HANDBOOK ON MULTIJURISDCTIONAL COMPETITION LAW INVESTIGATIONS

Belgium

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Introduction

Competition law in Belgium is primarily enforced through the civil regime which is based on the Belgian Competition Act.[1] Private actions also have a role to play in enforcement and, looking ahead, there is a possibility that a criminal regime will be introduced to strengthen competition enforcement.

Belgium's Competition Act, modeled on articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU), was first adopted in 1991 and subsequently modified in 1999 (1999 Act). In July 2006, the 1999 Act was replaced by two new Acts: the first comprises the actual Belgian competition rules,[2] and the second provides for the establishment of the Competition Authority.[3] These Acts have been consolidated into one by the Royal Decree of September 15, 2006, and they now form the new Belgian Competition Act (Competition Act).[4] The Competition Act came into force on October 1, 2006. Several Royal and Ministerial Decrees (Decrees) were adopted on October 31, 2006, implementing the Competition Act.[5] The Decrees entered into force

1. Belgian Act on the Protection of Economic Competition of Sept. 15, 2006, MONITEUR BELGE [Official Gazette of Belgium] [hereinafter "M.B."], Sept. 29, 2009, 50,613 (hereinafter "Competition Act").
2. The Protection of Economic Competition Act of June 10, 2006, M.B., June 29, 2006, 32,755.
3. The Establishment of a Competition Authority Act of June 10, 2006, M.B., June 29, 2006, 32,746.
4. *See generally* Competition Act.
5. *See* Royal Decree of Oct. 31, 2006 on the rules of procedures (hereinafter "Procedures Decree"); Royal Decree of Oct. 31, 2006 on the filing of complaints and requests in accordance with Article 44, §§ 1, 2 and 3 of Competition Act; Royal Decree of Oct. 31, 2006 concerning the issuing of copies of files in accordance with Competition Act; Ministerial Decree of Oct. 31, 2006 on the method of transmitting the Competition

retroactively on October 1, 2006. The Decrees do not contain any significant substantive rules, but do set out the procedural details on how the Competition Act will be applied.

Any discussion of the competition regime in Belgium cannot be undertaken in isolation from the EU regime. Since the entry into force of EC Regulation No. 1/2003 on May 1, 2004, Belgium, like all other EU Member States, is bound to apply EU competition law together with Belgian substantive law when restrictive practices affect both the Belgian market as well as trade between Member States. If restrictive practices affect the Belgian market exclusively, then Belgian substantive law only applies.

The relationship between Belgium and the European Union is also evident in Belgium's procedural and substantive competition law, which has traditionally been based on the European competition rules.[6] Indeed, the Belgian legislator explicitly stated in the 1991 Competition Act that EU competition legislation is the most important frame of reference for interpreting Belgian competition law.[7] The Competition Tribunal has also unequivocally stated that "it follows the case law of the European Court of Justice and the Court of First Instance as well as the decisional practice of the European Commission when applying Belgian competition law."[8] Similarly, the various guidelines issued by the

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Tribunal's file to the Brussels Court of Appeal; Ministerial Decree of Oct. 31, 2006 on the method of transmitting the proceedings file from the sectoral regulatory authority to the Competition Tribunal. *See also* Competition Authority online at http://economie.fgov.be/en/entreprises/competition/Belgian_Competition_Authority/.

6. What sets Belgian competition law apart from the EU system, however, is its dual enforcement structure whereby investigation and enforcement are conducted by two distinct institutions within the Belgian competition authority (*see infra*, section B(1(a)).
7. *See Parl. St.* Kamer 1989-90, no. 1282/1-89/90, p. 9 (explaining now repealed Law of Aug. 5, 1991 on the protection of economic competition, M.B., Oct. 11, 1991, 22,493.
8. Competition Tribunal, decision no 2002-P/K-45, June 19, 2002, *Marc De Smet v. Beroepsinstituut van Vastgoedmakelaars*, M.B., Feb. 12, 2003, 7,222.

European Commission provide direction in the application of Belgian competition law.[9]

In addition to the civil enforcement regime, Belgian competition law also relies on private enforcement. Claims for damages arising out of an infringement of the competition rules may be brought by a party with a legitimate interest[10] before the national courts. These courts may not impose administrative fines, but they may invalidate agreements that are incompatible with the competition rules,[11] declare illegal any abuse of dominant position and impose its termination, and award damages on the basis of general tort law. Notably, an infringement decision of the Competition Authority amounts to a finding of fault under tort law—as competition law is of public order—and can thus be relied upon in the plaintiff's action for damages before the civil courts.[12] A private individual can also initiate summary proceedings before civil courts to obtain injunctive relief that would terminate the infringement. This often occurs contemporaneously with a Competition Authority investigation.[13]

Like the EU regime, the Belgian system does not provide for criminal sanctions for breaches of competition law. However, this could change because there has been discussion regarding the introduction of a criminal regime. The Directorate-General for Competition, in its 2009 Annual Report, stated that "the introduction of criminal sanctions for individuals who actively participate in serious cartel infringements would contribute to a more efficient competition law enforcement."[14] This pronouncement shows that the scope of any criminal regime would likely apply only to individuals found guilty of serious cartel infringements. Of course, this change in the law would require a parliamentary debate and subsequent amendment to both criminal and competition law.

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9. Court of Appeal of Brussels, Mar. 7, 2006, *NV Power Oil v. NV D.D.D. Invest*, unpublished.
10. A legitimate interest exists when a party has personally suffered injury as a result of the competition law infringement.
11. Contract provisions that infringe competition law are void. *See e.g.*, Court of Appeal of Brussels, Nov. 23, 1995, JAARBOEK H&M, 645.
12. *See infra*, section H (Follow-on private litigation).
13. Competition Act, Art. 52, §§ 1 & 2. The Court is bound by the findings of the Competition Authority in cases where the latter makes a finding of an infringement or of a non-infringement at the end of an investigation.
14. Directorate General for Competition, ANNUAL REPORT 2009, p. 8.

The remainder of this chapter will address the key aspects of the enforcement regime and procedures under the Belgian Competition Act, as well as the procedure for private litigation.

I. INVESTIGATIONS BY COMPETITION AUTHORITIES

A. Enforcement Structure/Governmental Agencies

1. Enforcement Structure

Unlike the substantive Belgian competition rules, which are almost entirely modeled on European law, the institutional structure of the Belgian competition enforcement authority deviates considerably from the European structure. Under the European system the European Commission acts as investigator, prosecutor and decision maker. Conversely, the Belgian system has a dual structure that separates the power of investigation and prosecution on the one hand and the decision-making power on the other. The College of Competition Prosecutors and the Directorate-General for Competition are responsible for investigating and prosecuting cases. The Competition Tribunal issues binding decisions. Together these entities make up the Belgian Competition Authority (Competition Authority). [15]

2. Enabling Statutes

The enabling statute is the Competition Act, in particular Articles 11-43:

- Articles 11 - 24 establish and set out in detail the structure and the powers of the Competition Tribunal.
- Articles 25 - 30 establish and set out the structure and powers of the College of Competition Prosecutors.
- Article 31 provides for discipline for the members of the Competition Authority for violating their duties.
- Articles 32 - 33 establish the Registry within the Competition Tribunal and describe the structure and the functions of the Registry.
- Articles 34 - 35 establish the Directorate-General for Competition and set out its powers and duties.

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15. Competition Act, art. 1, § 4.

