by the College of Competition Prosecutors, it '*may*'<sup>19</sup> inform the undertaking or association of undertakings of a draft settlement decision in which this is stated and in which the fine is determined.<sup>20</sup> When the investigation involves the application of Article 101 or 102 TFEU, the European Commission

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<sup>13</sup> Although Book IV of the Code of Economic Law imposes very strict procedural deadlines on the Competition Authority during the investigation phase, no time limits are imposed in the framework of the settlement procedure, leaving the College of Competition Prosecutors a very wide discretion in this respect.

<sup>14</sup> Article IV.51 Code of Economic Law.

<sup>15</sup> According to the Explanatory Memorandum, the rationale behind this rule is that Article IV.51 Code of Economic Law creates the opportunity for the College of Competition Prosecutors to wrap up an infringement procedure faster with the establishment of an infringement. Therefore, the College of Competition Prosecutors is not obliged to take into account late responses. See Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 37.

<sup>16</sup> Article IV.52 Code of Economic Law.

<sup>17</sup> Please note that the College of Competition Prosecutors has full discretion to determine the '*possibility*' of a transaction.

<sup>18</sup> Article IV.53 Code of Economic Law.

<sup>19</sup> The Explanatory Memorandum mentions that, in as far as the settlement statement corresponds to the objections formulated by the College of Competition Prosecutors and the suggested sanction, the College '*must*' accept the transaction statement and take a transaction decision. See Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 14. This obligation for the College of Competition Prosecutors was deleted from the final text of Article IV.54 Code of Economic Law.

<sup>20</sup> Article IV.54 Code of Economic Law.

is also informed of this draft settlement decision.<sup>21</sup> The College of Competition Prosecutors ‘may’<sup>22</sup> apply a reduction of 10% to the fine calculated in accordance with the fining guidelines issued by the Belgian Competition Authority or, in the absence of such guidelines, by the European Commission.<sup>23</sup> When determining the fine, the College of Competition Prosecutors may also take into account commitments made by the undertaking or association of undertakings to pay damages to the victims of the infringement.<sup>24</sup>

In order to come to a final settlement, the undertaking or association concerned must confirm, by the deadline fixed by the College of Competition Prosecutors, that the draft settlement decision reflects the content of their settlement statement and that they accept the sanction mentioned in it.<sup>25</sup> Only if this is the case will the College of Competition Prosecutors take a final settlement decision, including the establishment of the fine, by virtue of which the settlement procedure is closed. In all other cases, the College of Competition Prosecutors will submit the settlement statement to the President of the Competition Authority together with the draft decision.<sup>26</sup> The final settlement decision counts as a final decision of the Competition College. It is sent to the undertaking or association concerned by registered letter and to the secretariat of the Belgian Competition Authority for publication.<sup>27</sup> If there is a complainant, the complainant will also receive a copy of the final decision.<sup>28</sup>

It is important to note that the College of Competition Prosecutors may, at its own discretion, stop or discontinue the settlement procedure at any time and continue its investigation.<sup>29</sup> In this respect, it should be noted that the undertaking or association of undertakings concerned does not have a right to a negotiated outcome.

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<sup>21</sup> Article IV.55 Code of Economic Law. If the European Commission formulates remarks which require an amendment of the draft decision and the College of Competition Prosecutors does not decide to stop the settlement procedure, the College of Competition Prosecutors will be obliged to make a new draft settlement decision. See Article IV.57 Code of Economic Law. In such case, the procedure referred to in Article IV.54 Code of Economic Law will have to be followed again.

<sup>22</sup> From the text of Article IV.54 Code of Economic Law it can be understood that the College of Competition Prosecutors has full discretion to determine the reduction of the fine up to a maximum of 10%. See to the contrary: Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 14, in which the legislator assumes that a 10% reduction must always be given in case of a settlement. See also A. DE CRAYENCOUR and D. GERARD, “La réforme du droit belge des pratiques restrictives de concurrence”, *T.B.M.* 2013, p. 140.

<sup>23</sup> The Notice of the Competition Council concerning the method of calculating fines which dates from 19 December 2011 is currently still applicable, see Notice of the Competition Council of 19 December 2011 concerning the method of calculating fines for restrictive practices which can be imposed by virtue of Article 63 of the Act on the Protection of Economic Competition, *Belgian Official Gazette* 18 January 2012, p. 3,217 (hereinafter “Notice on the method of calculating fines”). However, in a press release of 22 November 2013, the Belgian Competition Authority announced that it is considering repealing this notice and replacing it with a declaration stating that for the calculation of fines the Belgian Competition Authority will follow the guidelines on the method of setting fines issued by the European Commission.

<sup>24</sup> Article IV.54 Code of Economic Law.

<sup>25</sup> Article IV.54 Code of Economic Law.

<sup>26</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 14.

<sup>27</sup> It is not clear whether the published settlement decision will contain an acknowledgment by the undertaking of its involvement in, and its responsibility for, the infringement. In any case, it seems that the final settlement decision will need to mention the objections and evidence used to establish them, the amount of the fine, and the fact that, by the adoption of the final settlement decision, the investigation procedure against the undertaking is closed. See in this respect the Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 14.

<sup>28</sup> Article IV.57 Code of Economic Law.

<sup>29</sup> Article IV.53 Code of Economic Law.

All documents and data which are exchanged between the College of Competition Prosecutors and the undertaking or association concerned are confidential.<sup>30</sup> This means that the documents and data cannot be communicated to third parties (e.g. in the framework of follow-on actions for damages), even when the settlement procedure has come to a premature end.

The undertaking or association of undertakings cannot lodge an appeal against the final settlement decision.<sup>31</sup> According to the Explanatory Memorandum, no appeal is possible against the final settlement decision because the undertaking has to agree with the settlement before the final settlement decision is taken.<sup>32</sup> Although it is correct that the European settlement procedure initially also did not provide a right to appeal, it was added to the European settlement procedure, as the European legislator feared that a waiver of this right could potentially breach the right to an effective remedy and a fair trial.<sup>33</sup> The Belgian legislator's position regarding the right to appeal can therefore be questioned. In addition, the Explanatory Memorandum also notes that the undertaking or association cannot appeal against the decision of the College of Competition Prosecutors to start or (dis)continue a settlement procedure "*on the example set by EU procedure*".<sup>34</sup>

Since the introduction of the settlement procedure under Belgian law, no final settlement decision has yet been taken by the College of Competition Prosecutors. However, given the success of the European settlement procedure, it is expected that, in the near future, a significant percentage of all cases will be dealt with under the settlement procedure.<sup>35</sup> In this light it should also be noted that the settlement procedure is considered as complementary to the leniency programme.<sup>36</sup>

### 2.1.2. Commitments

As was the case under the former Belgian Competition Act<sup>37</sup>, Book IV of the Code of Economic Law allows the Competition College to close an investigation by declaring that the commitments offered by the parties are sufficient to satisfy the competition concerns and are

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<sup>30</sup> Article IV.56 Code of Economic Law.

<sup>31</sup> Article IV.57 Code of Economic Law.

<sup>32</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 54.

<sup>33</sup> Paragraph 41 of the Commission's Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, *OJ* 2008 C 167, p.1.

<sup>34</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 54.

<sup>35</sup> Report submitted by A. VANHESTE to the House of Representatives on 22 January 2013, No. 53-2591/003, p. 30.

<sup>36</sup> L. DE MUYTER and N. NEYRINCK, "Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie", *T.B.M.* 2012, p. 107, §9. However, it remains to be seen how this complementarity would work in practice as decisions in the framework of the leniency programme must always be taken by the Competition College and the final settlement decision must be taken by the College of Competition Prosecutors, without any formal intervention from the Competition College.

<sup>37</sup> See Article 53 of the Act on the Protection of Economic Competition as consolidated on 15 September 2006, *Belgian Official Gazette* 29 September 2006, p. 50,613 (hereinafter also referred to as the "former Belgian Competition Act"). This Act was abolished by the entry into force of Book IV of the Code of Economic Law.

therefore made binding.<sup>38</sup> This commitment procedure is available both in cases concerning restrictive agreements and in cases concerning abuse of dominant position.<sup>39</sup>

The initiative to propose commitments must always come from the undertaking or association concerned and it is not for the Competition College to impose commitments on its own initiative. Commitments may be proposed by the undertaking once the Competition College has made it clear that it intends to adopt a decision which will order the termination of an infringement.<sup>40</sup> In principle, commitments can be proposed up to the moment when the written procedure before the Competition College has been terminated, and even after a hearing has been held.<sup>41</sup> However, nothing seems to prevent the undertaking or association from approaching the Competition College beforehand to propose commitments.

Once commitments have been proposed, the Competition College may request the Prosecutor to submit an additional report on the proposed commitments by the deadline set by the Competition College.<sup>42</sup> In addition, the proposed commitments may be ‘market tested’ by requesting the major competitors and customers on the relevant market to give their remarks. Although not included in Book IV of the Code of Economic Law, it seems reasonable that interested parties, including the complainant, should be offered an opportunity to formulate their observations on the proposed commitments as well.<sup>43</sup>

In practice, the Competition College and the undertaking concerned will enter into a dialogue to discuss the competition concerns of the Competition College and the commitments proposed by the undertaking to satisfy these concerns. However, the Competition College will not enter into actual negotiations with the undertaking, nor will it take a written position regarding the proposed commitments.<sup>44</sup> On the basis of the discussions with the Competition College, the undertaking concerned may still need to amend the commitments that were initially proposed. In this respect, it should be noted that the undertaking does not seem to be entitled to amend the proposed commitments endlessly until they satisfy the competition concerns of the Belgian Competition Authority. In other words, the Competition College may decide at any time that the proposed commitments do not satisfy its competition concerns and thus retains full discretion to end the commitment procedure when it deems appropriate.

