ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2016

9th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2015

ISBN 978-1-910083-71-0
ISSN 1756-1027

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Belgium

Crowell & Moring

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is laid down in Book IV "Protection of Competition" of the Code of Economic Law (the "BPC"). The prohibition is civil in nature. Criminal sanctions are only indirectly related to the cartel prohibition. They relate to issues such as the improper use of information obtained in the context of an antitrust investigation.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article IV.1 §1 BPC prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, the aim or effect of which is to significantly prevent, restrict or distort competition in the relevant Belgian market or in a substantial part thereof. Article IV.1 §§1-3 BPC are substantively similar to article 101 of the Treaty on the Functioning of the European Union.

Article IV.1 §4 BPC provides that it is prohibited for individuals acting on behalf of an undertaking or association of undertakings to negotiate with competitors or enter into agreements with them regarding:

- the determination of the sales price of products and services to third parties;
- output restrictions and sales restrictions regarding products or services; and/or
- market allocation.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the Belgian Competition Authority (the "BCA") (*Autorité belge de la Concurrence/Belgische Mededingingsautoriteit*) which is composed of:

- The President of the BCA, who is the Chair of the Competition College and of the Management Committee.
- The Competition College (*Mededingingscollege/Collège de la concurrence*), which is the decision-making body of the BCA. It consists of the President and two Assessors. The Assessors are not full timers. They are appointed on a case-by-case basis in alphabetical order from a list of 20 academics, economists, in-house counsel and members of the Bar who have been selected to act as Assessor in cases submitted to the Competition College.
- The Management Committee (*Directiecomite/Comité de Direction*), which consists of the President, the Chief Economist, the Chief Legal, and the Chief Prosecutor. It is tasked with setting the policy objectives of the BCA and issuing guidelines and notices, such as fining guidelines.
- The College of Prosecutors, which is the investigatory arm of the BCA operating under the direction of the Chief Prosecutor (*Auditeur-generaal/Auditeur-général*). It is composed of members of the BCA allocated by the Management Committee to the College of Prosecutors.

The cartel prohibition can also be enforced by the national courts, which can impose injunctions and award damages in the context of private enforcement. The national courts do not have comparable investigatory powers and cannot impose fines on the infringers.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Investigations can be opened *ex officio*, following a complaint or following a request or instruction to the Chief Prosecutor by the competent Minister or a sector regulator.

The opening of the investigation leads to the designation by the Chief Prosecutor of a Prosecutor, a team of investigators composed of members of the College of Prosecutors and a "Case Cell" consisting of the Chief Prosecutor, the Prosecutor and a member of the College of Prosecutors who is not part of the team of investigators. The investigation is conducted by the team of investigators under the direction of the Prosecutor and the Chief Prosecutor.

The Case Cell can reject a complaint if it believes it has no merit or is inadmissible. It can also reject a complaint on grounds relating to enforcement priorities and the allocation of resources.

It will inform the complainant of the rejection in a reasoned decision, which will be notified to the complainant. It may organise a meeting with the complainant prior to taking the rejection decision.

The complainant can appeal the rejection decision with the President of the Competition College within 30 days following the notification. The President can invite the parties to submit written observations. The Competition College will take a decision based on the written elements on file. The decision of the Competition College cannot be appealed.

If the Case Cell believes the investigation reveals the existence of an infringement, the Chief-Prosecutor will issue a statement of objections (the "SO") informing the undertakings and individuals investigated, of the infringement invoked against them. The addressees of the SO are given access to all evidence on which the

SO relies, and to non-confidential versions of all documents and information gathered during the investigation. The Chief Prosecutor will give the addressees of the SO at least one month following the communication of the SO to respond to it.

Within one month following receipt of the responses or the expiry of the deadline to respond, the Prosecutor will submit a draft reasoned decision to the President of the BCA, together with a procedural file, containing all evidence relied upon by the Prosecutor. The President will subsequently set up the Competition College that will take the case.

The Prosecutor will send a copy of the draft reasoned decision to the undertakings and individuals investigated. The complainant will be informed of the fact that a draft reasoned decision has been issued. The Competition College can, however, decide to send a non-confidential version of the draft decision to the complainant and to third parties demonstrating a sufficient interest to be heard at the oral hearing.