- Articles 39 - 41 set out the professional incompatibilities concerning the functions of the members of the Competition Authority.
- Articles 42 - 43 establish the Competition Commission within the Central Economic Council.[16]

B. Enforcement Bodies

The Competition Authority is comprised of the Competition Tribunal, the College of Competition Prosecutors, the Directorate-General for Competition, and the Registry.

1. Competition Tribunal

a. Composition

The Competition Tribunal is an independent administrative court which has 12 members, headed by the President. The President, Vice-President and four Councillors exercise their functions on a full-time basis and all Council members are appointed by Royal Decree. The Competition Tribunal is divided into three-member chambers that hear cases, and the General Assembly consists of the Tribunal working in plenary session.[17]

b. Functions

The Competition Tribunal is the main decision-making body and its decisions have the force of *res judicata* (final decisions).[18] The Competition Tribunal makes the final decision as to the finding of an infringement on the basis of an investigation carried out by the College of Competition Prosecutors.[19] In urgent matters, the Tribunal can award

16. The Central Economic Council is a joint inter-professional advisory body that seeks to institutionalize dialogue between employer and worker organizations on economic issues, and to provide guidance to the government in economic policy formulation.
17. Competition Act, arts. 12, 13 & 19.
18. *Id.* at art. 11.
19. *Id.* at art. 48.

interim relief to prevent serious and irreparable damage to a particular person or to protect the public interest.[20]

Unlike the judgments of civil courts, the Competition Tribunal's decisions apply *erga omnes* because the provisions of the Competition Act are of public order.[21] The *erga omnes* doctrine provides that, for the purposes of competition enforcement, a decision not only binds the parties to the dispute, but also all third parties. This is necessary because the Competition Act seeks to protect consumers and the market, not only the interests of the parties to the dispute. The Competition Tribunal does not consider itself bound by judgments of civil courts in disputes between the same parties regarding whether the competition law has been breached.[22] In addition to being a court, the Competition Tribunal also has the power to develop and apply competition policy through the issuance of opinions and guidelines.[23] Under the updated Competition Act, the Competition Tribunal no longer has investigative powers but it does remain competent to reopen a case or to order the College of Competition Prosecutors to carry out additional inquiries.[24]

2. College of Competition Prosecutors

a. Composition

The College of Competition Prosecutors ("het Auditoraat" / "l'Auditorat") is headed by the Competition Prosecutor General and is composed of 6 to 10 members.[25]

b. Functions

The College of Competition Prosecutors functions as the public prosecutor, running investigations either on its own initiative (*ex officio*)

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20. *Id.* at art. 62.
21. Competition Tribunal decision no. 2002-V/M-02, Jan. 25, 2002, *Clear Channel Belgium v JC Decaux Belgium*, Driem. Tijdschr. RvdM. 2002/01, p. 17.
22. Competition Tribunal, decision no. 99-RPR-6, Apr. 22, 1999, *S.A Way UP v S.A. Belgacom*, M.B., Aug. 18, 1999, 30,795.
23. Competition Act, art. 11, § 3.
24. *E.g.*, Competition Tribunal, decision no. 2004-I/O-42, June 29, 2004, *Banksys S.A.*, M.B., Nov. 29, 2004, 80,214.
25. Competition Act, art. 25.

or after receiving complaints. Upon receipt of a complaint, the College of Competition Prosecutors may instruct civil servants of the Ministry of Economic Affairs (otherwise known as the Directorate-General for Competition) to assist it. The College of Competition Prosecutors is responsible for receiving complaints and requests for interim measures concerning practices that restrict competition. If it decides that a complaint or request is inadmissible or groundless, it has the power to close the file by reasoned decision.[26]

When an investigation is completed, the College of Competition Prosecutors will draft a Statement of Objections (SO) and submit it to the Competition Tribunal.[27] The drafting of the SO plays a crucial role because the decision making power of the Competition Tribunal is restricted in scope to the anticompetitive practices listed in the SO.

3. Directorate-General for Competition

a. Composition

The Directorate-General for Competition is part of the Federal Public Service for Economy (Ministry of Economic Affairs). It is directed by the Director General and consists of 25 civil servants of the Ministry.[28]

b. Functions

The Directorate-General for Competition detects and examines anticompetitive practices (*e.g.*, abuse of dominance, cartels, concentrations) under the authority of the College of Competition Prosecutors, which designates officials of the Directorate-General to participate in inspections carried out by officials of the European Commission. The Directorate-General of Competition thus helps the Competition Prosecutors perform its functions and carry out its investigations.[29]

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26. *Id.* at art. 29
27. *Id.* at art. 48.
28. *Id.* at art. 35.
29. *Id.* at art. 34.

4. Registry

The Registry is the secretariat of the Competition Tribunal and receives all complaints, including those relating to anticompetitive practices.[30]

a. How a case begins

The College of Competition Prosecutors, chaired by the Director-General for Competition, can start an investigation on the basis of:

- A complaint from a natural or legal person (i.e., undertaking) demonstrating a legitimate interest;[31]
- An *ex officio* determination, or at the request of the competent Minister, if supported by serious indications that a competition violation may have occurred; or
- A leniency application.

Complaints and requests must be made on Form PK,[32] which sets out the information that must be included on any such application. Each complaint is first assessed for admissibility and then on its merits. A complaint is inadmissible if: the complainant has no legitimate interest; Form PK was not used when lodging the complaint (meaning that anonymous complaints are not accepted, as full identification is required for Form PK); or the facts underlying the issues raised in the complaint occurred more than five years before the date of the complaint and thus have become prescribed.[33] If the complaint is considered admissible, the Prosecutor is obliged to investigate whether it is well founded (*i.e.*, look at the merits of the case). The only instance in which the Prosecutor can dismiss a case without having to provide a justification for doing so is if it had been opened *ex officio*.

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30. *Id.* at art. 32.
31. *See also* the Royal Decree of Oct. 31, 2006 on the filing of complaints and requests in accordance with art. 44, §§ 1, 2, & 3 of the Competition Act, M.B., consolidated Sept. 15, 2006, http://economie.fgov.be/en/binaries/RD_31102006_complaint_request_tcm327-56481.pdf.
32. See the complaint or request form available at: http://economie.fgov.be/en/binaries/RD_31102006_complaint_request_annex_tcm327-56483.pdf.
33. Competition Act, art. 45, §2.

(1) Investigation procedure

The Head of the College of Competition Prosecutors appoints a Prosecutor to lead the investigation who, together with the appointed officials of the Directorate-General for Competition, makes up the case team. The case team has extensive powers under Article 44 of the Competition Act to investigate anticompetitive behavior. The decision as to which investigatory measures will be used in a particular case is at the Prosecutor's discretion, subject to the principles of legality and proportionality.[34]

After the investigation is complete the Prosecutor decides to either (i) close the case or (ii) submit a "reasoned report" to the Competition Tribunal if he concludes that sufficient evidence exists to prove an infringement. The reasoned report consists of a report on the investigation, the SO, and a draft of the proposed decision to be taken by the Competition Tribunal.[35]

If the case team decides to close the case—which may entail the dismissal of the complaint by way of a reasoned decision—it may summon the complainant to a hearing; the latter can appeal the Prosecutor's decision before the Competition Tribunal.[36]

In cases that move forward, after the Prosecutor submits the investigation report to the Competition Tribunal, the parties concerned are called upon to submit their written observations. The parties have a right to a hearing before the Competition Tribunal and can propose remedies. The Competition Tribunal will then make its final decision on the infringements, the imposition of fines, and the amount of the fines.

b. Statute of limitations.

The limitation periods are set out in Article 88 of the Competition Act.