Only when the proposed commitments satisfy the competition concerns of the Competition College, may the College decide to make the commitments binding.<sup>45</sup> In contrast to European competition law, the Competition College is not obliged to publish its intention to make

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<sup>38</sup> It should be noted that Book IV of the Code of Economic Law does not offer the possibility to propose commitments in order to prevent interim measures from being imposed.

<sup>39</sup> In the past, the Belgian Competition Authority has been rather reluctant to accept commitments for cartel infringements. See Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC*, *Belgian Official Gazette* 19 February 2008, p. 10,525, §§59 ff.

<sup>40</sup> Article IV.49, §1 Code of Economic Law. It remains unclear when the Competition College should inform the undertakings of its intention to take an infringement decision so that the undertakings are left sufficient time to propose commitments.

<sup>41</sup> Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC*, *Belgian Official Gazette* 19 February 2008, p. 10,525, §4, in which commitments were proposed more than a month after the first hearing.

<sup>42</sup> Article IV.49, §1 Code of Economic Law.

<sup>43</sup> See in this respect also J. YSEWYN and M. DE BACKER, “Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht”, *T.B.H.* 2009, p. 448, §94 *in fine* and Article 27, §4 of Regulation 1/2003 for the extensive publication measures imposed on the European Commission in the framework of the European commitment procedure.

<sup>44</sup> See D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 293-294.

<sup>45</sup> Article IV.49, §1 Code of Economic Law.

commitments binding before deciding to do so. The decision by the Competition College to make commitments binding will always conclude that there are no longer any grounds for action by the Belgian Competition Authority against the undertaking or association of undertakings and may be adopted for a predetermined period. The decision cannot be explained as an adverse acknowledgment of the undertaking concerned and is without prejudice to the competence of the national courts to establish the existence of restrictive practices.<sup>46</sup> In practice, the proposed commitments are annexed to the decision of the Competition College and are considered to form an integral part of the decision.

The decision of the Competition College to make commitments binding is, in principle, final. However, the President of the Belgian Competition Authority may at any time decide to re-open the investigation against the undertaking or association covered by the commitment decision if requested to do so by a third party or on its own initiative if any of the facts on which the decision is based is subject to an important change; in case the undertakings concerned do not comply with their commitments; or in case the decision is based on incomplete, inaccurate or misleading information provided by the parties.<sup>47</sup>

Although the decision to make commitments binding does not imply the finding of an infringement, if the undertaking or association of undertakings does not comply with the commitments, the Competition College can impose the same fine as if it had found the undertaking or association guilty of an infringement.<sup>48</sup> This means that the Competition College can impose a fine of up to 10% of the turnover of the undertaking or association concerned. Moreover, if the Competition College decides to re-open the investigation, it may impose periodic penalty payments on the undertaking or association concerned for non-compliance with the commitments of up to 5% of the average daily turnover, per day of non-compliance.<sup>49</sup>

Book IV of the Code of Economic Law does not offer the possibility of appealing to the Brussels Court of Appeal against decisions by the Competition College to make commitments binding.<sup>50</sup> According to the legislator, this is because the decision of the Competition College merely constitutes the acceptance of a proposal by the defendant(s). The legislator is of the opinion that this concerns a decision of the authority on the enforcement of public policy provisions which aim to protect the public interest, so that an appeal should also not be possible by third parties. The legislator notes that third parties may assert their rights before the ordinary courts and tribunals.<sup>51</sup>

It is clear that the commitment procedure in Article IV.49 of the Code of Economic Law has many advantages for the undertaking or association of undertakings concerned. First, it requires no acknowledgment by them of their involvement or responsibility in the infringement. Second, in its decision the Competition College merely establishes that there are no longer any grounds for action against them, without establishing the existence of an infringement. This may reduce the likelihood of follow-on actions for damages as it aggravates the burden of proof on the claimant in an action for damages. Third, as long as the

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<sup>46</sup> Article IV.49, §1 Code of Economic Law.

<sup>47</sup> Article IV.49, §2 Code of Economic Law.

<sup>48</sup> See D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 294.

<sup>49</sup> Article IV.70, §2 Code of Economic Law.

<sup>50</sup> Article IV.79, §1 Code of Economic Law.

<sup>51</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 54.

commitments are complied with, the Competition College cannot impose a fine on the undertaking or association concerned. Nevertheless, the fact that Article IV.49 of the Code of Economic Law fails to address several procedural issues that may arise in the framework of a commitment procedure is regrettable.<sup>52</sup>

Although the European commitment procedure has proved to be very successful in the framework of Article 101 TFEU and particularly Article 102 TFEU cases<sup>53</sup>, under Belgian law so far only two decisions have been taken to make commitments binding, both in cases concerning an abuse of dominant position.<sup>54</sup> In both cases, the accepted commitments were behavioural conditions that regulated the way in which the parties should distribute products to third parties in the future and were based on the principles of non-discrimination and transparency. In the *Distri-One* case, for example, the parties committed to communicate to consumers in a more transparent way regarding client classifications, price lists, promotions, etc.; to execute deliveries within 10 days; to allow each client to order the full product range; and, in case of shortage, to allocate existing stock objectively. In the *Banksys* case, on the other hand, the parties committed to amend the general terms of their standard agreement; to conclude all agreements for an unlimited duration; to provide uniform termination clauses; to continue to offer a wide range of products; and not to offer two specified products in a joint offer. To guarantee the effectiveness of the proposed commitments, the parties were required to publish the final commitments on their websites and to report the measures taken to implement these commitments to the Belgian Competition Authority on an annual basis.

In this respect, it is also interesting to note that, in the only cartel case in which commitments have ever been proposed, the Competition Council rejected them because they did not depart from the elements in the price-setting system that formed the essence of the infringement and because they failed to respond to the harm done to competition in the past.<sup>55</sup>

### 2.1.3. Leniency

As is the case under European competition law, Belgian competition law includes a leniency programme, which already existed under the former Belgian Competition Act<sup>56</sup>, but which was further elaborated by Book IV of the Code of Economic Law.

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<sup>52</sup> For example, the Code of Economic Law does not contain any provisions on procedural or formal requirements that must be satisfied when proposing commitments or evaluating the commitments that have been proposed.

<sup>53</sup> Between May 2004 and February 2014, the European Commission took 34 commitment decisions. See “To commit or not to commit? Deciding between prohibition and commitments”, *Competition policy brief*, Issue 3, March 2014.

<sup>54</sup> See decision of the Competition Council No. 2006-I/O-12 of 31 August 2006, *Banksys S.A., FNUCM / Banksys S.A. and Unizo / Banksys S.A.*, *Belgian Official Gazette* 3 October 2006, p. 51,236 and decision of the Competition Council No. 2005-I/O-52 of 30 November 2005, *Distri-One S.A. / Coca-Cola Enterprises Belgium S.P.R.L.*, *Belgian Official Gazette* 22 December 2005, p. 55,371. Please note that both decisions were taken before the option of accepting commitments was formally introduced by the former Belgian Competition Act, on the basis of the direct effect of Article 5 of Regulation No. 1/2003. No commitment decisions were taken in application of Article 53 of the former Belgian Competition Act, nor have any commitment decisions been taken yet in application of Article IV.49 of the Code of Economic Law.

<sup>55</sup> Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC*, *Belgian Official Gazette* 19 February 2008, p. 10,525, §§59 ff.

<sup>56</sup> Article 49 of the former Belgian Competition Act. See also the Notice of the Competition Council on immunity from fines and reduction of fines in cartel cases, *Belgian Official Gazette* 22 October 2007, p. 54,713 (hereinafter “Notice on immunity from fines”), which remains applicable after the entry into force of Book IV of the Code of Economic Law.



Under Belgian competition law, immunity from fines or a reduction of fines may be granted to an undertaking or an association of undertakings which, together with others, was involved in a cartel<sup>57</sup>, if this undertaking or association has helped the investigators prove the existence of, and identify the participants in, the prohibited practice, for instance by providing information which the Belgian Competition Authority did not have before; by providing evidence of the prohibited practice whose existence had not yet been established; or by admitting to having committed the prohibited practice.<sup>58</sup>

When a leniency application is filed, the Prosecutor-General may suggest that a Competition College is composed to deal with the application. At the request of the Prosecutor-General and after the undertaking or association of undertakings has submitted their observations, the Competition College makes a leniency declaration that specifies the conditions to which the exemption is subject and sends it to the undertaking or association of undertakings concerned, but does not publish it. If the conditions of the leniency declaration are complied with, the Competition College ‘may’<sup>59</sup> grant the undertaking or association of undertakings concerned immunity from, or a reduction of, the fine in proportion to the contribution which was provided in order to prove the infringement.<sup>60</sup>

In accordance with the Notice on immunity from fines, immunity will be granted if the following conditions are cumulatively fulfilled<sup>61</sup>:

- (i) The undertaking or association of undertakings is the first<sup>62</sup> to submit information and evidence which enables the Belgian Competition Authority to carry out targeted inspections in connection with the alleged cartel;
- (ii) At the time of the application, the Belgian Competition Authority did not have sufficient evidence to justify an inspection in connection with the alleged cartel or had not already carried out an inspection;
- (iii) The undertaking or association of undertakings co-operates fully, genuinely, promptly and on a continuous basis with the Belgian Competition Authority from the time of its application until the final decision, and it provides the Belgian Competition Authority with all relevant information and evidence in its possession;
- (iv) The undertaking or association of undertakings ends its involvement in the alleged cartel immediately following its application;
- (v) The undertaking or association of undertakings does not take any steps to coerce another undertaking or association of undertakings to participate in, or continue, the cartel.

