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Belgium

Question A: Abuse of Dominant position and Globalization :

Is there any consistency between the recent approach of the different jurisdictions to the notion of abuse ?

Are there too many restrictions on legal rights and business opportunities ?

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Executive summary

This report aims at providing insight on the assessment by the national competition authority² and by courts of abuses of a dominant position in Belgium in order to enable the international rapporteur to answer two questions, namely (i) whether there is any consistency between the recent approaches of the different jurisdictions to the notion of abuse and (ii) whether there are too many restrictions on legal rights and business opportunities.

The structure of this report mirrors the questionnaire established by the LIDC. First, it provides the full text of the provision prohibiting anticompetitive unilateral conduct in Belgium. Second, it clarifies the question whether the list of prohibited practices is to be interpreted as an exhaustive list or as an indicative list. Third, it traces back the origin of the rule prohibiting unilateral conduct in the Belgian legal system. Fourth, it explains whether there are any other legal rules in other areas of law (such as unfair competition law, etc.) that prohibit practices similar to those prohibited by the competition rule on anticompetitive unilateral conduct. Fifth, it provides some explanations regarding the definition of “abuse” as used by the BCA and Belgian courts. Sixth, it deals with the conceptual distinction between “exploitative” and “exclusionary” abuse and it describes how this distinction is reflected in the law as well how the BCA and Belgian courts apply it in practice. Seventh, it analyses whether the law distinguishes between price-based and non-price-based abuse as well how the BCA and Belgian courts reflect this distinction in their decisional practice. Eighth, it clarifies whether the possibility offered by Article 3 (2) of Regulation I/2001 to apply stricter rules than that contained in Article 102 TFEU³ is used under Belgian law. Ninth, it provides insight about the enforcement of the prohibition of abuse of dominance in Belgium notably by providing quantitative and qualitative data regarding the decisional practice of the BCA and the courts over the past five years as well as a sample of reactions from academics, business, media triggered by the enforcement of the prohibition of abuses of a dominant position.

In order to assess the existence of an abuse of a dominant position, the BCA and Belgian Courts rely on Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice. Therefore, the approach and standard of harm relied upon in the decisional practice of the Competition Authority and the case law regarding the interpretation of the concept of “abuse”, the distinction between price-based and non-price-based abuses, and the distinction between exclusionary and exploitative abuses, are in line with European competition law. However, stakeholders usually lack guidance regarding the application of the prohibition of unilateral conduct due to the limited number of cases involving the application of Article IV.2 CDE and/or 102 TFEU.

Regarding the question whether there are too many restrictions on legal rights and business opportunities, this report indicates that in the recent *Electrabel* case, the BCA mentioned that it is important, in the framework of its enforcement of the prohibition of anticompetitive unilateral conducts, to ensure that a favourable environment for sustainable investments is maintained. This would lead to conclude that competition law imposes restrictions on business via the prohibition of an abuse of a dominant position in as much as it is necessary to prevent foreclosure of competitors or exploitation of consumers while aiming at fostering a favourable environment for businesses.

² The Belgian national competition authority is the *Autorité belge de la Concurrence* (in French) *Belgische Mededingingsautoriteit* (in Dutch), referred to as the “BCA”.

³ Consolidated version of the Treaty on the functioning of the European Union (“TFEU”), OJ C 326, 26 October 2012, p. 47–390.

1. Please provide the full text of the provision prohibiting anticompetitive unilateral conduct in your jurisdiction. Please indicate whether this provision is found in a statute exclusively concerning competition law or whether it is found in a statute with a broader remit than competition law.

On 3 April 2013, as part of the modernization of Belgium's economic legislation, the Parliament enacted Book IV of the Economic Code ("CDE"), also referred to as the Belgian Competition Act of 3 April 2013, which integrated the relevant provisions on competition in the CDE.⁴ As such, Book IV of the CDE only contains provisions related to competition law enforcement. However, the CDE deals with issues ranging from the protection of freedom of establishment and freedom to provide services (Book III), price control (Book V), consumer protection (Book IV), etc.

The prohibition of abuses of a dominant position is laid down in Article IV.2 CDE, which provides that:

"Art. IV.2. Without the need for a prior decision to that effect, the abuse by one or more undertakings of a dominant position in the Belgian market concerned or in a substantial part of that market is prohibited.