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34. Directorate General for Competition, ANNUAL REPORT 1994-1995, p. 26.
35. Competition Act, art. 45, §4.
36. Art. 2 Procedures Decree.

(1) Investigation

There are no statutory deadlines for the opening or completion of investigations by the College of Competition Prosecutors. However, when opening or carrying out an investigation, the College of Competition Prosecutors needs to take the limitation periods into account. An investigation into alleged restrictive practices may only be opened by the College of Competition Prosecutors if the facts which are underlying the investigation have not become prescribed. This is the case when the facts occurred more than five years before the date of the complaint (or the *ex officio* opening of an investigation). [37] Once an investigation is opened, the College of Prosecutors has a five-year period (running from the date the investigation was opened) to complete the investigation.[38] This period may be tolled by certain investigatory measures, such as a request for information.[39] Following such investigatory measures, a new benchmark for the five-year period is created.[40]

(2) Imposition of sanctions

The limitation period for the imposition of sanctions is five years (three years in the case of infringements of provisions concerning requests for information or the conduct of inspections), running from the date of the infringement or, in the case of a continuous offence, from the date on which the offence came to an end. This period can be interrupted by any act of the Directorate-General for Competition, the College of Competition Prosecutors, the Competition Tribunal, or—in cases where Articles 101-102 TFEU apply—the competition authority of a Member State. The limitation period starts to run again from each interruption. However, at the latest, the limitation period expires on the day on which a period equal to twice the limitation period has elapsed without the Tribunal imposing a fine or a periodic penalty payment. The period for the imposition of fines or periodic penalties can be extended only for as

37. Competition Act, art. 88, § 1.
38. *Id.* at art. 88, § 2.
39. Competition Tribunal decision no. 2002-P/K-34, May 3, 2002, *NV Mauretus Spaarbank v NV Banksys*, M.B., Feb. 12, 2003, 7,219.
40. Competition Act, art. 88, § 2.

long as the appeal against the Tribunal's decision is pending before the Brussels Court of Appeal.[41]

(3) Enforcement of decisions/penalties

The power to enforce the Competition Tribunal's decisions is extinguished five years after the decision becomes final. The limitation period is interrupted if the Competition Tribunal gives notice of a change to the original amount of the fine or periodic penalty payment or if it refuses an application for such change. The limitation period is also interrupted by any action of the competent body, or by a Member State acting at the request of the competent body, to recover the fine or periodic penalty payment. The limitation period starts to run again after each interruption. The limitation period for the enforcement of penalties is suspended if a postponement of payment is granted or if the Brussels Court of Appeal suspends the judicial execution of payment.[42]

c. Process and Procedures for Reviewing and/or Challenging Decisions of Enforcers

The provisions applicable to appeals are set out in Chapter VI of the Competition Act.

Decisions of the College of Competition Prosecutors to dismiss a case because the complaint is either inadmissible or unfounded, or to dismiss a request for interim measures, are appealable decisions.[43] The Competition Tribunal hears these appeals and may refer the case back for further investigation if the appeal is well founded. The decision of the Competition Tribunal in this regard is not appealable.[44]

The decisions of the Competition Tribunal and of its President may be appealed before the Brussels Court of Appeal (hereinafter "Court of Appeal").[45] Appeals can be lodged within 30 days after notification of the decision of the Competition Tribunal or its President by the concerned undertakings, by the complainant, or any person who can

41. *Id.* at art. 88, § 3.
42. *Id.* at art. 88, § 4.
43. *Id.* at art. 45, § 3.
44. *Id.* at art. 62, § 4.
45. *Id.* at art. 75.

demonstrate a legitimate interest.[46] A legitimate interest exists if a contrary decision can change a party's legal position and inflict damages in the form of financial or other disadvantages, such as the discontinuation of a contract. An appeal can be brought on a point of law or on factual grounds.

An appeal does not suspend the decisions of the Tribunal, or those of its President. Under certain conditions, however, the Court of Appeal can suspend the execution of a decision.[47]

The Court of Appeal has full jurisdiction, including the power to impose fines on undertakings or an association of the undertakings concerned and the power to adopt interim measures.[48] Its power to review the decisions of the Competition Tribunal are extensive and are considerably wider than the reviewing power of the European General Court over the decisions of the European Commission. The European General Court may only examine the legality of Commission decision while the Belgian Court of Appeal's power extends to partially or entirely reforming the decision of the Tribunal or its President both as to the merits of the case as well as to the fines or other measures imposed. The Belgian Court of Appeal recently re-established its broad power of review in *BVBA Incine v. NV Rendac*.[49] In *BVBA Incine*, the Court held that its jurisdiction is not limited by the findings of the Competition Tribunal and ordered the Prosecutor involved to carry out an additional investigation.

Although the Belgian Court of Appeal's power of review is broad, in 2006, the preliminary ruling procedure was reformed to take away the competence of the Court of Appeal to consider requests for preliminary rulings on the interpretation of Belgian competition law. Such requests used to be brought by the civil courts and by the Competition Tribunal. Article 72 of the Competition Act provides that this competence is now reserved for Belgium's Supreme Court (Hof van Cassatie/Cour de

46. *Id.* at art. 76, §2.
47. *Id.* at art. 76, §4.
48. *Id.* at art. 75, § 2.
49. Court of Appeal of Brussels, Feb. 13, 2007, *BVBA Incine v NV Rendac*, decision no. 2006/MR/4.

Cassation). The preliminary ruling procedures have rarely been used in the context of competition law cases.[50]

5. Jurisdictional Reach

a. Consistency with EU law

The Belgian Competition Authority, like all other national competition authorities within the European Union, is bound by EC Regulation 1/2003 to apply EU competition law, *i.e.*, Articles 101-102 TFEU, when trade between Member States is affected. It is against this background that the Belgian Competition Act aligns Belgian Competition law with EU competition rules.

b. Enforcement of EU law

Under Article 101 TFEU, the Belgian Competition Authority and courts already had the power to apply Article 101(1) TFEU under Regulation 17/1962, but pursuant to Regulation 1/2003, they may now also apply Article 101(3) TFEU, under which particular agreements may be declared exempt from Article 101(1) TFEU's prohibition over restrictive agreements if they satisfy certain criteria (e.g., if they result in benefits to consumers).[51] However, Article 52(2) of the Competition Act provides that the Belgian Competition Authority can only determine that no restrictive practice exists "provided it does not affect trade between Member States of the European Community." It thus follows that the Belgian Competition Authority is only competent to judge whether restrictive practices exist in cases that relate exclusively to allegations of anticompetitive agreements or abuses of dominance within Belgium (*i.e.*, where there is no affect on inter-state trade). The Belgian Competition Authority cannot decide that Article 101 TFEU is not applicable to the restrictive practice concerned because under Article 10 of EC Regulation 1/2003, only the European Commission can decide that question. In such a case, therefore, the Belgian Competition Authority will decide that there are no grounds for action on its part.

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50. *E.g.*, Supreme Court case AR D.06.0010.N, 27 April 2007 (C.T. / Orde der architecten); Court of Appeal of Brussels, Nov. 3, 2005, decision no. 2004/MR/7, AM 2006, afl. 1, 50; Court of Appeal of Brussels, Dec. 18, 1996, JAARBOEK HANDELSPRAKTIJKEN & MEDEDINGING 1996, 836.
51. Regulation 1/2003, art. 3, §2.

c. European Competition Network

In order to ensure effective cooperation among the national competition authorities of the different Member States, EC Regulation 1/2003 established the European Competition Network, within which all EU national competition authorities and the EU Commission must cooperate with each other, to provide or receive assistance.[52] The Belgian Competition Act provides that the College of Competition Prosecutors and the Directorate-General for Competition shall provide assistance, carry out investigations, or perform any other duties either on their own initiative or at the request of the EU Commission or of the other EU national competition authorities.[53] The College of Competition Prosecutors, assisted by officials of the Directorate-General for Competition, has the same powers and obligations as the officials from the competition authority of another Member State or of the European Commission that requested their assistance. The Belgian Competition Authority may send any de facto or legal elements relating to the application of Articles 101-102 TFEU, and any confidential information, to the European Commission or to the other Member States' competition authorities.