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<sup>57</sup> See Notice on immunity from fines, §7.

<sup>58</sup> Article IV.46, §1 Code of Economic Law.

<sup>59</sup> In this respect it should be noted that, according to some authors, the undertaking concerned shall be granted immunity or a reduction if the conditions of the leniency declaration are complied with. See J. YSEWYN, M. VAN SCHOORISSE and E. MATTIOLI, *De Belgische Mededingingswet 2013 – Een praktische en kritische analyse*, Antwerp, Intersentia, 2013, p. 124.

<sup>60</sup> Article IV.46, §1 Code of Economic Law.

<sup>61</sup> Notice on immunity from fines, §§10, 14 and 20.

<sup>62</sup> As is the case under European competition law, the timing or ranking of the leniency application is thus very important.

If the undertaking or association of undertakings does not fulfil the above-mentioned conditions, it may still be eligible for a reduction of fines if it provides evidence of the cartel which represents ‘significant added value’ to the evidence already in the possession of the Belgian Competition Authority; if it ends its involvement in the cartel immediately following its application; and co-operates fully, genuinely, promptly and on a continuous basis with the Belgian Competition Authority.<sup>63</sup> In any case and except if expressly agreed with the Prosecutor otherwise, the applicant is not entitled to disclose the leniency application or its content until after the investigation has ended and a draft decision has been submitted to the President of the Competition Authority by virtue of Article IV.51 of the Code of Economic Law.<sup>64</sup>

Together with the introduction of administrative fines for individuals who have negotiated restrictive agreements or made arrangements in the name and for the account of an undertaking or association of undertakings<sup>65</sup>, Book IV of the Code of Economic Law allowed them to apply for leniency with regard to the infringements for which they could be individually sanctioned.<sup>66</sup> At the request of the Prosecutor-General, the Competition College can grant immunity from prosecution to the individual concerned if this person has contributed to gathering evidence of, and to identifying the participants in, a prohibited practice, for example by providing information which the Belgian Competition Authority did not yet have; by providing evidence of an alleged prohibited practice; or by admitting to having committed the prohibited practice.<sup>67</sup> In this respect, it should be noted that no distinction is made between immunity from, and reductions of, fines. Individuals who fulfil the required conditions will always receive full immunity from prosecution (and thus from fines). In addition, individuals may qualify for immunity from prosecution regardless of the ranking of their leniency application.<sup>68</sup>

As the legislator feared that the introduction of sanctions for individuals could threaten the existing leniency system for undertakings<sup>69</sup>, the legislator expressly provided that a leniency application filed by an individual does not preclude the granting of full immunity from fines to the undertaking.<sup>70</sup> In the same framework, the legislator also provided that individuals may be granted immunity from prosecution if they co-operate in the framework of the leniency application filed by the undertaking for which they act.<sup>71</sup> Nevertheless, several questions regarding the relationship between the leniency system for undertakings and that for individuals remain unanswered.<sup>72</sup> For example, should a leniency application filed by an individual be communicated to the undertaking for which he/she acts? Or, should it be

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<sup>63</sup> Notice on immunity from fines, §§15 and 20.

<sup>64</sup> Notice on immunity from fines, §20, 3), e.

<sup>65</sup> Articles IV.1, §4 and IV.70, §2 Code of Economic Law.

<sup>66</sup> It is to be expected that the Belgian Competition Authority will amend its Notice on immunity from fines to encompass the new rules regarding leniency applications introduced by individuals in the future. As confirmed in a press release of 6 September 2013, until this happens, the Belgian Competition Authority will apply the Notice on immunity from fines by analogy to leniency applications filed by individuals.

<sup>67</sup> Article IV.46, §2 Code of Economic Law.

<sup>68</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 37.

<sup>69</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 15.

<sup>70</sup> Article IV.46, §5 Code of Economic Law.

<sup>71</sup> Article IV.46, §2 Code of Economic Law.

<sup>72</sup> See also A. DE CRAYENCOUR and D. GERARD, “La réforme du droit belge des pratiques restrictives de concurrence”, *T.B.M.* 2013, p. 139, §29.

automatically considered as a leniency application on behalf of the undertaking as well (e.g. in the framework of ranking)?

Finally, Book IV of the Code of Economic Law provides that the documents and observations submitted by the leniency applicant in support of the application may become part of the investigation file or procedural file after the leniency declaration has been adopted or immunity has been granted to the individual or undertaking concerned.<sup>73</sup> This implies that access to these documents can be obtained only by the parties to the investigation, in the same manner as access to the investigation file or the procedural file. No other access to these documents and observations may be granted, with the exception of Article IV.69 of the Code of Economic Law.<sup>74</sup> With this provision, the legislator aimed to protect the leniency documents against disclosure in the light of follow-on actions for damages by third parties. According to the legislator, the confidentiality of the leniency application is a pre-condition for the functioning of the leniency programme, which has proved to be an essential element in the establishment of cartel infringements. Because an action for damages has a higher chance of success when the Belgian Competition Authority has already established an infringement, the legislator considered that the good functioning of the leniency programme is also to the advantage of the victims of an infringement.<sup>75</sup>

This line of thought is, however, contrary to the recent decision of the Court of Justice of the European Union (hereinafter “CJEU”) in the *Donau Chemie* case. After confirming that “*the effectiveness of [leniency] programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages*”, the CJEU stated that this does “*not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case*”.<sup>76</sup> By automatically preventing access to any documents received in the framework of a leniency application, Article 46, §3 Code of Economic Law thus seems to conflict with European law.

The leniency applicant cannot appeal against the leniency declaration by the Competition College. Whether or not the leniency applicant will be granted immunity or a reduction of the fine will form part of the final decision of the Competition College on the merits.<sup>77</sup> The final decision of the Competition College can be appealed to the Brussels Court of Appeal.<sup>78</sup>

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<sup>73</sup> Article IV.46, §3 Code of Economic Law.

<sup>74</sup> Article IV.46, §3 Code of Economic Law. Article IV.69 Code of Economic Law provides that “*For the purposes of the application of Articles 101 and 102 of the TFEU and of Regulation (EC) n°139/2004 of the Council of 20 January 2004 concerning the control on concentrations of undertakings, the President, the Competition Prosecutor-General and the officials of the Belgian Competition Authority may communicate to the European Commission and the competition authorities of the Member States any de facto or legal elements, including confidential information, and if applicable use as means of proof such information obtained from the European Commission or from the competition authorities of other Member States.*”

<sup>75</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 14.

<sup>76</sup> CJEU, Case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG and others*, not yet published, §§42-43. See also CJEU, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECR 2011 I-5161, §31.

<sup>77</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 54.

<sup>78</sup> Article IV.79 Code of Economic Law.

## 2.2. Fundamental and procedural rights of the parties

This section will discuss the way in which the transactional procedures described above take into account the fundamental and procedural rights of the parties. Given the importance of the newly introduced settlement procedure, it will mainly focus on the fundamental and procedural rights in the framework of this procedure. Where relevant, other transactional procedures will also be discussed.

### 2.2.1. Right against self-incrimination

In the framework of a competition investigation, the Prosecutor may collect all necessary information from undertakings and associations of undertakings through requests for information<sup>79</sup>, which must be answered by the deadline set by the Prosecutor. If an undertaking or association of undertakings does not provide the information by the deadline or if the information supplied is incomplete, inaccurate or misrepresented, the Prosecutor may demand the information by a reasoned decision. This decision shall specify the information required and shall set a deadline for providing it.<sup>80</sup> In order to ensure compliance with this decision, the Competition College may, during the investigation and at the request of the Prosecutor, impose periodic penalty payments of up to 5% of the daily turnover per day of non-compliance.<sup>81</sup> In addition, the Competition College hearing the case may also impose fines on individuals, undertakings or associations of undertakings of up to 1% of their turnover if they, deliberately or by negligence, provide inaccurate or misleading information in response to a request for information; provide incomplete information; or do not provide the information by the deadline.<sup>82</sup>

As confirmed by the General Court of the European Union, the mere fact that an undertaking or association of undertakings is obliged to answer purely factual questions and to produce existing documents does not in itself constitute a breach of the rights of defence and the right to a fair trial.<sup>83</sup> However, the General Court also pointed out that the European Commission may not compel an undertaking to provide answers which might involve an admission of the existence of an infringement which it is incumbent on the Commission to prove.<sup>84</sup> In line with this case law of the European courts, the Belgian Competition Council has confirmed that the Prosecutor may not pose questions in such a way that an answer to these questions could amount to the undertaking or association acknowledging the existence of the infringement, as this would be in breach of the right against self-incrimination.<sup>85</sup>

It follows from this that undertakings and associations of undertakings have a duty to respond to requests for information and to provide the Prosecutor with the requested documents in a timely manner. Under Belgian competition law, there is thus no absolute right to remain silent. However, the duty to respond is confined by the right against self-incrimination. As

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<sup>79</sup> Requests for information may not only be addressed to the complainant or the undertakings or associations of undertakings that are subject to investigation, but also to third parties (e.g. competitors, customers or suppliers of the undertaking(s) under investigation).