Such abuse may in particular consist in:

- 1° directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- 2° limiting production, markets or technical development to the prejudice of consumers;*
- 3° applying, with regard to business partners, unequal conditions for equivalent services, thus putting them at competitive disadvantage;*
- 4° making the conclusion of contracts subject to acceptance, by the parties, of additional services which, by their nature or according to commercial usage, have no connection with the subject of such contracts."⁵*

The definition of the concept of a dominant position is provided in Article I.6 of Book I of the CDE as "*the position enjoyed by an undertaking, which enables it to prevent effective competition being maintained by affording it the power to behave to an appreciable extent independently of its competitors, its customers or suppliers.*"⁶

⁴ The Code was enacted one book after the other and there are different dates of entry into force for the various books. Most of the provisions of the Book dedicated to competition law have entered into force on 6 September 2013 (Belgian Competition Act of 3 April 2013 inserting Book IV and V published in the *Belgian Official Gazette* on 26 April 2013, p. 25216 and Act of 3 April 2013, published in the *Belgian Official Gazette* on 26 April 2013, p. 25248).

⁵ This is an excerpt of the unofficial translation in English of the official Dutch and French version of the Act provided by the BCA for information purposes only. Only the texts published in the Belgian Official Gazette are authentic. The English version of the full text of the Act is available at http://economie.fgov.be/en/binaries/Book_IV_of_the_Code_of_Economic_Law-The_Act_english_translation_tcm327-241692.pdf. Accessed 15 April 2015.

⁶ Article I.6, which reads as follows: "*la position permettant à une entreprise de faire obstacle au maintien d'une concurrence effective en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, clients ou fournisseurs.*" / "*de positie die een onderneming in staat stelt om de instandhouding van een daadwerkelijke mededinging te verhinderen en het haar mogelijk maakt zich, jegens haar concurrenten, afnemers of leveranciers, in belangrijke mate onafhankelijk te gedragen.*" was inserted in Book I of the CDE by Article 2 of the Belgian Competition Act of 3 April 2013 published in the *Belgian Official Gazette* on 26 April 2013, p. 25248).

2. If there is a list of prohibited practices in the provision, is this list interpreted as an exhaustive or indicative list of prohibited practices?

The list of abuses provided in Article IV.2 CDE is interpreted as being not exhaustive but merely providing indications regarding potential abuses, as reflected in the doctrine⁷ and in accordance with the case law of the Court of Justice.⁸

3. How long has your jurisdiction had a rule prohibiting anticompetitive unilateral conduct? Please provide a brief history concerning the adoption of the rule.

In the 1960's, an early prohibition of an abuse of economic power was adopted in Belgium following the Treaty of Rome in 1957.⁹ According to the doctrine, the entry into force of the Treaty of Rome significantly speeded up the process to enact a prohibition against "monopolies" in Belgium.¹⁰ The concept of "economic power" was defined under Article 1 of the 1960 Act as "*the power enjoyed by an individual or a legal entity, acting alone or acting together as a group, on the territory of Belgium, through industrial, commercial, agricultural or financial activities, a decisive influence on supply of the market for goods or capitals, on the price or the quality of a specific good or service*"¹¹

The concept of "abuse" was defined under Article 2 of the 1960 Act as "[a situation] where one or more persons, holding economic power, harm the general interest through practices which hinder or impede the normal functioning of competition or which hamper the economic freedom of producers, distributors or consumers, or [which hamper] the development of production or [the flow of] exchanges".¹²

A new Act on the Protection of Economic Competition adopted in 1991 entered into force in 1993 in order to bring competition law more in line with rules and principles applicable at European level.¹³ The concepts of a "dominant position" and of an "abuse" were defined respectively under Article 1 (b) and under Article 3 by using a wording similar to the currently applicable provisions.¹⁴

⁷ See D. Grisay, Introduction au droit belge de la concurrence, Larcier, Bruxelles, 2009, p. 158. See also Dirk Vandermeersch, De Medingswet, Kluwer, Mechelen, 2007, p. 208.

⁸ See CJEU, C-95/04, *British Airways v. Commission*, ECR [2007 I-2331], paras 57-58 and cited case law.

⁹ Act against an abuse of economic power of 27 May 1960, published in the *Belgian Official Gazette* on 22 June 1960, p. 4674.

¹⁰ Roger Dehem, La protection contre l'abus de puissance économique, Bulletin de l'Institut de Recherches Économiques et Sociales, 26e Année, No. 6 (September 1960), pp. 497-522.