C. Evidence Gathering

1. Authority for Evidence Gathering

Once an investigation has been commenced there are a number of tools available to the case team to help gather information. Article 44 of the Competition Act allows the case team to collect all information, carry out inspections, receive written or oral testimony, obtain all necessary documents or information, and make all necessary on-the-spot findings. The Belgian Competition Authority thus has wide investigative powers, which are comparable to those of the European Commission.

2. Requests for Information

The tool most commonly used in investigations is the formal "request for information."[54] The case team may require the undertakings concerned—as well as the complainant and third parties such as

52. Competition Act, arts. 69, 70 & 71.
53. *Id.* at arts. 69, 70 and 71.
54. *Id.* at art. 44, § 2.

competitors, suppliers or customers—to provide documents and information relevant to the investigation. Each request must state the subject matter of the investigation, the specific information required, and the deadline for receipt of such information. If the deadline is breached, a "demand" for the information can be made by the adoption of a reasoned decision by the Prosecutor. The President of the Competition Tribunal can, at the request of the Prosecutor, impose a penalty on the company concerned to secure compliance with the demand of the Prosecutor.[55]

The recipient of a request for information may receive multiple notices requiring the production of documents or information during the course of an investigation. For example, the case team may require a company under investigation to produce further information after considering the material produced by it in response to an earlier notice.

3. Power to carry out inspections

The case team is authorized to carry out inspections in furtherance of its information-gathering powers. Inspections may be undertaken in both private residences and business premises.[56]

Inspections of private residences may only be carried out when the case team obtains a warrant from an examining magistrate. The homes of heads of undertakings, directors, managers, and other members of staff who possess relevant information can be searched, and copies of documents covered by the warrant can be taken. Inspection may only occur between the hours of 8 a.m. and 6 p.m., with or without prior notice. Officials entering the private dwellings will be entitled to use force, or police assistance, if they are denied entry.[57]

A case team investigating a competitive law infringement also has the power to enter business premises and means of transport where they have reason to believe they will find information necessary for their investigation. These inspections can be undertaken without a warrant, but require the prior permission of the President of the Competition Tribunal. When conducting an onsite inspection, the investigators must also be in possession of a specific search order issued by the Prosecutor,

55. *Id.* at art. 66.
56. *Id.* at art. 44, §3.
57. *Id.* at art. 44, §3, 1° and 2°.

which must specify both the subject matter and purpose of the investigation.[58]

As with the inspections of private residences, the inspection of business premises can be carried out between the hours of 8 a.m. and 6 p.m., with or without prior notice.[59] In the past, because of limited personnel and resources within the Belgian Competition Authority, unannounced inspections, known as "dawn raids," were used only as an exceptional investigatory tool. However, their frequency has increased. The Competition Service has carried out dawn raids at the premises of more than 15 companies under investigation for alleged anticompetitive behavior between the years 2006 and 2007; 12 raids in 2008; and 7 raids in 2009.[60]

Notably, when conducting such inspections, the case team need not suspect that the occupier of the inspected premises is guilty of an infringement; thus, for example, the premises of a supplier or customer may be inspected using this power. In such circumstances, the only prerequisite is that there is reasonable suspicion that useful information can be found on the premises in question—a provision meant to prevent "fishing expeditions." The inspectors are not entitled to exercise their investigative powers (e.g., copying records, recording statements by company staff) in relation to matters which do not fall within the scope of the investigation.[61]

During an investigation, the case team may seize items relevant to their investigation and affix seals for the duration of their task, but for no longer than 72 hours. The team is permitted to question persons on the premises with respect to locations of documents and explanations regarding the documents produced. Members of staff can also be

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58. *Id.* at art. 44, § 3.
59. *Id.* at art. 44, §3, 2°.
60. For example, inspections were carried out at the premises of mobile phone operators in January 2006; of travel agencies and waste companies in February 2006; of retail chains in May 2007; of milling houses in 2008; of labs and electricity sector in 2009; and of ground-handling services at the Brussels airport in 2010. *See*: http://economie.fgov.be/nl/ondernemingen/mededinging/Activiteiten/Actualites_communiques_presse/.
61. Competition Act, art. 29; Competition Tribunal, decision no. 99-RPR-1, January 21, 1999, Occasiemarkt bvba, M.B., Mar. 13, 1999, 8,268.

questioned about the subject matter of the investigation. Moreover, the case team can appoint experts to help with the inspection—particularly with IT-related information gathering—and to enable the review and copying of documents, such as computer records, emails, invoices, and personal notes.[62]

During an inspection, the case team can record oral or written testimony from the undertaking's representatives and its employees.[63] Contrary to the request for information under Article 44, paragraph 2 of the Competition Act, however, undertakings (*i.e.*, undertaking representatives and employees) are not obliged to provide such testimonials during onsite inspections.[64]

4. Penalties for non-compliance

The Prosecutor may impose a fine of up to one percent of the total turnover on natural persons, or associations of undertakings, found guilty of obstruction of an investigation or failure to reply fully or in a timely manner to a request for information.[65] Also, this penalty may be imposed for providing incorrect or incomplete information in response to a formal request.

The President of the Competition Tribunal may also impose penalty payments of up to five percent of the average daily turnover of the undertaking or association concerned for each day of delay in complying with a decision of the Competition Prosecutor requesting the supply of information.[66]

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62. Competition Act, art. 44.
63. *Id.* at art. 44, § 3.
64. The Competition Act does not contain a provision similar to Council Regulation (EC) No. 1/2003 of Dec. 16, 2002. The latter enables European Commission inspectors to ask any representatives, members of staff, or associations of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection, and to record the answers.
65. Competition Act, art. 64.
66. *Id.* at art. 66.

5. Jurisdictional Reach of Evidence Gathering

There is no legal basis granting the College of Competition Prosecutors or the Directorate-General for Competition investigative powers outside of Belgium. However, as part of the European Competition Network, the Belgian Competition Authority can expect assistance from the other members of the Network. That is, the Belgian Competition Authority may rely on assistance from the European Commission and European Competition Network when it needs to conduct an investigation outside of the Belgian territory. Such cooperation has already been implemented in the *BBP* case.[67] There, one of the companies involved in the cartel, Lonza S.p.A, was based in Italy. To obtain all relevant information for the investigation the Italian Competition Authority conducted a dawn raid in Lonza's headquarters in Italy and then provided the Belgian Competition Authority with all the information gathered during the search.

The Directorate-General for Competition, the College of Competition Prosecutors and the Competition Tribunal may use as evidence any matter of fact or of law, including any confidential information, obtained from the European Commission or the competition authorities of other EU Member States.[68]

D. Penalties

1. Financial Penalties

The competent body for deciding upon and imposing penalties is the Competition Tribunal. It can impose the following financial penalties:

- Up to 10 percent of the undertakings' turnover, for infringements of the Competition Act.
- Periodic penalties of up to 5 percent of the average daily turnover for each day of non-compliance with prohibitive decisions or decisions of provisional authorization.
- Periodic penalty payments may also be imposed to ensure compliance with interim measures ordered by the Tribunal's President.