<sup>80</sup> Article IV.41, §2 Code of Economic Law.

<sup>81</sup> Article IV.73 Code of Economic Law.

<sup>82</sup> Article IV.71 Code of Economic Law.

<sup>83</sup> General Court, Cases T-236/01 and others, *Tokai Carbon Co. Ltd and others v Commission*, ECR 2004 II-1181, §406.

<sup>84</sup> General Court, Cases T-25/95 and others, *Cimenteries CBR and others v Commission*, ECR 2000 II-491, §732.

<sup>85</sup> See decision of the Competition Council No. 99-RPR-1 of 21 January 1999, *FEBIAC*, *Belgian Official Gazette* 13 March 1999, p. 8,268, §20.

requests for information may be used in all investigations carried out by the Belgian Competition Authority, they may also be relevant in the framework of a transactional procedure (e.g. following a leniency application or in preparation of the opening of a settlement procedure).

Except in the framework of the leniency programme<sup>86</sup>, where active co-operation is explicitly mentioned as a pre-condition to qualify for leniency<sup>87</sup>, the duty to respond to a request for information does not amount to an obligation on the undertaking to spontaneously and actively provide all the information and documents in its possession. Nevertheless, active and efficient co-operation of the undertaking or association of undertakings beyond its legal obligation to do so or outside the scope of the leniency notice is specifically recognised as a mitigating circumstance in the framework of the calculation of the fine.<sup>88</sup>

### **2.2.2. Presumption of innocence**

When it comes to the presumption of innocence, a distinction should be made between the various transactional procedures under Belgian law.

In the framework of the Belgian settlement procedure, the undertaking that wishes to proceed to a settlement must submit a settlement statement in which it acknowledges its involvement in, and its responsibility for, the infringement held against it by the College of Competition Prosecutors.<sup>89</sup> According to the legislator, it is an essential element of the settlement procedure that the undertakings concerned acknowledge the infringement to avoid settlements harming the interests of third parties who were disadvantaged by the infringement.<sup>90</sup> Indeed, third parties who were disadvantaged by the infringement may be more inclined to pursue actions for damages against the undertaking concerned if the involvement of the undertaking in the infringement is established.

In this respect, it should be noted that Article IV.56 of the Code of Economic Law expressly provides that all documents and data exchanged between the College of Competition Prosecutors and the undertaking or association of undertakings concerned are confidential. Although this prevents third parties from using the information exchanged in the framework of the settlement procedure (e.g. in the framework of follow-on actions for damages), this does not as such prevent the Belgian Competition Authority from making use of the information if the settlement procedure is unsuccessful. If the College of Competition Prosecutors decides to stop the settlement procedure after the undertaking or association concerned has already acknowledged its involvement in, and responsibility for the infringement (i.e. after a settlement statement has been made), the question can be asked if the Prosecutor in charge of the investigation will be able to continue the investigation in an objective and impartial manner. Given the new monopolistic structure of the Belgian Competition Authority, some authors also doubted whether it can be guaranteed that the

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<sup>86</sup> In this respect it should be noted that leniency programmes in themselves are not considered to breach the right against self-incrimination as the leniency programmes do not involve any compulsion. See R. ALLENDESALAZAR, "Evidence gathered through leniency: From the prisoner's dilemma to a race to the bottom", in X., *European Competition Law Annual 2009*, Oxford, Hart Publishing, 2011, p. 571-572.

<sup>87</sup> Notice on immunity from fines, §20, 3).

<sup>88</sup> Notice on the method of calculating fines, §36.

<sup>89</sup> Article IV.53 Code of Economic Law.

<sup>90</sup> Explanatory Memorandum of the House of Representatives 2012-13, No. 53-2591/001 and 53-2592/001, p. 38.

Competition College will not be aware of the content of the discussions held earlier during the procedure.<sup>91</sup>

Although, in the framework of the settlement procedure, the College of Competition Prosecutors continues to carry the burden of finding evidence of the infringement and must always communicate the objections it believes it can hold against the undertaking prior to the settlement statement, a pre-condition for the settlement procedure to succeed is that the settlement statement contains a “*reproduction and acceptance of the infringement identified in the communication of the College of Competition Prosecutors*”.<sup>92</sup> As this may certainly incentivise undertakings not to object to the objections and the evidence held against them, this could also be considered to constitute a breach of the presumption of innocence.<sup>93</sup>

In the framework of the commitment procedure, Article IV.49 of the Code of Economic Law expressly states that the decision of the Competition College to make commitments binding “*cannot be explained as an adverse acknowledgment of the undertaking concerned*”. This means that the undertaking does not acknowledge the existence of an infringement, nor does it assume any liability for the infringement, simply by proposing commitments.<sup>94</sup> In addition, the decision to make commitments binding will not establish an infringement by the undertaking. In theory, the presumption of innocence therefore seems to be adequately protected in the framework of the commitment procedure.

In practice, however, the Competition College is not obliged to accept the proposed commitments and may decide to make the envisaged infringement decision at any time. As Article IV.49 of the Code of Economic Law does not explicitly protect the statements of the undertaking concerned in the framework of a commitment procedure<sup>95</sup>, it cannot be guaranteed that these statements will not be used against the undertaking by the Competition College.

Finally, in the framework of the leniency programme, it should be noted that, by definition, applying for leniency implies the recognition that an infringement has been committed. This, however, does not mean that leniency is granted in exchange for an acknowledgment of guilt, but rather in exchange for the provision of evidence that an infringement has been committed.<sup>96</sup> Indeed, in accordance with Article IV.46, §1 of the Code of Economic Law, immunity is granted to an undertaking that “*has contributed to prove the existence of the prohibited practice and to identify the participants*”. “*Admitting the prohibited practice*” is only mentioned as one possible way in which the undertaking may contribute to providing evidence of the existence of an infringement, but it is certainly not the only way. Acknowledgment of guilt therefore does not seem to be a necessary pre-condition to qualify

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<sup>91</sup> See H. GILLIAMS, “Het nieuwe Belgisch mededingingsrecht”, *T.B.H.* 2013, p. 487, §28.

<sup>92</sup> Article IV.54 Code of Economic Law.

<sup>93</sup> See also L. DE MUYTER and N. NEYRINCK, “Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l’Economie”, *T.B.M.* 2012, p. 107, footnote 13.

<sup>94</sup> J. YSEWYN and M. DE BACKER, “Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht”, *T.B.H.* 2009, p. 438, §37 *in fine*.

<sup>95</sup> Article IV.49 Code of Economic law only refers to the decision of the Competition College to make the commitments binding.

<sup>96</sup> R. ALLENDESALAZAR, “Evidence gathered through leniency: From the prisoner’s dilemma to a race to the bottom”, in X., *European Competition Law Annual 2009*, Oxford, Hart Publishing, 2011, p. 571-572 and M. CHAMMAS, “La nouvelle loi: lignes de force et points faibles”, *T.B.M.* 2013, p. 294, footnote 81. See also the Notice on immunity from fines, §§10, 12 and 15.

for leniency.

### 2.2.3. Right of the parties to know the case against them

In the framework of the settlement procedure, Book IV of the Code of Economic Law only expressly obliges the College of Competition Prosecutors to communicate its intention to proceed to a settlement to the undertaking or association concerned in writing.<sup>97</sup> For the communication of objections and the minimum and maximum fine the College of Competition Prosecutors intends to propose, Book IV of the Code of Economic Law does not contain such an express obligation. However, for practical reasons it seems likely that the College of Competition Prosecutors will also communicate (a summary of) the objections and the minimum and maximum fine to the undertaking concerned in writing.

Only after settlement discussions have taken place and a settlement statement has been issued by the undertaking or association concerned, will the College of Competition Prosecutors inform the undertaking of a draft settlement decision in which the fine will be determined.<sup>98</sup> This draft decision must be in writing. However, other than the fine, it is not clear from the text of Article IV.54 of the Code of Economic Law what other elements should be mentioned in the draft decision, nor if the draft decision should reflect the discussions with the College of Competition Prosecutors. The same can be said with respect to the final settlement decision, for which it is only clear that it will contain the fine that is imposed, as well as the fact that by the adoption of the final settlement decision the investigation procedure against the undertaking is closed.<sup>99</sup>

As to the certainty and the predictability of the benefits of the settlement procedure, it should be noted that for the reduction of the fine to be predictable, it is indispensable that the undertaking knows up front the amount of the fine for the quoted infringement and the reduction available for co-operating with the Belgian Competition Authority in the framework of the settlement procedure.