¹¹ The French version of Article 1 of the Act reads as follows: "La puissance économique, au sens de la présente loi, est le pouvoir que possède une personne physique ou morale agissant isolément ou un groupe de ces personnes agissant de concert d'exercer sur le territoire du Royaume, par des activités industrielles, commerciales, agricoles ou financières, une influence prépondérante sur l'approvisionnement du marché de marchandises ou de capitaux, sur le prix ou la qualité d'une marchandise ou d'un service déterminé." The Dutch version of Article 1 of the Act reads as follows: "Deze wet verstaat onder economische machtspositie, de positie waarin een afzonderlijke handelende natuurlijke of rechtspersoon of een in gemeen overleg handelende groep dezer personen de macht bezit om op het grondgebied van financiële verrichtingen, een overwegende invloed op de bevoorrading van de goederen- of kapitaalmarkt, op de prijs of de hoedanigheid van een bepaalde waar of dienst uit te oefenen."

¹² The French version of Article 2 of the Act reads as follows: "Il y a abus, au sens de la présente loi, lorsqu'une ou plusieurs personnes, détentrices de puissance économique, portent atteinte à l'intérêt général par des pratiques qui faussent ou qui restreignent le jeu normal de la concurrence ou qui entravent soit la liberté économique des producteurs, des distributeurs ou des consommateurs, soit le développement de la production ou des échanges." The Dutch version of Article 1 of the Act reads as follows: "Er is misbruik in de zin van deze wet, wanneer een of meer personen die een economische machtspositie bekleden op het algemeen belang inbreuk maken door praktijken welke de normale werking der mededeling vervalsen of beperken, of een hinderpaal vormen hetzij voor de economische vrijheid der voortbrengers, verdeleers of verbruikers, hetzij voor de ontwikkeling van de produktie of ruilverkeer."

¹³ Act on the Protection of Economic Competition of 5 August 1991, published in the *Belgian Official Gazette* on 11 October 1991, p. 22493.

¹⁴ For an overview of the changes brought by the Act to the institutional framework and early cases of application of the prohibition of abuses of a dominant position, see the first annual report of the Belgian

The 1991 Act was amended in the course of the year 1999 and a codified version was published.¹⁵ A few years later, on 1 October 2006 a new Act entered into force in order to implement a reform of the structure of the Belgian Competition Authority and to further align the substantive provisions with European law.¹⁶

Finally, the Belgian Competition Act of 3 April 2013 was enacted as part of the modernization of Belgium's economic legislation and competition law provisions were integrated as Book IV of the Economic Code.¹⁷

4. Are there any other legal rules found in other areas (for example in unfair competition law, etc) that prohibit practices similar to those prohibited by the competition rule on anticompetitive unilateral conduct?

The relationship between the prohibitions of anticompetitive conducts and of unfair commercial practices was already dealt by the Belgian Supreme Court (*Cour de Cassation / Hof van Cassatie*) in the mid-1960'.¹⁸ It is clear that an infringement to European or Belgian competition rules falls under the prohibition of unfair commercial practices and warrants for a cease-and-desist action under Article XVII.1 CDE.¹⁹ However, if a conduct were to fall short of constituting an infringement of competition law because of one missing factual or legal element, according to a 2000 landmark case of the Belgian Supreme Court, it would not be possible to find this conduct illegal on the basis of the prohibition of unfair commercial practices.²⁰ This "mirror effect" ("*effet réflexe*")²¹ theory thus provides that, save for the case of an abuse of one's right, a conduct complying with competition rules may not be prohibited under the law against unfair commercial practices if this conduct is only allegedly impeding the functioning of the free market.

5. Definition of 'abuse'

- a. Is there a definition of 'abuse' in the legislation? If so, please provide the definition.

The definition of the concept of a dominant position is provided in Article I.6 of Book I of the CDE as "*the position enjoyed by an undertaking, which enables it to prevent effective competition being maintained by affording it the power to behave to an appreciable extent independently of its competitors, its customers or suppliers.*"²² Article IV.2 CDE also provides a list of abuses similar to the ones listed in Article 102 TFUE, it includes situations where an "*abuse may in particular consist in:*

- 1° *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- 2° *limiting production, markets or technical development to the prejudice of consumers;*

Competition Authority, available at http://statbel.fgov.be/fr/binaries/report_competition_fr_001_tcm326-31172.pdf. Accessed 10 April 2014.

¹⁵ See the 2000 Annual report of the Belgian Competition Authority, p. 9, available at http://economie.fgov.be/fr/binaries/report_competition_2000_fr_tcm326-36145.pdf. Accessed on 10 April 2015.

¹⁶ Act on the Protection of Economic Competition (APEC) consolidated on the 15th of September 2006, published in the *Belgian Official Gazette* on 29 September 2006, p. 50613 and amended by the act of 6 May 2009 published in the *Belgian Official Gazette* on 19 May 2009, p. 37860.