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67. Competition Tribunal decision no. CONC-I/O-04/0051, April 4, 2008, M.B., May 19, 2008, 26,034.
68. Competition Act, art. 71.

- Up to 1 percent of the turnover of persons, undertakings or associations of undertakings for not being cooperative during the inquiry, namely for obstructing the investigation or for not replying fully or in a timely manner to the authorities' request for information.
- If incorrect or incomplete information has been provided in response to a formal request, a penalty of up to 1 percent of the turnover may be imposed.[69]

The Competition Act does not provide for the imposition of fines on individuals, apart from those cited above for procedural breaches. However, third parties can sue company employees for civil damages if fraud or gross negligence can be demonstrated; the companies who employ the individuals can bring these civil damage claims as well. The legal basis for this is general tort law as stated in Articles 1382 ff of the Belgian Civil Code.

The Competition Authority issued guidelines on the calculation of fines in 2004 (Guidelines),[70] but these were not amended after the adoption of the Competition Act in 2006. Therefore, the Competition Tribunal held that the Guidelines are obsolete and should not be applied.[71] However, the Tribunal noted that the general principles set out in the Guidelines should continue to be taken into account for the calculation of the fines. The Competition Tribunal therefore has wide discretionary powers to set the amount of fines, as long as it respects the fundamental principles of proportionality and nondiscrimination. The leading considerations in setting fines are the nature, gravity and duration of the infringement, as well as the illicit gains generated by it. The method for calculating fines starts with setting a base amount under the aforementioned criteria, and then either increasing that amount on the

69. *Id.* at art. 64.
70. Competition Tribunal Guidelines on the method of setting fines imposed pursuant to arts. 36 & 39 of the Act on the Protection of Economic Competition, coordinated on July 1, 1999, M.B., Apr. 30, 2004, 36,257 (French and Dutch versions) and June 25, 2004, 52,330 (English version) (hereinafter "Fining Guidelines").
71. Competition Tribunal decision no. MEDE-I/O-04/0045, Jan. 25, 2008, *The Flemish Bakers Case*, M.B., Feb. 19, 2008, 10,525.

basis of aggravating circumstances or reducing it on the basis of attenuating circumstances.[72]

2. Other penalties

Although there are no criminal sanctions for anticompetitive behavior, there are a number of criminal sanctions that can be imposed under the Competition Act for certain procedural breaches. Article 84 paragraph 1 restricts the use and the disclosure of documents and information received in connection with competition investigations. Breach of this obligation can result in imprisonment for up to five years and a fine of €55.000. Under Article 84 paragraph 2 the same penalty can be imposed for breaking the seal or taking documents seized during a formal investigation.

According to the Royal Decree relating to the Payment and Recovery of the Administrative Fines and Penalties, these must be paid within thirty days after notification by registered letter of the decision imposing them.[73]

3. Trends

Under the 1999 Act, small and medium-sized enterprises were exempt from financial penalties, and so there have been very few cases in which the Competition Tribunal imposed fines for infringements to date. The Competition Act has removed this immunity, however, and it is expected that more penalties will be imposed. According to the Belgian Competition Authority's Annual Reports of 2007, 2008 and 2009, since the adoption of the Competition Act in 2006 and through 2009, there were 4 decisions imposing fines adopted by the Competition Tribunal.[74] However, for serious infringements such as cartels, the Tribunal has been eager to impose considerable fines.[75]

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72. Section III ff Fining Guidelines.
73. Royal Decree of Oct. 31, 2006 relating to the payment and recovery of the administrative fines and penalties provided for in the Competition Act, M.B., Sept. 15, 2006, http://economie.fgov.be/en/binaries/RD_31102006_fines_and_penalties_tcm327-56487.pdf.
74. 2007 ANNUAL REPORT, available at http://economie.fgov.be/en/binaries/part1-

4. Ability to punish foreign entities or individuals

Companies located outside Belgium or agreements implemented outside Belgium are capable of restricting competition in Belgium. Because the Competition Act prohibits any practice that restricts or significantly distorts competition within the Belgian market or in a substantial part of it,[76] the Competition Tribunal determined that it can fine foreign companies, most recently in the *BBP* case.[77] This case concerned a hardcore price-fixing and market allocation cartel between Belgian- and foreign-based companies with regard to the sales of a chemical product (BBP) in the period between 1983 and 2002. Because the cartel conduct of the foreign companies had a direct effect on the Belgian market (distribution and sales of BBP in Belgium), the Tribunal determined that these companies fell entirely under the Belgian substantive competition rules and that their conduct was punishable.

E. Leniency

1. Introduction

Belgium instituted its leniency program in 2004, allowing cartel participants to benefit from full immunity or a reduced penalty in exchange for informing the authorities about cartels. The introduction of the program places Belgium on par with several other EU Member States, and with the EU itself, in having the ability to bestow lenient treatment on those who aid in the discovery and investigation of cartel activity. The Belgian leniency scheme has enabled the Competition Authority to uncover several cartels operating on the Belgian market. The President of the Competition Tribunal has said that the original 2004

21ANNUAL_REPORT_2007_en_tcm327-28322.pdf; 2008 ANNUAL REPORT, available at http://economie.fgov.be/en/binaries/annual_report_e1_2008_en_tcm327-68211.pdf; 2009 ANNUAL REPORT, available at http://economie.fgov.be/en/binaries/Annual_Report_E1_2009_tcm327-100091.pdf.

75. *See, e.g.*, Belgian Competition Tribunal, Press Release, "The Competition Tribunal fines members of a cartel in radiators sector," May 20, 2010 (fining carter 3,539,527 Euros (approx. $5,091,609) to be split amongst each of three cartel members.
76. Competition Act, art. 2, § 1.
77. Competition Tribunal decision no. CONC-I/O-04/0051, Apr. 4, 2008, M.B., May 19, 2008, 26,034.

Leniency Notice has been successful and that dozens of leniency applications have been received since its implementation.[78]

Article 49 of the Competition Act provides the legal basis for the leniency program and states that leniency can be granted to companies that help prove the existence of anticompetitive practices and help identify the participants. A new Leniency Notice was published in 2007 (Leniency Notice), which further amended the regime.[79]

Although the Leniency Notice states that leniency is only available to participants of horizontal cartels,[80] the Notice's definition of a cartel suggests a wider application. The definition refers to non-competitors, and thus arguably brings "hub and spoke cartels"[81] within its remit. This interpretation is supported by an explicit reference in Article 49 of the Competition Act to the general cartel prohibition of Article 2 of the Competition Act, which goes beyond horizontal cartels.

The Leniency Notice is based on the Model Leniency Programme of the European Competition Network and so ensures that Belgium's regime is consistent with the European Commission's 2006 Leniency Notice.[82] One difference between the two is that the Belgian Leniency Notice refers to cartels while the European Commission's Leniency Notice refers to "secretive cartels." This distinction may mean that the Belgian leniency program has a broader application, as it could be available to

78. The Competition Authority's Annual Report from 2004 states that approximately ten leniency applications were received. http://mineco.fgov.be/organization_market/competition/competition_council/annual_reports/report_competition_2004_nl.pdf. Six leniency applications were submitted in 2006. *See*, Global Competition Review, June 2006, p. 12. Twenty leniency applications were submitted between 2007 and 2009. The Annual Reports of the Competition Authority are available at: http://economie.fgov.be/en/entreprises/competition/Belgian_Competition_Authority/Annual_Reports/.
79. The Leniency Notice is available at: http://economie.fgov.be/en/binaries/Leniency_Notice_tcm327-28533.pdf
80. *See* Leniency Notice ¶ 7.
81. A "hub and spoke cartel" is a vertical arrangement in which suppliers or manufacturers organize or facilitate a cartel between its competing distributors.
82. *See* Competition Act, art. 49.

participants of commercial agreements which are anticompetitive but which do not necessarily amount to a secret cartel.