First, with respect to the amount of the fine for the quoted infringement, it should be noted that the College of Competition Prosecutors is only obliged to indicate in its draft decision the minimum and maximum amounts it intends to propose to the Competition College if the normal investigation procedure were to continue.<sup>100</sup> The Competition College, however, remains free to impose another fine in its final infringement decision, taking into account the principles set out in the Notice on the method of calculating fines.<sup>101</sup> Even if the normal investigation continues, the College of Competition Prosecutors would, in principle, remain free to propose a different amount of fine up until the submission of the draft decision to the President of the Belgian Competition Authority. Therefore, when engaging in settlement discussions, the undertaking concerned can never be certain of the amount of the fine that

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<sup>97</sup> Article IV.52 Code of Economic Law.

<sup>98</sup> Article IV.54 Code of Economic Law.

<sup>99</sup> Article IV.57 Code of Economic Law. See also M. CHAMMAS, “La nouvelle loi: lignes de force et points faibles”, *T.B.M.* 2013, p. 295.

<sup>100</sup> Article IV.52 Code of Economic Law.

<sup>101</sup> Please note that §36 of the Notice on the method of calculating fines expressly recognises “*the fact that the infringement was admitted during the investigation or at the latest during the procedure before the Chamber of the Council*” as a mitigating circumstance which may be taken into account by the Competition College when setting the fine. Nevertheless, the Notice does not specify the level of reduction that can be linked to such a mitigating circumstance.

could be imposed for the quoted infringement, were the normal investigation procedure to continue.

Second, with respect to the reduction that can be granted for co-operating with the Belgian Competition Authority in the framework of a settlement procedure, it should be noted that Article IV.54 merely states that the College of Competition Prosecutors ‘*may*’ grant a reduction of up to 10%. The College of Competition Prosecutors, however, retains full discretion to determine the exact reduction it is prepared to grant to the undertaking or association concerned. This also means that the reduction that may be granted for co-operation in the framework of a settlement procedure is not certain at the moment when the undertaking commits to engage in a settlement procedure.

The final amount of the fine, including the reduction for co-operation, that the College of Competition Prosecutors intends to impose on the undertaking that has engaged in a settlement procedure will only be communicated to the undertaking at the moment of the draft settlement decision and thus after the undertaking acknowledging liability for the infringement. This implies that, in principle, the College of Competition Prosecutors retains full discretion to decide on the final amount of the fine after liability has been acknowledged.

#### **2.2.4. Right to be heard and access to the file**

As both the decision to make commitments binding and the final decision regarding leniency are, in principle, only taken at the end of the normal investigative and decision-making phases, the undertaking that has proposed commitments or that has applied for leniency will, in principle, have similar rights to be heard and similar rights of access to the investigation and procedural files as the other undertakings or associations of undertakings whose conduct is subject to the investigation.<sup>102</sup> However, the situation is somewhat different in the framework of the settlement procedure.

When an undertaking or association of undertakings indicates that it is prepared to engage in settlement discussions, the College of Competition Prosecutors will grant the undertaking or association access to the evidence used to support the objections that it believes it can hold against the undertaking or association, as well as to all non-confidential documents and information received during the investigation.<sup>103</sup> From the text of Article IV.52 of the Code of Economic Law it is not clear whether or not this means that access is granted to the same documents as would be the case upon the communication of objections in the normal investigation procedure<sup>104</sup>, nor is it clear whether or not the undertaking or association that engages in a settlement will be able to access the full investigation file.<sup>105</sup> Therefore, it is currently not possible to assess whether or not the undertaking or association of undertakings that engages in a settlement procedure (implicitly) waives its right of full access to the file.<sup>106</sup>

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<sup>102</sup> See for example Articles IV.42, §4 and IV.45, §§1 and 5 Code of Economic Law.

<sup>103</sup> Article IV.52 Code of Economic Law.

<sup>104</sup> Compare the text of Article IV.42, §4 Code of Economic Law with the text of Article IV.52 Code of Economic Law.

<sup>105</sup> See J. YSEWYN, M. VAN SCHOORISSE and E. MATTIOLI, *De Belgische Mededingingswet 2013 – Een praktische en kritische analyse*, Antwerp, Intersentia, 2013, p. 82, footnote 284, with reference to A. DE CRAYENCOUR and D. GERARD, “La réforme du droit belge des pratiques restrictives de concurrence”, *T.B.M.* 2013, p. 134, §§12-13.

<sup>106</sup> See also M. CHAMMAS, “La nouvelle loi: lignes de force et points faibles”, *T.B.M.* 2013, p. 296.



Moreover, no formal hearings are held in the framework of a settlement procedure. Rather, the undertaking or association concerned will engage in informal settlement discussions.

### **2.2.5. Right to equal treatment**

Book IV of the Code of Economic Law does not provide for a right to equal treatment of undertakings or associations of undertakings whose conduct is subject to the same investigation by the Belgian Competition Authority when it comes to the opening of a settlement procedure. Moreover, Book IV of the Code of Economic Law does not regulate the situation in which not all of the undertakings or associations of undertakings to whom the opening of a settlement procedure has been proposed are prepared to engage in settlement discussions. The College of Competition Prosecutors will thus retain full discretion to decide whether or not and to whom it will propose the opening of a settlement procedure and, if certain undertakings decline to engage in settlement discussions, whether or not it will continue the settlement procedure with respect to the other undertakings.<sup>107</sup>

In exercising this discretion, the College of Competition Prosecutors may, for example, be guided by the fact that, when a settlement procedure is opened in parallel to a normal investigation procedure, the procedural efficiencies which are inherent to the settlement procedure will not have full effect, or that the outcome of the normal procedure might compromise the validity of the settlement concluded with other undertakings.<sup>108</sup> However, all these considerations do not seem to be of such a nature to deny an undertaking the benefits of a settlement just because other undertaking(s) are not prepared to do so.

### **2.2.6. Right to an impartial decision-making**

Since the entry into force of Book IV of the Code of Economic Law, the Belgian Competition Authority forms a single administrative body. However, this does not prejudice the fact that the investigative and decision-making powers are still separated between the College of Competition Prosecutors on the one hand and the Competition College on the other hand. In principle, as the decision-making body, the Competition College therefore has the exclusive competence to make infringement decisions and to establish the amount of the fine to be imposed on the infringing undertaking or association of undertakings.<sup>109</sup>

Nevertheless, in the framework of the Belgian settlement procedure, both the competence to open the settlement procedure and to take the final settlement decision, including establishing the infringement and the amount of the fine, are granted to the College of Competition Prosecutors (i.e. the investigative body).<sup>110</sup> As this means that the investigative body not only negotiates, but also decides on the final settlement, the right to an impartial judge seems to be impaired.

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<sup>107</sup> It should be noted that the European Commission seems rather hesitant to engage in so-called 'hybrid procedures' in which a settlement procedure is opened with some parties in parallel to a normal investigation procedure of other parties. See Memorandum issued by the European Commission on 19 May 2010, MEMO/10/201, "Antitrust: Commission adopts first cartel settlement decision – questions & answers".

<sup>108</sup> L. DE MUYTER and N. NEYRINCK, "Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie", *T.B.M.* 2012, p. 116, § 62 ff and the case-law of the European Commission and the OFT cited there.

<sup>109</sup> Notice on the method of calculating fines, §11.

<sup>110</sup> Articles IV.51 and IV.57 Code of Economic Law.

Moreover, the current institutional organisation of the settlement procedure creates a difference in treatment between undertakings fined in the framework of a normal infringement procedure and undertakings fined in the framework of a settlement procedure. This difference in treatment cannot be remedied simply by referring to the fact that the final settlement decision of the College of Competition Prosecutors counts as a decision of the Competition College.<sup>111</sup> Therefore, the legitimacy of this difference in treatment can also be questioned.<sup>112</sup>

### 2.2.7. Right to trial

Article IV.57 of the Code of Economic Law expressly states that the undertaking or association of undertakings concerned cannot lodge an appeal with a higher court against the final settlement decision. Moreover, the undertaking or association concerned cannot appeal against decisions of the College of Competition Prosecutors to open or (dis)continue a settlement procedure.

This exclusion of the right to appeal against the final settlement decision is debatable for several reasons. First, the final settlement decision is assimilated to a final decision of the Competition College in the sense of Article IV.48 of the Code of Economic Law.<sup>113</sup> As decisions of the Competition College may be appealed to the Brussels Court of Appeal<sup>114</sup>, it is hard to see why no appeal is possible against the final settlement decision of the College of Competition Prosecutors. Second, the fact that the undertaking acknowledges its involvement and responsibility for the infringement and accepts the fine (and therefore can evidently not appeal against the decision on these grounds), does not mean that the undertaking does not have any interest in appealing against the settlement decision on other grounds (e.g. procedural grounds). Third, the settlement procedure can be qualified as an administrative decision by virtue of which a fine is imposed on an undertaking or association of undertakings. In light of Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, which both protect the right to a fair trial, such decisions should be open to appeals to a court that has full jurisdiction and the power to overturn the decision on points of fact and law.<sup>115</sup> Finally, it should be noted that, in light of the right to an effective remedy and a fair trial, the European Commission has added a right of appeal to the European settlement procedure.<sup>116</sup>

If a right of appeal against the final settlement decision were to be introduced under Belgian competition law in the future, the Brussels Court of Appeal seems to be the most adequate court to deal with these appeals. Not only does it already have a lot of experience in dealing with appeals against decisions made by the Belgian Competition Authority, but in accordance

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<sup>111</sup> Article IV.57 Code of Economic Law.