¹⁷ Belgian Competition Act of 3 April 2013 inserting Book IV and V published in the *Belgian Official Gazette* on 26 April 2013, p. 25216 and Act of 3 April 2013, published in the *Belgian Official Gazette* on 26 April 2013, p. 25248.

¹⁸ Cass. 18 February 1965, Pas., 1965, I, p. 621. See J. Ligot, F. Vanbossele, Olivia Battard, *Les pratiques loyales*, Larcier, Brussels, 2012, p.186 -192 and cited case law.

¹⁹ See Dirk Vandermeersch, *De Medingingswet*, Kluwer, Mechelen, 2007, p. 507.

²⁰ Cass., 7 January 2000, (*Multipharma Groep c. Louis Widmer*), R.C.J.B. 2001, p. 255, commented by J. Stuyck; R.D.C., 2000, p. 369, commented by D. Vandermeersch.

²¹ See Gand, 1 March 2010 (*N.V. Cinecom c. NV Independent Film Distributie*), *T.B.M. / R.C.B.*, 2010.

²² Article I.6, which reads as follows: "*la position permettant à une entreprise de faire obstacle au maintien d'une concurrence effective en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, clients ou fournisseurs.*" / "*de positie die een onderneming in staat stelt om de instandhouding van een daadwerkelijke mededinging te verhinderen en het haar mogelijk maakt zich, jegens haar concurrenten, afnemers of leveranciers, in belangrijke mate onafhankelijk te gedragen.*" was inserted in Book I of the CDE by Article 2 of the Belgian Competition Act of 3 April 2013 published in the *Belgian Official Gazette* on 26 April 2013, p. 25248).

3° applying, with regard to business partners, unequal conditions for equivalent services, thus putting them at competitive disadvantage;

4° making the conclusion of contracts subject to acceptance, by the parties, of additional services which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

b. Is there a definition of ‘abuse’ provided by the competition authority? If so, please provide the definition.

There is no specific definition of an abuse provided by the BCA. The BCA relies on the definition of an abuse of a dominant position provided under Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice. Unlike the European Commission, which provided some further indications on its views on exclusionary abuses in its Guidance Paper²³, the BCA has not issued any specific guidance on the concept of an abuse of a dominant position.

c. Is there a definition of ‘abuse’ provided by case law? If so, please provide the definition.

Belgian courts rely on the definition of an abuse of a dominant position provided on the one hand by Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice. For example, in a recent case involving the assessment of an abuse of a dominant position in the telecommunication sector, the Court of Appeal of Brussels relied on the definition of a dominant position provided in the *United Brands* case as “ a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”²⁴

6. Exploitative and exclusionary abuse

a. Is there a distinction between exploitative and exclusionary abuse in the legal provision prohibiting anticompetitive unilateral conduct?

Exploitative abuses are conducts that are directly targeting or “exploiting” consumers, e.g. charging excessive prices while exclusionary conducts aim at harming competitors of the dominant undertaking by excluding them from the market.

In order to assess the existence of an abuse of a dominant position, the BCA and Belgian Courts rely on Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice.

As it is the case for Article 102 TFEU, there is no clear mention of exploitative or exclusionary abuses within the categories of abuses listed in Article IV.2 CDE.²⁵ Therefore, the distinction established between the two categories in the framework of Article 102 is applicable, *mutatis mutandis*, to Article IV.2 CDE as follows.

Regarding the category listed under Article IV.2 CDE, 1°, regarding behaviours consisting in “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”, it constitutes exploitative abuses.

As to the category listed under Article IV.2 CDE, 2°, regarding behaviours consisting in “*limiting production, markets or technical development to the prejudice of consumers*”, it constitutes exclusionary abuses.

²³ Communication from the Commission - Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

²⁴ Judgment of the Court of Appeal of Brussels, 9th chamber, Belgacom v. Base and Mobistar, 26 February 2015, para 45 referring to the ECJ, case C-27/76, *United Brands*, 1978 ECR 207, point 65. The electronic version of the judgment is available on the website of the BCA at http://economie.fgov.be/fr/binaries/20150226_CAB_2012AR1_Belgacom_v_Base_Mobistar_tcm326-264381.pdf. Accessed on 15 April 2015.

²⁵ See R. O’Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU*, Hart Publishing, London, 2013, p. 190ff.