2. Immunity and reduction of fines

Leniency is available to applicants who can either give evidence that enables a "targeted inspection" to be carried out (Immunity Type 1A) or give evidence that enables the finding of an infringement of Article 2 of the Competition Act or Article 101 TFEU (Immunity Type 1B) (collectively known as "Type 1 Immunity").

Full immunity is granted to the first applicant who fulfills one of these criteria, and the various other general conditions set out in the Notice. For immunity to be granted the applicant will be expected to provide the names of the companies, as well as current and/or past employees that participate in the cartel; details about how the cartel operates (*e.g.*, purpose, activities, products or services concerned, duration, geographical scope, locations and dates of cartel meetings); and evidence of cartel activities.[83]

In addition to full immunity, the leniency program also provides the possibility of benefiting from a reduction in the penalty imposed for cartel behavior. That is, if the opportunity for full immunity is gone, applicants who can provide evidence that gives "significant added value" to an existing investigation can receive a reduction in the level of their fine (Type 2 Immunity). The first company to provide such evidence can benefit from a reduction in fines between 30 and 50 percent. Subsequent successful leniency applicants can receive a reduction between 10 and 30 percent. The level of reduction depends on the point in time when the evidence is provided to the Competition Authority and on the level of added value of the evidence. Written evidence that relates to the period of time during which the cartel was operational has the greatest evidential value.[84]

3. Procedure

Before making a formal leniency application, an applicant may, on an anonymous and informal basis, approach the College of Prosecutors. There are two methods for applying, either in writing or orally, and an

83. *See* Leniency Notice at ¶ 11.
84. Leniency Notice at ¶ 15.

application can be made at any stage in the course of proceedings. Both methods rely on a submission of a corporate statement, which must contain information about the cartel and the company's role in it. The statement must be supported by relevant evidence.[85] If written, the statement must be drafted in one of Belgium's official languages (*i.e.*, Dutch, French or German).[86]

The most common and widely used method is to hand deliver a written corporate statement and supporting evidence to the Registry, directed to the attention of the Prosecutor General. The statement may also be sent to the Registry via fax, e-mail or registered mail, so long as it has also hand delivered on the next working day before the closing hour of the Registry.

There is also an oral application procedure. This procedure is an innovation brought in under the Leniency Notice. The Prosecutor must agree to receive an oral corporate statement, which would then be recorded and transcribed by the Registry of the Competition Tribunal. Undertakings can modify their oral statement within five working days, after the expiration of which another five days is granted during which they can check the accuracy of the transcript.[87]

The submission of a corporate statement will be sufficient in itself if a company makes a so-called "summary leniency application."[88] If an applicant has already made a leniency application to the European Commission, and if the Commission is well placed to review the case, then only a summary leniency application needs to be made to the Prosecutor General. This process can only be used for Immunity Type 1A applications.

A Competition Prosecutor assesses leniency applications and may request further information from the leniency applicant. The Prosecutor General will ask the Chamber of the Tribunal dealing with the case to issue a so-called leniency declaration which grants full or partial leniency to the applicant and sets out any conditions to that end (e.g., full

85. Leniency Notice at ¶ 27.
86. The corporate statement can also be drafted in English, but a translation into one of the official languages must be provided within two working days.
87. Leniency Notice at ¶ 29.
88. Leniency Notice at ¶ 23.

cooperation during the entire investigation period, no contact with competitors, no external communication). Before adopting the leniency declaration, the concerned company can submit remarks to the draft declaration. Subsequently, and within the following twenty working days, the Competition Tribunal must make the final decision on leniency applications. If the Tribunal decides that the conditions for immunity are not fulfilled, the leniency application for immunity may still be eligible for a reduction of fines, but the applicant must inform the Registry of this request.[89]

The Competition Tribunal will not consider a leniency application filed after the Prosecutor transmits the reasoned report on the investigation of the alleged cartel to the Tribunal.

4. Marker Procedure

The Leniency Notice establishes a marker system with respect to applications for full immunity. Under this system an applicant's place in the queue for immunity can be safeguarded for a defined period of time following an initial submission of information.[90] Following an initial submission the applicant is given time to collate the relevant evidence for a full application. In these cases the Prosecutor has discretion to decide whether to grant the marker, taking the seriousness and credibility of the request into account. The Belgian Competition Authority cannot be approached on an anonymous basis to check whether a company is the first to seek immunity. However, paragraph 21 of the Leniency Notice provides that the company can contact the College of Prosecutors before formally applying for leniency in order to "make inquiries about the application of the Leniency Notice." The Notice does not go into further detail as to what type of response an applicant can expect—*i.e.*, whether the College of Prosecutors would inform the applicant regarding the adequacy of information or about whether immunity is still available.

5. Confidentiality

Leniency applications will be treated confidentially; access to the leniency application is restricted to the recipients of the SO and granted under the condition that it will not be used for any other purpose other than the procedure in which the leniency application was made. Third

89. Competition Act, art. 49.
90. Leniency Notice at ¶¶ 32-35.

parties do not get access to the leniency applications. If an applicant *chooses* to disclose the content of its corporate statement to a third party, however, it will no longer be deemed confidential.[91]

6. Practicalities

Prior to the submission of an application for leniency, the prospective applicant must assess its perceived chances of success. The submission of an application does not guarantee that either Type 1 Immunity or Type 2 Immunity will be granted. Therefore a risk exists that the Competition Authority will find that the applicant has not satisfied the required evidential standard for protection while the company will be left having exposed its involvement in the cartel.

In addition to assessing the chances of success in applying for leniency, applicants must also take into account the possibility that the information they provide may be shared with other relevant enforcement agencies. Article 71 of the Competition Act permits the Competition Authority to transfer information, including confidential information, to other EU competition authorities and to the European Commission, within the framework of Article 101 TFEU. There is, however, some degree of protection incorporated into this information-sharing framework. Paragraph 31 of the Leniency Notice states that corporate statements may only be transferred if the receiving authority can guarantee that "equivalent" safeguards are in place. However, leniency applicants do not know which jurisdictions may ultimately receive copies of their corporate statements before disclosure takes place and therefore they cannot check whether these competition authorities can give equivalent protection.

In addition to considering the possibility of investigations by competition authorities in other EU jurisdictions and worldwide, prospective applicants must take into account the possibility of criminal investigations being launched against them. A leniency application in Belgium does not provide criminal immunity. This leaves the cartel participants open to criminal prosecutions in other jurisdictions. This apparent gap in protection arises because Belgium does not have criminal liability for breach of competition law for which immunity from criminal prosecution could be provided.

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91. Leniency Notice at ¶ 30.

Leniency applications also do not provide protection against civil claims—notwithstanding the fact that a leniency applicant is not compelled to admit participation in a cartel—because in the majority of cases an application for leniency will come from a party who participated in a cartel. Therefore customers and competitors can still bring damages claims against leniency applicants. This is particularly noteworthy when private actions are lodged against the successful leniency applicant and there is a risk of discovery in the jurisdictions where the private actions are brought.