<sup>112</sup> See also L. DE MUYTER and N. NEYRINCK, “Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l’Economie”, *T.B.M.* 2012, p. 112, §38.

<sup>113</sup> Article IV.57 Code of Economic Law.

<sup>114</sup> Article IV.79, §1 Code of Economic Law.

<sup>115</sup> Judgment of the European Court of Human Rights of 4 March 2004, *Sylvester’s Horeca Service v. Belgium*, *www.echr.coe.int*, §§25-27. See also judgment of the European Court of Human Rights of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, *www.echr.coe.int*.

<sup>116</sup> See Article 41 of the European Commission’s Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, *OJ* 2008 C 167, p. 1.

with the requirement set by the European Court of Human Rights, the Brussels Court of Appeal also has full jurisdiction in these matters.<sup>117</sup>

## **2.3. Rights of third parties**

### **2.3.1. Right to be heard and access to file**

In the framework of the Belgian settlement procedure, all documents and data exchanged between the College of Competition Prosecutors and the undertaking or association of undertakings concerned remain confidential.<sup>118</sup> It follows from this that third parties do not have access to the document containing the objections communicated by the College of Competition prosecutors to the undertaking or association of undertakings concerned, nor to any other documents or data contained in the investigation file.<sup>119</sup> Moreover, third parties do not have any right to be heard during the settlement procedure.

In the framework of the commitment procedure, Book IV of the Code of Economic Law also does not provide a right for third parties to be heard regarding proposed commitments. However, given the interests that certain third parties may have, it seems reasonable that interested third parties should at least be offered an opportunity to formulate written observations regarding the proposed commitments.<sup>120</sup>

Finally, with respect to the leniency procedure, it should be noted that third parties do not have access to the documents and observations submitted by the leniency applicant.<sup>121</sup> Nevertheless, interested parties may be granted access to the non-confidential versions of the draft decision submitted by the Prosecutor to the President of the Competition Authority and the final decision of the Competition College, which will both inevitably contain references to the documents and observations submitted by the leniency applicant.<sup>122</sup>

### **2.3.2. Right to trial**

Article IV.79, §1 of the Code of Economic Law gives an exhaustive list of the decisions of the College of Competition prosecutors and the Competition College which can be appealed against to the Brussels Court of Appeal. It follows from this list that neither the parties concerned in the decision, nor interested third parties<sup>123</sup>, can appeal against (i) the decision of the Competition College to adopt a leniency declaration<sup>124</sup>; (ii) the decision of the

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<sup>117</sup> Article IV.79, §2 Code of Economic Law.

<sup>118</sup> Article IV.56 Code of Economic Law.

<sup>119</sup> Please note that under the normal investigation procedure the complainant and other third parties that are heard by the Competition College can be granted access by the Competition College to a non-confidential version of the draft decision submitted by the Prosecutor to the President of the Competition Authority. The complainant and the other third parties that are heard by the Competition College will not be granted access to the investigation and procedural file, unless the President would decide otherwise with respect to the procedural file. See Article IV.45, §§1 and 2 Code of Economic Law.

<sup>120</sup> See in this respect J. YSEWYN and M. DE BACKER, “Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht”, *T.B.H.* 2009, p. 448, §94 *in fine*. See also Article 27, §4 of Regulation 1/2003 for the extensive publication measures imposed on the European Commission in the framework of the European commitment procedure.

<sup>121</sup> Article IV.46, §3 Code of Economic Law.

<sup>122</sup> Articles IV.45, §1 and IV.65 Code of Economic Law. See also H. GILLIAMS, “Het nieuwe Belgisch mededingingsrecht”, *T.B.H.* 2013, p. 487, §25.

<sup>123</sup> Article IV.79, §3 Code of Economic Law.

<sup>124</sup> Article IV.46 Code of Economic Law.

Competition College to make commitments binding<sup>125</sup>; (iii) the settlement decision of the College of Competition Prosecutors<sup>126</sup>.

### **2.3.3. Confidentiality and publicity of the transactional solutions**

It follows from Articles IV.46, §3 and IV.56 of the Code of Economic Law that documents and data submitted by the leniency applicant or by the undertaking concerned in the framework of a leniency application or a settlement procedure cannot be communicated to third parties, i.e. possible claimants in actions for damages. In addition, it is not yet clear which elements of the settlement will be published in the final settlement decision. Although these factors do not prevent third parties from launching actions for damages against an infringing undertaking as such, they could serve to aggravate the burden of proof on third parties and therefore could be considered as dissuasive to the parties that have suffered damages as a result of a competition law infringement.

## **3. Remedies in the framework of merger control**

### **3.1. Overview of the merger control procedure**

This section will discuss the possibility of negotiating remedies in the framework of the Belgian merger control procedure (see Section 3.1.1), as well as the way in which the negotiated remedies are subsequently enforced (see Section 3.1.2).

#### **3.1.1. Negotiation of remedies**

The Belgian merger control system, which requires a pre-merger notification and approval for all concentrations above the legal thresholds<sup>127</sup>, allows commitments or remedies to be proposed by the undertakings concerned in both phase I and phase II of the merger control proceedings. As is the case for commitments in cases concerning restrictive agreements or abuse of dominance, the initiative to propose commitments in merger control cases must always come from the parties concerned.<sup>128</sup>

Concentrations which are notifiable under Belgian law must be notified to the Prosecutor-General.<sup>129</sup> Upon receipt of the notification, or if the information to be provided is incomplete, upon receipt of the complete information, the Prosecutor designated by the Prosecutor-General begins his investigation.<sup>130</sup> Within 25 working days of the complete notification being submitted to the Prosecutor-General, the Prosecutor shall submit a reasoned draft decision to the President of the Competition Authority, together with the file of the documents and data on which the Prosecutor based his draft decision. This deadline is extended by a further 5 working days in cases where commitments have been proposed.<sup>131</sup> At the same time the Prosecutor must also transmit a copy of the draft decision to the notifying

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<sup>125</sup> Article IV.49 Code of Economic Law.

<sup>126</sup> Article IV.57 Code of Economic Law.

<sup>127</sup> See Articles IV.6 to IV.8 Code of Economic Law for the conditions and thresholds above which concentrations are notifiable to the Belgian Competition Authority.

<sup>128</sup> Judgment of the Brussels Court of Appeal of 15 September 2005, *IMP / Rossel & Cie / De Persgroep / Editco*, *Jaarboek Handelspraktijken en Mededinging* 2005, §30, in which the court confirmed that the Competition College is in principle only competent to accept commitments proposed by the parties themselves.

<sup>129</sup> Article IV.10, §1 Code of Economic Law.

<sup>130</sup> Article IV.58, §1 Code of Economic Law.

<sup>131</sup> Article IV.58, §§3 and 4 Code of Economic Law.

parties and, after business secrets and confidential information have been removed, to the representatives of the largest employee representative organisation of the undertakings involved, and must inform them that they may consult the file and obtain a copy thereof at the secretariat.<sup>132</sup>

If the Prosecutor considers that effective competition on the Belgian market or on a substantial part of it would be significantly impeded by the merger, amongst others by creating or strengthening a dominant position, he must inform the undertakings concerned at least 5 working days before submission of the reasoned draft decision to the President of the Competition Authority. The undertakings then have 5 working days to propose commitments with a view of obtaining a decision that the concentration is admissible.<sup>133</sup> As the undertakings must be placed in a position where they can propose commitments that satisfy the concerns of the Prosecutor, it seems to be essential that the Prosecutor clearly explains his concerns towards the undertakings. The Prosecutor must hear the undertakings regarding the proposed commitments and must adopt a position on the commitments in his draft decision.<sup>134</sup>

At least 10 working days after the draft decision is sent to the notifying parties, the Competition College designated to deal with the case must organise a hearing.<sup>135</sup> The Competition College shall hear the undertakings concerned and, when it deems necessary, any individual or company that it has summoned or any third party that can demonstrate an interest.<sup>136</sup> The undertakings concerned may submit their written observations to the Competition College (with a copy to the Prosecutor) until at the latest the day before the hearing. However, they may not add additional documents to the file that were not submitted during the investigation by the Prosecutor, except for evidence of a fact or an answer to objections of which they have not yet been informed.<sup>137</sup>

The Competition College must come to a final decision on the proposed merger within 40 working days after the day following the day on which the complete notification was received by the Prosecutor-General. This deadline is extended by 15 working days when the undertakings concerned have proposed commitments.<sup>138</sup> If the Competition College wishes to

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<sup>132</sup> Article IV.58, §5 Code of Economic Law.

<sup>133</sup> Article IV.59 Code of Economic Law. It should be noted that the proposal of commitments can in principle not be regarded as an acknowledgment by the undertakings concerned of the competition concerns of the Prosecutor. See D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 379. See to the contrary: Decision of the Competition Council No. 2002-C/C-89 of 18 December 2002, *Belgacom / De Post – BPG e-Services*, *Belgian Official Gazette* 1 October 2003, p. 48,092, §4.

<sup>134</sup> Article IV.59 Code of Economic Law. In practice, the Prosecutor will often also ‘market test’ the proposed commitments by asking the opinion on the commitments to the most important players on the market.

<sup>135</sup> Article IV.60, §1 Code of Economic Law.