Regarding the category listed under Article IV.2 CDE, 3°, regarding behaviours consisting in “*applying, with regard to business partners, unequal conditions for equivalent services, thus putting them at competitive disadvantage*”, as it is the case regarding Article 102 TFEU, there is a lack of clarity to separate exclusionary conducts from exploitative conducts. Indeed, a dominant undertaking could discriminate against its rivals so that the conduct would constitute an exclusionary abuse or the discrimination could target undertakings, which are its customers, potentially committing an exploitative abuse.²⁶

As to the category listed under Article IV.2 CDE, 4° regarding behaviours consisting in “*making the conclusion of contracts subject to acceptance, by the parties, of additional services which, by their nature or according to commercial usage, have no connection with the subject of such contract*”, those can constitute exclusionary abuses leading to foreclosure of competitors or exploitative abuses leading to price discrimination and higher prices.

b. Is there a distinction between exploitative and exclusionary abuse in the decisional practice of the competition authority?

The enforcement of the prohibition of anticompetitive unilateral conducts by the BCA relies on the case law of the Court of Justice and on the decisional practice of the European Commission, which apply this distinction. For example, in the *Electrabel* case, the BCA dealt with the analysis of an exploitative abuse of a dominant position²⁷ and it clearly makes a distinction with exclusionary abuses.²⁸

c. Is there a distinction between exploitative and exclusionary abuse in the case law?

The enforcement of the prohibition of anticompetitive unilateral conducts by the courts relies on the case law of the Court of Justice and on the decisional practice of the European Commission, which apply this distinction. For example, in the *Belgacom* case, the Court of Appeal states clearly the difference between the concepts of exploitative abuse and exclusionary abuse.²⁹

7. Price-based and non-price-based abuse

a. Is there a distinction between price-based and non-price-based abuse in the legal provision prohibiting anticompetitive unilateral conduct?

Both exclusionary and exploitative unilateral conducts may be price-based or non-price-based. Since Article IV.2 CDE mirrors the wording of Article 102 TFEU, the same distinction applies.

b. Is there a distinction between price-based and non-price-based abuse in the decisional practice of the competition authority?

The enforcement of the prohibition of anticompetitive unilateral conducts by the BCA relies on the case law of the Court of Justice and on the decisional practice of the European Commission, which apply this distinction. For example, in the *bpost* case, the price-based abuse of a dominant position established by the BCA consisted in the grant of rebates.³⁰ In the *De Beers* case, the BCA had granted interim measures in light of a *prima facie* non-price-based abuse of a dominant position consisting in a refusal to supply.³¹

²⁶ See R. O’Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU*, Hart Publishing, London, 2013, p. 201ff.

²⁷ Case CONC-I/O-09-0015 wholesale electricity markets, 18 July 2014, para 135, available at http://economie.fgov.be/fr/binaries/ABC-2014-IO-15_Electrabel%20PUB_tcm326-253790.pdf. Accessed on 15 April 2015, para 162.

²⁸ Case CONC-I/O-09-0015 wholesale electricity markets, 18 July 2014, para 135, available at http://economie.fgov.be/fr/binaries/ABC-2014-IO-15_Electrabel%20PUB_tcm326-253790.pdf. Accessed on 15 April 2015, para 96-98.

²⁹ Court of Appeal of Brussels, *Belgacom v. Base and Mobistar*, 26 February 2015, para 196 and 145, available at http://economie.fgov.be/fr/binaries/20150226_CAB_2012AR1_Belgacom_v_Base_Mobistar_tcm326-264381.pdf. Accessed on 15 April 2015.

³⁰ Case CONC-P/K-05/0067, CONC-P/K-09/0017 and CONC-P/K-10/0016, decision n° 2012-P/K-32, *bpost*, 10 December 2012, Available at

c. Is there a distinction between price-based and non-price-based abuse in the case law?

The enforcement of the prohibition of anticompetitive unilateral conducts by the courts relies on the case law of the Court of Justice and on the decisional practice of the European Commission, which apply this distinction. For example, in the *Belgacom* case, the price-based abuse of a dominant position established by the BCA consisted in a margin squeeze.³² In the *Magyar Telekom v. Kapitól* case, the Court of Appeal had to deal with a non-price-based abuse consisting in a refusal to supply.³³

8. (For EU/EEA Member States only) Does your jurisdiction have stricter rules than that contained in Article 102 TFEU in the sense of Regulation 1/2003 Article 3(2)?

Article 3(2) of Regulation 1/2003 notably provides that “Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertaking”.³⁴ The rules in Belgium which were most likely to overlap regarding the prohibition of unilateral conduct while imposing stricter conditions than those provided under competition rules were to be found in the field of the prohibition of unfair commercial practice, such as the prohibition under certain conditions by Article VI.116 of sales at loss, i.e. the sale price of the product is smaller than the price that was originally paid to acquire said product.³⁵ In Belgium, this question was dealt with by the Supreme Court regarding the relationship between the prohibitions of anticompetitive conducts and of unfair commercial practices.³⁶ According to the mirror effect theory developed by the Supreme Court, save for the case of an abuse of one’s right, it is not possible to prohibit a conduct complying with competition rules under the law against unfair commercial practices if this conduct is only allegedly impeding the functioning of the free market. Therefore, under Belgian rules regarding unfair commercial practices there are no stricter rules in the meaning of Regulation 1/2003 Article 3(2).