F. Defenses/Protective Measures Available to Targets of Investigation

As has been described above, the case team has extensive powers to investigate undertakings and gather information. However, these powers are not left unchecked. There are a number of procedural safeguards available to undertakings suspected of anticompetitive practices.

1. Access to information obtained by agency

Once an investigation has been concluded, the findings are relayed in an SO and a proposed decision; together, these make up the reasoned report. This report is then submitted to the parties under investigation and the Competition Tribunal.[92] Once in receipt of the SO the parties gain the right, by virtue of Royal Decree, to access the file.[93] This right of access does not extend to the complainant, but the Competition Tribunal has the power to grant access if it so decides.[94] In this respect Belgium deviates from EU jurisprudence, under which the complainant is given the right of access to the file.[95]

Another right that is not automatically extended to the complainant, nor to interested third parties, is the right to access of a copy of the SO. The complainant and third parties may request a non-confidential copy, but this request will only be granted if the Competition Tribunal deems it

92. Competition Act, art. 48, § 1.
93. Access to the file is regulated by Royal Decree of Oct. 31, 2006 concerning the issuing of copies of files in accordance with Competition Act M.B., Sept. 15, 2006.
94. Competition Act, art. 48, § 2.
95. EU Regulation no. 773/2004, art. 15.

"necessary."[96] In the interest of efficient case management, the Competition Tribunal will ordinarily grant this request, particularly where the opinion of the complainant or the interested third party will be instructive to the Competition Tribunal in determining the accuracy of the report. However, parties should not rely upon this because the Competition Tribunal can exercise its discretionary power to refuse such requests.[97] Again, this system differs from that of the European Commission, which always transmits a copy of the SO to the complainant.[98] Furthermore, under EU law, third parties can submit their observations on the commitments offered by the party and those accepted by the Commission. This right is not available under Belgian competition law.

Another right afforded to the accused undertaking is the right to make written and oral representations concerning the SO to the Competition Tribunal.[99] Complainants can submit written representations but must make a request before they can be heard at any oral hearing.[100]

2. Right to counsel

Undertakings have the right to legal representation during onsite inspections and during hearings before the Competition Tribunal. The exercise of the right to consult a legal adviser must not unduly delay or impede the inspection, but investigators will generally wait a "reasonable time" for legal advisers to arrive.[101]

3. Right against self-incrimination

Another right afforded to subjects under investigation is the right against self-incrimination. This is a fundamental legal principle enshrined in Article 6 of the European Convention on Human Rights (ECHR). Belgian law recognizes this right with regard to investigations

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96. Competition Act, art. 48, § 2.
97. Competition Tribunal decision no. 2001-P/K-21, Apr, 23, 2001, *VT4 v VTM*, M.B., September 21, 2001, 31,739.
98. EU Regulation no. 773/2004, art. 6, OJ [2004] L123, p.18.
99. Procedures Decree, art. 10.
100. Procedures Decree, art. 11.
101. In practice, investigators will normally wait 30 minutes for legal advisers to arrive.

into alleged breaches of anticompetitive agreements and alleged abuses of dominant position.[102] Undertakings can be forced to release particular documents or specific information, but cannot be compelled to answer questions that would lead to an admission of guilt.

4. Confidentiality

During the course of an investigation, undertakings will be asked to disclose confidential information. Belgian law protects such undertakings through laws relating to confidentiality of documents and laws relating to legal professional privilege.

If a document contains trade or business secrets then it may qualify for protection as a confidential document. Documents protected by professional secrecy—a doctrine that extends beyond business secrets (*e.g.*, information held by banks)—are also likely to qualify.[103] However, the Competition Act does not define "confidential information," and therefore decisions must be made on the basis of the facts in each case. Such decisions are made by the College of Competition Prosecutors prior to sending the information to the Competition Tribunal, and these decisions relate to documents that have been gathered during the investigation and those that are relied upon in the SO.[104] Documents that are considered confidential in relation to one recipient may not be confidential with respect to another. If confidentiality is upheld then a non-confidential summary is sent to the Competition Tribunal in place of the original document, which is removed from the file.

Documents submitted by third parties do not have an absolute guarantee that a claim for confidential treatment will be respected. The Competition Tribunal can decide to treat information as non-confidential if, under the circumstances, the efficient application of the Competition Act is deemed more important than protecting the confidential nature of the documents at issue.

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102. Competition Tribunal decision no. 99-RPR-1, Jan. 21, 1999, *Occasiemarkt bvba v Honda Belgium*, M.B., Mar. 13, 1999, 8,268.
103. EU General Court, T-198/03, May 30, 2006, *Bank Austria Creditanstalt AG v European Commission*, Jur. 2006, II, 1429, ¶¶ 30 & 71.
104. Competition Act, art. 44, § 6.

5. Privileged information

In addition to seeking protection for confidential documents, parties can also rely on the legal professional privilege to safeguard communications between the company and its legal advisers. A company is likely to have both in-house legal counsel and outside counsel, and so privilege needs to be considered in relation to both types.

Belgium, like other EU Member States, protects communications between the company and its outside counsel under the legal professional privilege.[105] With respect to in-house counsel, if such counsel is a member of the Belgian Institute of In-House Legal Counsel, then communications between the legal advisor and the undertaking are also protected by legal privilege.[106] This position puts Belgium at odds with the European Union, which has held that legal privilege does not attach to in-house counsel.[107] Notably, moreover, when the EU Commission carries out investigations within Belgium in the context of EU investigations, even though it is assisted by the Belgian Competition Authority, the EU competition rules on legal professional privilege apply and thus communications between a company and its in-house counsel are not covered by legal privilege.

6. Right to trial within a reasonable time

Article 6(1) of the ECHR dictates that investigations and hearings must be carried out in a "reasonable time." The Competition Tribunal assesses whether this subjective standard is met by taking into account the seriousness of the offence and the severity of the possible penalties.[108] In practice, a cartel case usually lasts around four years in Belgium, from the start of the investigation to the decision of the Competition Tribunal. Investigations into abuse of dominant position

105. EU Court of Justice, case 155/79, May 18, 1982, AM & S Europe Limited vs European Commission, Jur. 1982, 1575.
106. In Belgium, the profession of "in-house counsel" is regulated by the Act of March 1, 2000, establishing the Belgian Institute of In-House Legal Counsel, M.B., Jul. 4, 2000.
107. EU General Court, Akzo Nobel cases, Sept. 17, 2007, T-125/03 and T-253/03.
108. Competition Tribunal decision no. 2002-P/K-51, July 4, 2002, *R.C., T.D., M.V., J.B. v Orde van Architecten*, M.B., Oct. 1, 2003, 48,062.

cases typically take less time because generally only one company is under investigation.

G. Recent Enforcement

The adoption of the Competition Act signaled the start of a renewed focus on competition law and a commitment to its enforcement, particularly in relation to anticompetitive practices. This was followed by the announcement in 2008 that the Belgian Competition Authority will be strengthened in terms of personnel.[109] Since then, there has been an increase in activity by the Competition Authority. In recent months, there have been a number of investigations into anticompetitive practices, in particular in the context of trade associations.

An example of such an investigation is one in the travel sector. In May 2011, the College of Competition Prosecutors submitted a reasoned report to the Competition Tribunal in relation to an investigation into anticompetitive behavior in the Belgian travel sector, including the Belgian Travel Organisation and its member undertakings. The report was the culmination of an investigation started in 2006, following the request of a former minister. The undertakings and the Travel Organisation are accused of restrictive practices, such as reducing discounts and coordinating in charging costs for the delivery of airline tickets between 2002 and 2006. The Competition Tribunal is considering this case and will make a decision after all the undertakings concerned have had the opportunity to make written submissions and attend an oral hearing.[110]

In addition to investigations launched following *ex officio* complaints, many are started in response to complaints from undertakings. In January 2011, for example, the President of the Competition Tribunal ordered De Beers to continue supplying rough

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109. Press Release Belgian Government of May 23, 2008, available at: http://presscenter.org/archive/20080523/dc238141a9b3f6ae7e1c6be4cbd25539/?lang=fr.