<sup>136</sup> In this respect Article IV.60, §2 Code of Economic Law expressly provides that in the economic sectors placed under the control or supervision of a public body or another specific public institution, these bodies or institutions shall be deemed to have a sufficient interest. In addition, the chief economist and the general counsel shall be deemed to have a sufficient interest in all cases. Finally, also the members of the supervisory or executive bodies of the undertakings concerned, as well as the representatives of the most representative employee organisation of those undertakings, or those that they designate, shall be deemed to have a sufficient interest.

<sup>137</sup> Article IV.60, §2 Code of Economic Law. Especially in cases in which new commitments would be proposed after submission of the draft decision, the fact that no new documents may be added to the file may have undesired consequences. Indeed, in order to duly analyse the effectiveness of new commitments, the Competition College may need additional documents (e.g. market studies) to be submitted. See H. GILLIAMS, “Het nieuwe Belgisch mededingingsrecht”, *T.B.H.* 2013, p. 493, §50.

<sup>138</sup> Article IV.61, §2 *in fine* Code of Economic Law. The deadlines may only be extended at the request of the notifying parties and only for the duration proposed by them. The Competition College shall in each case grant

take into consideration conditions and/or obligations to ensure respect of the proposed commitments that have not yet been discussed by the Prosecutor in the draft decision<sup>139</sup>, the undertakings concerned and the Prosecutor shall be heard on this point and shall have at least 2 working days to communicate their views. In this respect, it should also be noted that the notifying undertakings have the right to modify the merger (e.g. by proposing new, amended or additional commitments) up to the time when the Competition College has made its reasoned decision.<sup>140</sup> In any case, the Competition College retains full discretion to decide whether or not the proposed commitments can be accepted.

In its reasoned decision, the Competition College may decide (i) that the merger is permissible, eventually subject to conditions and/or obligations intended to ensure that the undertakings concerned respect the proposed commitments; (ii) that the merger is permissible because the undertakings concerned do not together control more than 25% of any relevant market (through horizontal or vertical relationships); or (iii) that there are serious doubts about the permissibility of the merger which requires the initiation of phase II proceedings.<sup>141</sup> If no decision is made by the specified deadline, the merger will be deemed permissible.<sup>142</sup>

If phase II proceedings are initiated, the Prosecutor must carry out a supplementary investigation and submit a supplementary draft decision to the Competition College.<sup>143</sup> No later than 20 working days after the decision to initiate phase II proceedings, the notifying undertakings may provide the Prosecutor with commitments, aiming at a decision of permissibility of the merger.<sup>144</sup> The supplementary draft decision must be submitted to the Competition College within 30 working days of the decision of the Competition College to initiate phase II proceedings. This deadline shall be extended by a period equal to that used by the notifying parties to propose their commitments.<sup>145</sup>

Within 10 working days of the supplementary draft decision being filed, the undertakings concerned and the intervening parties may submit their written observations to the Competition College (with a copy to the Prosecutor and the other intervening parties). However, as is the case in phase I, they may not add additional documents to the file that were not submitted during the investigation by the Prosecutor, except if they are evidence of a fact or an answer to objections of which they had not yet been informed.<sup>146</sup> Following the submission of these written observations, the Prosecutor has 5 working days to submit an additional draft decision, a copy of which will again be sent to the notifying parties and to the representatives of the largest organisation representing the employees of the undertakings involved. The undertakings concerned have until the day before the hearing to submit their

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an extension of 15 working days and an additional hearing if the notifying parties so request. See Article IV.61, §3 Code of Economic Law.

<sup>139</sup> Please note that the Competition College can only impose certain conditions and/or obligations to ensure that proposed commitments will be respected (e.g. deadlines, reporting obligations, periodic penalty payments, etc.), but that it cannot introduce new commitments that have not been proposed by the parties.

<sup>140</sup> Article IV.61, §2, 1° Code of Economic Law. By virtue of this provision it seems that the undertakings concerned also remain free to withdraw the proposed commitments. See D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 385.

<sup>141</sup> Article IV.61, §2 Code of Economic Law.

<sup>142</sup> Article IV.61, §2 Code of Economic Law.

<sup>143</sup> Article IV.62, §1 Code of Economic Law.

<sup>144</sup> In this respect, it should be noted that commitments proposed during phase I proceedings may still be relevant in the framework of phase II proceedings. See decision of the Competition Council No. 2008-C/C-16 of 25 April 2008, *Tecteo / Brutélé – Câble Wallon*, *Belgian Official Gazette* 11 June 2006, p. 29,430, §§36 and 40-41.

<sup>145</sup> Article IV.62, §2 Code of Economic Law.

<sup>146</sup> Article IV.62, §3 Code of Economic Law.

written observations to the Competition College (with a copy to the Prosecutor), but again no additional documents may be added to the file. At this point, any additional observations made by the intervening parties must be excluded from the debate.<sup>147</sup>

The hearing and the decision-making procedure of the Competition College in phase II is identical to that in phase I.<sup>148</sup> The Competition College must take a decision on whether or not to authorise the merger within 60 working days of its decision to initiate the phase II procedure. This deadline shall be extended by a period equal to that used by the notifying parties to propose commitments. The concentration shall be approved if no decision is taken by the deadline. The deadline may only be extended at the express request of the parties, and for a period that may not exceed the period proposed by them. In any case, the Competition College must grant an extension of 20 working days, as well as a new hearing, if so requested by the notifying parties, in order to allow them to present new commitments.<sup>149</sup>

As is the case under European competition law, under Belgian competition law both behavioural and structural remedies have been accepted in the framework of merger control proceedings in the past. In most cases, however, the Belgian Competition Authority seems to be more inclined to impose behavioural remedies, such as the commitment to terminate exclusivity agreements<sup>150</sup>; the commitment to provide access to infrastructure<sup>151</sup>; the commitment to continue to offer a certain product range<sup>152</sup>; the commitment to terminate co-operation agreements with competitors<sup>153</sup>; the commitment to facilitate access to the market for competitors<sup>154</sup>; the commitment not to engage in tying or bundling<sup>155</sup>; etc. Nevertheless, in some cases, structural remedies have also been imposed.<sup>156</sup>

### 3.1.2. Enforcement of remedies

The Competition College may subject its approval of a merger to conditions and/or obligations intended to ensure that the undertakings concerned respect the proposed commitments.<sup>157</sup> These conditions or obligations may, for example, exist in the imposition of a time period during which behavioural remedies will apply; a way in which structural remedies should be realised (e.g. deadlines, selling arrangements, reporting obligations, etc.);

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<sup>147</sup> Article IV.62, §4 Code of Economic Law.

<sup>148</sup> Article IV.62, §5 Code of Economic Law.

<sup>149</sup> Article IV.62, §6 Code of Economic Law.

<sup>150</sup> See e.g. decision of the Competition Council No. 2006-C/C-20 of 9 October 2006, *Autogrill / Carestel*, *Belgian Official Gazette* 28 November 2006, p. 65,976.

<sup>151</sup> See e.g. decision of the Competition Council No. 2003-C/C-89 of 12 November 2003, *Telenet Bidco / Canal+*, *Belgian Official Gazette* 6 May 2004, p. 37,071.

<sup>152</sup> See e.g. decision of the Competition Council No. 2010-C/C-08 of 25 March 2010, *Mobistar / KPN Belgium Business*, *Belgian Official Gazette* 23 April 2010, p. 22,872 and decision of the Competition College No. BMA-2013-C/C-03 of 25 October 2013, *Mediahuis*, *Belgian Official Gazette* 28 November 2013, p. 92,644.

<sup>153</sup> See e.g. decision of the Competition Council No. 97-C/C-25 of 17 November 1997, *Kinopolis*, *Belgian Official Gazette* 5 February 1998, p. 3,276.

<sup>154</sup> See, for example, decision of the Competition Council No. 2002-C/C-89 of 18 December 2002, *Belgacom / De Post – BPG e-Services*, *Belgian Official Gazette* 1 October 2003, p. 48,092.

<sup>155</sup> See, e.g. decision of the Competition Council No. 2012-C/C-31 of 31 August 2012, *Swissport / Flightcare*, *Belgian Official Gazette* 28 September 2013, p. 59,938.

<sup>156</sup> See e.g. decision of the Competition Council No. 2008-C/C-59 of 7 November 2008, *Belgacom / Scarlet*, *Belgian Official Gazette* 17 December 2008, p. 66,900; decision of the Competition Council No. 2011-C/C-55 of 23 December 2011, *Belgacom / Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11,173; and decision of the Competition College No. BMA-2013-C/C-02 of 24 October 2013, *Autoveiligheid / Koninklijke Belgische Touring Club*, *Belgian Official Gazette* 3 December 2013, p. 95,502.