9. Enforcement

a. How many cases concerning the prohibition on anticompetitive unilateral conduct have been decided in your jurisdiction in the last five years by the competition authority? How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules)?

Over the last five years, a total of 10 decisions of the BCA dealt with the prohibition of an abuse of a dominant position compared to a total of 30 decisions, which were adopted in the field of the prohibition of cartels. Decisions regarding the application of IV.2 CDE or former Article 3 of the 2006 Competition Act concerning interim measures, closure of investigation for lack of interest, for reasons linked with internal priorities of the BCA or related to the application of the statute of limitations have not been included for lack of interest to the questions at stake in this report.

http://economie.fgov.be/en/binaries/32_2012PK32_VERSION_PUBLIQUE_F_tcm327-210746.pdf. Accessed on 15 April 2015.

³¹ Case MEDE-P/K-09/0019: *Diamanthandel A. Spira BVBA / De Beers UK Limited*, 15 October 2014, available at http://economie.fgov.be/fr/binaries/BMA-2014-PK-22-AUD_PUB_SITE_tcm326-259076.pdf. Accessed on 15 April 2015.

³² Court of Appeal of Brussels, *Belgacom v. Base and Mobistar*, 26 February 2015, available at http://economie.fgov.be/fr/binaries/20150226_CAB_2012AR1_Belgacom_v_Base_Mobistar_tcm326-264381.pdf. Accessed on 15 April 2015.

³³ Court of Appeal of Brussels, *Magyar Telekom v. Kapitól*, 8 March 2012, available on www.tbm-rcb.be. Accessed on 15 April 2015.

³⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

³⁵ See also in this respect Case C-343/12, *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA*, ECR [2013], p 0. where the Court of Justice ruled that Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which provides for a general prohibition of offering for sale or selling at a loss in so far as that provision pursues objectives relating to consumer protection.

³⁶ See question 4 above.

Tableau 1 - BCA: count of decisions per field and per year (period January 2010 - April 2015)³⁷

Year/Area	Abuse of a dominant position	Agreements, decisions, concerted practices	Total number of cases per year
2015 ³⁸	1	3	4
2014	4	1	5
2013	1	5	6
2012	3	4	7
2011	1	17	18

b. How many cases concerning the prohibition on anticompetitive unilateral conduct have been decided in your jurisdiction in the last five years by the courts? How does this number compare to the number of cases on the other competition rules in your jurisdiction (excluding merger control rules)?

During the period 2011-2015, 24 decisions involving the prohibition of anticompetitive unilateral conducts have been identified.³⁹ Since, most of those decisions also include elements related to the application of the prohibition of anticompetitive agreement, both sets of decisions are in the same approximate range.

c. Are there specialist courts in your jurisdiction dealing with competition infringements? Please provide a brief explanation of the judiciary background regarding the competition cases.

There is a need to distinguish between two situations. On the one hand, Article IV.79 § 1er CDE provides that appeals against decisions of the BCA may only be lodged before the Court of Appeal of Brussels. Regarding the internal organisation of the Court of Appeal of Brussels, efforts are made to assign cases related to competition law to specific judges and/or chambers. In that sense, there is a court that is specifically in charge of reviewing decisions of the BCA.⁴⁰

On the other hand, where the question related to the existence of an abuse of a dominant position is raised in the framework of a civil or a commercial dispute before any court, common rules of procedure based on the amount of the claims as well as the location of the court apply to identify whether it is possible to lodge an appeal against a decision adopted in first instance. In those instances, be it in first instance or in appeal, it is possible for the BCA to intervene as *amicus curiae* by submitting written observations to the court and to make an oral presentation upon approval of the court pursuant to Article VI.77 CDE.

In both cases, regarding questions arising as to the interpretation of rules laid down in Book IV CDE, Article IV.75. CDE provides that the courts with a possibility to ask for a reference for preliminary ruling to the Belgian Supreme Court (“*Cour de Cassation*” – “*Hof van Cassatie*”).

³⁷ The set of data is constituted by the information published on the website of the BCA available at http://economie.fgov.be/fr/entreprises/concurrence/decisions/autorite/decisions_pratiques_restrictives_concurrence/ Accessed on 15 April 2015) and in its annual reports available at http://economie.fgov.be/fr/entreprises/concurrence/publications/rapports_annuels/ Accessed on 15 April 2015.