110. Press Release available at: http://economie.fgov.be/en/binaries/Pressrelease_19052011_tcm327-128956.pdf. There have also been investigations of the following trade associations: Professional Association for Real Estate Brokers, Federation for Architects, and Federation for Belgian Business Managers.

diamonds to Spira, a trader based in Antwerp, as an interim measure.[111] The order followed Spira's complaint, filed in 2009, arguing that De Beers should be compelled to supply Spira with rough diamonds, as it had done since 1935. [112] Spira had also complained to the European Commission, which found no infringement by De Beers; Spira is now challenging that finding before the General Court of the European Union. In its complaints, Spira alleged that De Beers's newly introduced Supplier of Choice distribution system amounted to a cartel and an abuse of dominant position because of the system's exclusionary effects. The Competition Tribunal's interim measures will remain in force until either the General Court of the European Union finds that there was no abuse or until the College of Competition Prosecutors rejects Spira's complaint on the merits. De Beers is also appealing the President's decision before the Court of Appeal in Brussels.

Another example of a high-profile investigation that began in response to a complaint is one against the mobile communications undertaking Proximus; this investigation began in 2005.[113] The competitor undertaking, Base, lodged a complaint alleging that Proximus engaged in several exclusionary practices in relation to termination rates in the market for professional clients. The Tribunal found that Proximus abused its dominant position in the market for mobile telecommunications in Belgium between 2004 and 2005 by applying a strategy of squeezing the margins. Therefore, the Tribunal imposed a fine on Proximus in the amount of EUR 66.3 million, which so far is the largest fine in the history of the Belgian Competition Authority.

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111. Competition Tribunal decision of Jan. 25, 2011, *Diamanthandel A. Spira BVBA / De Beers UK Limited*, http://economie.fgov.be/nl/binaries/PressRelease_BelgianCompetitionCouncil_25012011_tcm325-116023.pdf.
112. Competition Tribunal decision no. 2010 – V/M – 47, Nov. 25, 2010, *Diamanthandel A. Spira BVBA / De Beers UK Limited*, http://economie.fgov.be/nl/binaries/47_2010VM47_SPIRA%20DE%20BEERS_Pub_tcm325-115721.pdf.
113. Press Release of the Belgian Competition Tribunal, "The Competition Tribunal imposes a fine of 66,3 million euros on mobile operator Proximus for abuse of a dominant position," May 26, 2009, available at: http://statbel.fgov.be/en/binaries/press_release_26052009_en_tcm327-67953.pdf.

There are also signs that the College of Competition Prosecutors is becoming proactive in informing potential infringers of their position and giving them the opportunity to remedy any breaches. In March 2011, the College of Competition Prosecutors informed the Belgian football Pro League that if its new relegation rules remained unchanged, the College would start proceedings under the Competition Act.[114] Those rules appear to have as their object the limitation of relegation risk for teams that are currently in the Premier League, meaning that teams which are promoted later will face a greater relegation risk.

Investigations such as those described above can also lead the Competition Authority to exercise its power to impose fines on undertakings found guilty of infringing competition law. In May 2010, the Competition Tribunal fined four producers of steel plate radiators for participation in a cartel. The Competition Tribunal found that the undertakings had made agreements that included the exchange of information and price coordination. The investigation began after the College of Prosecutors received leniency applications from two undertakings, the first of which received full immunity in exchange for the information provided. The total amount of the fines imposed was EUR 3,539,527 between the three remaining undertakings; this included a reduction in fine for the second undertaking that submitted a leniency application.[115]

H. Use of Evidence obtained in Government Investigations in Follow-On Private Litigation

Belgian competition law does not contain specific provisions for follow-on litigation—litigation by a private individual following a public action—but, applicants with a legitimate interest[116] can bring claims before the national court for damages for an infringement of the competition laws. The claims are dealt with under general tort law; the court does not have the power to impose administrative fines, but it can

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114. Press Release of the Belgian College of Competition Prosecutors, Mar. 16, 2011, http://economie.fgov.be/nl/binaries/Persbericht_ProLeague_tcm325-119850.pdf.
115, Competition Tribunal decision no. 2010-I/O-11, May, 20 2010, M.B., Aug. 9, 2010.
116. Legitimate interest is established if someone has suffered injury as a result of the infringement.

declare unlawful the abuse of dominance, invalidate the agreements, and award tortious damages.[117] Under the Belgian tort law (Article 1382 of the Civil Code), three conditions must be fulfilled: a fault must have occurred due to the defendant's behavior,[118] the fault must have caused injury or damage to the plaintiff, and there must be a causal link between the defendant's behavior/fault and the damage.[119]

1. Admissibility and discoverability of statements, documents and information provided to the government

Belgian law does not provide for discovery procedure; that is, the plaintiff cannot oblige the defendant to disclose information in the context of evidence gathering in order to prove a claim. However, judges can force defendants to disclose certain pieces of information (*e.g.*, company records) and can order the parties and their witnesses to attend hearings. If defendants from other jurisdictions are involved, the plaintiff can decide to initiate proceedings in a different country, where one of the defendants is from, before a court with discovery procedures. This is advisable because it makes evidence gathering easier for the plaintiff.

2. Effect/admissibility of guilty plea in private litigation

An infringement decision of the Competition Authority amounts to a finding of fault under tort law because competition law is of public order. The Competition Authority's finding of an infringement is binding on courts and may be used by plaintiffs as a basis for claiming damages, for a guilty plea normally constitutes evidence of fault. The burden of proving the competition law infringement is on the plaintiff, who must also demonstrate a personal interest in bringing the claim.

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117. Agreements that infringe competition laws are automatically void under the Competition Act, art 2, § 2.
118. Competition law revolves around public policy, and therefore an infringement of it amounts automatically to a fault under Belgian general tort law. See Art. 1382 of the Belgian Civil Code.
119. Although it is easy for a claimant to prove that he would have paid lower prices in the absence of the anticompetitive practices, it is difficult to make a precise assessment or quantification of the resulting damages.

3. Joint Defense Agreements

Joint Defense Agreements do not exist under Belgian competition law.

4. Recognition of confidentiality/investigative privilege by courts

When certain documents are treated as confidential, such confidentiality must be respected by the Competition Authority and all other authorities involved in the investigation, except in the event that they are called to testify in court.

I. Conclusion

As has been shown, the entry into force of the Competition Act ushered in a new era in competition law and competition law enforcement in Belgium. Equipped with more resources and better laws, the Belgian Competition Authority has determined to ensure that laws are enforced and that competition between undertakings is permitted to flourish. The extensive investigatory powers of the Competition Authority and the threat of fines mean that undertakings must ensure, now more than ever, that they act in accordance with competition laws.

In line with the European Union, the discovery and investigation of cartel behavior is one of the Competition Authority's priorities. The use of leniency applications appears to also play a crucial role in this process by incentivizing undertakings to come forward with information, prompted by the threat of heavy fines.

Finally, the possibility that a criminal enforcement regime will be introduced in Belgium will align Belgium with emerging international practice; the U.S., UK and other nations already impose criminal sanctions for certain competition law infringements.