<sup>157</sup> Article IV.61, §2 Code of Economic Law.

or periodic penalty payments that may become due when certain commitments are not respected.<sup>158</sup>

If a decision to approve a merger made by the Competition College is not complied with, the Prosecutor can open an investigation, on his own initiative or following a complaint by a third party.<sup>159</sup> In accordance with Article IV.70 of the Code of Economic Law, in case of non-compliance the Competition College may impose a fine on the undertakings concerned of up to 10% of their turnovers. In addition, the Competition College may impose periodic penalty payments on the undertakings concerned for non-compliance with its decision of up to 5% of their average daily turnover, per day of non-compliance. As is the case under European competition law, non-compliance could also deprive the undertakings concerned of the advantage of the approval of the merger.<sup>160</sup>

The decision of the Competition College to accept the proposed commitments and to approve the merger is, in principle, final. Nevertheless, the Competition College sometimes allows the undertakings concerned to request the revision or withdrawal of the accepted commitments after a certain period of time or if their enforcement is no longer justified.<sup>161</sup> It is also possible that the undertakings concerned are required to request a revision because they are no longer in a position to comply with the accepted commitments.<sup>162</sup> It should be noted that Book IV of the Code of Economic Law does not provide any procedural framework to be followed if commitments are withdrawn or revised, leaving the Competition College with full discretion in this respect. In practice, the undertakings concerned will address a request for revision to the Competition College, which in turn will ask the Prosecutor to conduct market research and to submit a reasoned report and investigation file on the proposed revision. In this respect, the Brussels Court of Appeal confirmed that the revision or withdrawal of commitments should be accompanied by an investigation equivalent to the investigation carried out when the merger was approved.<sup>163</sup>

### 3.2. Fundamental and procedural rights

This section will briefly discuss the right to be heard and the right to access the file (see Section 3.2.1) and the right to trial (see Section 3.2.2) in the framework of the Belgian merger control procedure.

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<sup>158</sup> See D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 394.

<sup>159</sup> In this respect it is very important that commitments are published in full in an annex to the approval by the Competition College, allowing third parties to effectively evaluate whether or not the proposed and accepted commitments are indeed complied with. This is all the more true for commitments imposing behavioural remedies on the undertakings concerned, as these remedies require continuous supervision.

<sup>160</sup> See also D. VANDERMEERSCH, *De mededingingswet*, Mechelen, Kluwer, 2007, p. 454.

<sup>161</sup> See e.g. decision of the Competition Council No. 97-C/C-25 of 17 November 1997, *Kinepolis*, *Belgian Official Gazette* 5 February 1998, p. 3,276 and decision of the Competition Council No. 2003-C/C-89 of 12 November 2003, *Telenet Bidco / Canal+*, *Belgian Official Gazette* 6 May 2004, p. 37,071.

<sup>162</sup> See e.g. decision of the Competition Council No. 2012-C/C-03 of 31 January 2012, *Belgacom / Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11,190, in which Belgacom requested (and was granted) a revision of the structural remedies that had been imposed because one of the points of sales that should have been sold in accordance with these remedies had been closed between the decision of the Competition Council and the closing of the transaction.

<sup>163</sup> Decision of the Brussels Court of Appeal of 18 March 2008, *Federatie van Cinema's van België VZW*, not published. See also J. YSEWYN and M. DE BACKER, "Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht", *T.B.H.* 2009, p. 436, §31.



### 3.2.1. Right to be heard and to access the file

The Belgian merger control procedure gives the undertakings concerned the right to be heard in relation to the proposed commitments at various stages of the procedure. When commitments are proposed in phase I, the Prosecutor must first hear the undertakings concerned regarding the proposed commitments before adopting a position in his draft decision.<sup>164</sup> The undertakings concerned must also be heard by the Competition College.<sup>165</sup> If the Competition College in its decision wishes to take into consideration conditions and/or obligations that have not yet been dealt with by the Prosecutor in the draft decision, an additional hearing will be held during which the undertakings concerned can present their views on these conditions and/or obligations.<sup>166</sup> If commitments are proposed in phase II, the undertakings concerned must be heard by the Competition College.<sup>167</sup>

In addition, the Belgian merger control procedure also provides interested third parties with the right to be heard by the Competition College, both in phase I and in phase II, and this irrespective of whether commitments have been proposed or not.<sup>168</sup> In practice, interested third parties must submit a written request to the Competition College in which they substantiate their interest. Although the right of interested third parties to be heard is recognised explicitly, whether this also means that third parties must have access to the file has been subject to debate.

The Belgian Supreme Court (*Cour de Cassation*) has ruled that the former Belgian Competition Act (and by extension also Book IV of the Code of Economic Law) does not grant interested third parties an automatic right of access to the file, and this irrespective of whether commitments have been proposed or not. However, this is put into perspective by adding that interested third parties could be granted limited access to the draft decision of the Prosecutor and to certain documents in the investigation file if this is strictly necessary to allow them to present their views on the proposed transaction in a useful way. The Competition Council must assess the need for access on a case-by-case basis, taking into account the usefulness of the views of the interested third party to assess the proposed merger, the confidential nature of the documents in the file and the necessity to take a decision within strict time limits.<sup>169</sup> In this respect it seems reasonable that interested third parties who explicitly request access must at least be granted access to a non-confidential version of the proposed commitments and those parts of the draft decision that discuss them.<sup>170</sup>

Finally, Book IV of the Code of Economic Law does not provide interested third parties with the right to be heard on conditions and/or obligations that have not yet been dealt with by the

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<sup>164</sup> Article IV.59 Code of Economic Law.

<sup>165</sup> Article IV.60, §2 Code of Economic Law.

<sup>166</sup> Article IV.61, §2, 1° Code of Economic Law.

<sup>167</sup> Article IV.62, §5 *juncto* Article IV.60, §2 Code of Economic Law. Please note that in phase II the Prosecutor is not obliged to hear the undertakings concerned regarding the proposed commitments.

<sup>168</sup> Article IV.62, §5 *juncto* Article IV.60, §2 Code of Economic Law.

<sup>169</sup> Judgment of the Cour de Cassation of 22 January 2008, *Tecteo / Brutele – Câble Wallon*, *T.B.H.* 2008, p. 350, §19-29.

<sup>170</sup> J. YSEWYN and M. DE BACKER, “Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht”, *T.B.H.* 2009, p. 432, §18. This also seems to be in line with the decisional practice of the Belgian Competition Authority. See for example decision of the Competition Council No. 2008-C/C-16 of 25 April 2008, *Tecteo / Brutele – Câble Wallon*, *Belgian Official Gazette* 11 June 2008, p. 29,374, §5; decision of the Competition Council No. 2008-C/C-59 of 7 November 2008, *Belgacom / Scarlet*, *Belgian Official Gazette* 17 December 2008, p. 66,900, §15; and decision of the Competition Council No. 2011-C/C-55 of 23 December 2011, *Belgacom / Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11,173.

Prosecutor in the draft decision. Nevertheless, the Brussels Court of Appeal has confirmed that the Competition College must also hear interested third parties before making these commitments binding.<sup>171</sup>

### 3.2.2. Right to trial

Book IV of the Code of Economic Law expressly provides a right to appeal to the Brussels Court of Appeal against the decisions of the Competition College to approve mergers.<sup>172</sup> Appeals can be lodged by the undertakings concerned or by any interested third party that was heard by the Competition College in the framework of the merger control procedure.<sup>173</sup> The Brussels Court of Appeal does not have full jurisdiction in this respect, but will only rule on the contested decision with the power of annulment.<sup>174</sup>

## 4. Conclusion and recommendations

The introduction of a formal settlement procedure under Belgian law and the further elaboration of the existing commitment and leniency procedures by Book IV of the Code of Economic Law, can, in my opinion, only be welcomed. Indeed, the transactional procedures may not only help to reduce the length of the proceedings before the Belgian Competition Authority (and therefore also the procedural costs), but may also enhance the enforcement of Belgian competition law in general by allowing the Belgian Competition Authority to better allocate its resources. However, in practice, it remains to be seen whether the transactional procedures under Belgian law will prove to be as effective as they are under European competition law.

The potential success of the transactional procedures depends to a great extent on the existence of a real risk that the infringing undertaking will be sanctioned for its conduct if a normal decision-making procedure were to be followed instead of a transactional procedure (i.e. the so-called deterrent effect of competition law). The higher the risk that a substantial fine may be imposed on the infringing undertaking, the higher the incentive will be for the infringing undertaking to try to reach a transactional resolution with the Belgian Competition Authority. In this respect, the procedural changes introduced by Book IV of the Code of Economic Law (e.g. individual sanctions, more efficient procedures, etc.) only seem to enhance the deterrent effect of Belgian competition law and thus possibly also the potential success of the transactional procedures.

This being said, the current procedural framework surrounding the various transactional procedures under Belgian competition law still seems to contain several important gaps with respect to the protection of due process and fundamental rights of the parties concerned, as well as of third parties. In my view, it is, for example, particularly regrettable that the benefits of engaging in settlement discussions are rather unpredictable up front and that there is no right to appeal the final settlement decision by the College of Competition Prosecutors. Moreover, the limited rights of interested third parties to access the file or give their observations with respect to the proposed transactional resolutions may seriously harm the interests of those that are disadvantaged by a competition law infringement. As the Belgian

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<sup>171</sup> Judgment of the Brussels' Court of Appeal of 15 September 2005, *IMP / Rossel & Cie / De Persgroep / Editco*, *Jaarboek Handelspraktijken en Mededinging* 2005, p. 832, §30.

<sup>172</sup> Article IV.79, §1 Code of Economic Law.

<sup>173</sup> Article IV.79, §3 Code of Economic Law.

<sup>174</sup> Article IV.79, §2 Code of Economic Law.

Competition Authority has not yet taken many decisions in transactional procedures (with the exception of merger control cases), it remains to be seen whether or not some of these procedural gaps will be resolved in practice. If not, it might be highly recommended for the legislator to rethink some of the procedural aspects concerning the transactional procedures and to formalize them into the text of Book IV of the Code of Economic Law.

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