³⁸ For the year 2015, the count is based on the decisions adopted by the BCA during the period between 1 January 2015 and 26 April 2015.

³⁹ The analysis is based on information regarding the case law of the courts published on the website of the BCA, available at http://economie.fgov.be/fr/entreprises/concurrence/jurisprudence/Decisions_jurisdictions_belges/. Accessed on 15 April 2015 as well as on information available via Juridat (<http://jure.juridat.just.fgov.be>) and Jura (www.jura.be). Under Article IV.78 CDE, courts are notably supposed to address to the BCA a copy of judgments involving the assessment of a conduct under competition rules. There is a significant improvement regarding this practice since the modernization of the BCA in 2013.

⁴⁰ During the 2013 modernisation process, the possibility to create and entrust a special administrative “Market Court” (“*Cour du Marché*” – “*Markthof*”) was discussed but later abandoned notably due to the potential breaches of the Belgian Constitution that the creation of such a court would entail. Therefore, the review of the decisions adopted by the BCA remained within the jurisdiction of the Court of Appeal of Brussels. See in this respect, the Opinion of the Belgian Competition Commission, 14 September 2009, CCE 2012-0963, available online at <http://www.ccecrb.fgov.be/txt/fr/doc12-963.pdf>. Accessed on 13 April 2015.

d. Are there regulators with concurrent powers that can enforce the same competition rules as the competition authority? If so, do they follow the approach of the competition authority in their interpretation of the prohibition or do they have a distinct approach?

In Belgium as in other Member States, some sectors such as telecommunications and energy are subject to *ex ante* regulation by national regulation authorities (“NRA”). Regarding telecommunications, the Belgian Institute for Postal services and Telecommunications (“BIPT”) is notably in charge of prices and costs monitoring. In the framework of its mission, it may impose specific obligation on undertakings that enjoy significant market power (“SMP”).⁴¹ Under this framework, the NRA undertakes market definitions and assessments whether undertakings enjoy significant market power. While the assessment of the BCA and the BIPT are respectively based on *ex post* or *ex ante* assessments because the two authorities focus on different issues, both shall, in principle, use the same principles regarding market definition.⁴² However, regarding the concepts of enjoying SMP and dominance, the fact that the NRA would consider that an undertaking enjoys SMP in a market does not automatically imply that it is dominant for the purpose of the application of competition rules. The NRA’s findings would only imply that, in the short to medium term, the undertaking has and will have, on the relevant market identified, from a structural point of view, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.⁴³

e. Of the cases decided by the competition authority and/or courts, are you able to identify the proportion of exploitative and exclusionary abuses?

Based on information provided under 9 a) and 9 b) above, the proportion is estimated as 60% of exclusionary abuses and 40% of exploitative abuses.

f. Are there guidelines of any form or shape adopted by the competition authority in your jurisdiction concerning the enforcement of or the substantive interpretation of the prohibition?

Unlike the European Commission, which provided some further indications on its views on exclusionary abuses in its Guidance Paper⁴⁴, the BCA has not issued any specific guidance on the concept of an abuse of a dominant position. However, as many other competition authorities, the BCA provides guidance to stakeholders regarding its enforcement priorities by specifying on which sectors/industry of type of infringement of competition it shall focus its actions.⁴⁵

g. Is there a particular approach and/or standard of harm that can be identified in the decisional practice of the competition authority or the case law of the courts regarding their interpretation of ‘abuse’?

In order to assess the existence of an abuse of a dominant position, the BCA and Belgian Courts rely on Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice. Therefore, the approach and standard of harm relied upon in the decisional practice of the Competition Authority and the case law regarding the interpretation of the concept of “abuse”, are in line with European competition law.

⁴¹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ C 165, 11 July 2002 p. 6 – 31.

⁴² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ C 165, 11 July 2002 p. 6 – 31, para. 24.

⁴³ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ C 165, 11 July 2002 p. 6 – 31, para 30.

⁴⁴ Communication from the Commission - Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

⁴⁵ See the document containing the policy priorities of the BCA for 2015, available on the BCA’s website at http://economie.fgov.be/fr/binaries/2015_Note_Politique_Priorites_%20ABC_tcm326-266107.pdf. (Last Accessed on 2 May 2015).

h. Is there a claimed objective of the prohibition of anticompetitive unilateral conduct adopted by the competition authority and/or the courts?

Based on a review of the decisional practice of the BCA and of the case law of Belgian courts, the underlying objectives of the prohibition of unilateral conducts consist in avoiding foreclosure of competitors and harming consumers.

For example, in the *Belgacom* case, the objective mentioned by the Court of Appeal is to maintain competition on the merits in order to avoid causing harm to consumers.⁴⁶ In addition to the objectives of protection of direct and indirect consumers, the BCA recently indicated in the *Electrabel* case that, in the framework of its enforcement of the prohibition of anticompetitive unilateral conducts, it shall ensure that a favourable environment for sustainable investments is maintained.⁴⁷

i. (For EU/EEA Member States only) Can you please identify what, if any, effect the Commission's Guidance on enforcement priorities might have had on the approach of the competition authority and/courts in your jurisdiction?

The enforcement of the prohibition of anticompetitive unilateral conducts by the BCA relies on the case law of the Court of Justice, on the decisional practice of the European Commission as well as on the many soft-law instruments published by the European Commission notably regarding market definition. For example, regarding priorities of the Commission in the field of exclusionary abuses, the BCA refers to DG Competition's discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.⁴⁸

In the *Belgacom* case, the Court of Appeal clearly stated that the Guidance paper is not suited to state the applicable law.⁴⁹ The Court further explained that priorities guiding the action of the European Commission or any other discussion paper do not constitute the European law that the Court is bound to apply, however the Court has to comply with legal instruments as interpreted by the Court of Justice or with the Treaty.⁵⁰

j. Are there any criticisms directed towards the decisional practice of the competition authority or the case law of the courts regarding their approach, particularly alleging that their approach leads to too many restrictions on legal rights and business opportunities? The criticisms may involve those from academics, businesses, media, etc.

Criticism regarding the BCA is not focused as such on the application of the prohibition of unilateral conducts but rather on the lack of resources and the length of the proceedings. The recent modernization process of Belgium's economic legislation including the amendments brought to the institutional framework and material provisions regarding competition law enforcement were notably designed to improve the functioning of the BCA.⁵¹ However, stakeholders usually lack guidance regarding the application of the prohibition of unilateral conduct due to the limited number of cases involving the application of Article IV.2 CDE and/or 102 TFEU.

⁴⁶ Judgment of the Court of Appeal of Brussels, 9th chamber, *Belgacom v. Base and Mobistar*, 26 February 2015, para 96.

⁴⁷ Case CONC-I/O-09-0015 wholesale electricity markets, 18 July 2014, para 135, available at http://economie.fgov.be/fr/binaries/ABC-2014-IO-15_Electrabel%20PUB_tcm326-253790.pdf. Accessed on 15 April 2015.

⁴⁸ Case MEDE-PK-11/0027: NV Handling CO / NV Sony Pictures Releasing, BVBA The Walt Disney Company (Benelux), NV Universal Pictures International Belgium, NV Twentieth Century Fox Film Belge en Warner Bros. Studios Leavesden Limited, 2 December 2014,

⁴⁹ Judgment of the Court of Appeal of Brussels, 9th chamber, *Belgacom v. Base and Mobistar*, 26 February 2015, para 53

⁵⁰ Judgment of the Court of Appeal of Brussels, 9th chamber, *Belgacom v. Base and Mobistar*, 26 February 2015, para 72.

⁵¹ See the Opinion of the Belgian Competition Commission, 14 September 2009, CCE 2012-0963, available online at <http://www.ccecrb.fgov.be/txt/fr/doc12-963.pdf>. Accessed on 13 April 2015. This document constitutes an adequate summary of the views of stakeholders on this issue.

10. Conclusion

In order to assess the existence of an abuse of a dominant position, the BCA and Belgian Courts rely on Article IV.2 CDE or its previous versions and on the decisional practice of European institutions such as the European Commission and the European Court of Justice. Therefore, the approach and standard of harm relied upon in the decisional practice of the Competition Authority and the case law regarding the interpretation of the concept of “abuse”, the distinction between price-based and non-price-based abuses, and the distinction between exclusionary and exploitative abuses, are in line with European competition law. However, stakeholders usually lack guidance regarding the application of the prohibition of unilateral conduct due to the limited number of cases involving the application of Article IV.2 CDE and/or 102 TFEU.

Regarding the question whether there are too many restrictions on legal rights and business opportunities, this report indicates that in the recent *Electrabel* case, the BCA mentioned that it is important, in the framework of its enforcement of the prohibition of anticompetitive unilateral conducts, to ensure that a favourable environment for sustainable investments is maintained. This would lead to conclude that competition law imposes restrictions on business via the prohibition of an abuse of a dominant position in as much as it is necessary to prevent foreclosure of competitors or exploitation of consumers while aiming at fostering a favourable environment for businesses.