The undertakings investigated are given full access to the procedural file and to non-confidential versions of all documents and information gathered during the investigation. The Competition College can decide to grant access to the procedural file to the complainant and to third parties demonstrating a sufficient interest to be heard at the oral hearing.

The parties have two months, which can be extended by the President, as of the moment the undertakings investigated have had access to the file, to submit their written observations and add documents to the procedural file. They are not entitled to submit new evidence except if needed to rebut a fact or an objection that they were not previously aware of.

The President will organise an oral hearing during which the parties and the Prosecutor will be heard. This hearing will take place within two months following the submission of the written observations. Following the hearing, the Competition College is required to issue a decision within one month.

1.5 Are there any sector-specific offences or exemptions?

There are no national sector-specific offences or exemptions. However, the European Commission's block exemption regulations also apply in the context of the BPC.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside Belgium will only be caught by article IV.1 BPC if and to the extent that it has a noticeable effect on the Belgian market concerned or on a substantial part thereof. Agreements between undertakings located in Belgium, the effects of which are exclusively felt outside of Belgium, will in principle not be caught by the BPC.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	No	N/A
Carry out an unannounced search of business premises	Yes*	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	No	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please Note: * indicates that the investigatory measure requires authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The BCA has issued guidelines on the conduct of inspections, which are available on its website.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are not.

2.4 Are there any other significant powers of investigation?

The Chief Prosecutor can call upon external experts in the course of the performance of an investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches are carried out by the Prosecutor together with officials from the BCA. The Prosecutor can ask for the assistance of police forces. There is no legal requirement to wait for the arrival of legal advisors. However, in practice, the Prosecutor will be prepared to wait for a short period of time.

2.6 Is in-house legal advice protected by the rules of privilege?

Article 5 of the Act of 1 March 2000 regarding the creation of the Institute of In-House Counsel (*Institut des Juristes d'Entreprise/ Instituut voor Bedrijfsjuristen*), provides that legal advice provided

by a member of the Institute of In-House Counsel to his employer is legally privileged.

The College of Prosecutors of the previous Competition Authority did not recognise this legal privilege. In its guidelines on the conduct of inspections, the BCA now explicitly acknowledges that correspondence with an in-house counsel member of the Institute of In-House Counsel is legally privileged.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Searching business or residential premises requires a mission statement from the Prosecutor and a prior authorisation by a judge (*Juge d'Instruction/Onderzoeksrechter*).

The right to secure premises (seals) is limited in time to a maximum of 72 hours if the seals are affixed in premises other than those of the undertakings or associations of undertakings concerned.

Searches can only be conducted between 8am and 6pm.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

If an undertaking or individual gives inaccurate, untimely, misleading or incomplete information or obstructs the investigation, a fine of up to 1% of the Belgian turnover can be imposed. A formal request for information can also be made subject to a periodic penalty payment of up to 5% of daily Belgian turnover, per day the response is delayed.

We are not aware of any instance in which the sanctions were applied in the context of a cartel investigation. On 5 April 2012, the Competition Council imposed a fine of €75,000 to Belgacom for the provision of misleading responses to a request for information in the context of merger proceedings (Case MEDE-C/C-11/0010) and on 1 October 2015 the Competition College fined Sanoma Belgium €50,000 for having provided market information too late, again in merger proceedings.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The Competition College can impose a fine of up to 10% of the Belgian turnover of the undertaking concerned for infringement of article IV.1 of the BPC. The turnover is determined based on the last published consolidated annual accounts. It takes into account turnover from sales on the Belgian market and export sales made from Belgium.

On 26 August 2014, the Management Committee of the BCA adopted new fining guidelines laying out the approach towards the calculation of fines for infringements of competition law. The new guidelines bring the fine calculation in line with the fining guidelines of the European Commission. The main consequence of the change is a greater impact of the duration of the infringement on the level of the fine. The new guidelines entered into force on 1 November 2014.

3.2 What are the sanctions for individuals?

Infringements of the prohibition contained in article IV.1 § 4 BPC can give rise to an administrative fine of up to €10,000.

Criminal sanctions may be imposed on individuals for the improper use of information obtained in the context of an antitrust investigation.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

There are no provisions in the BPC dealing with financial hardship and/or the ability to pay.

3.4 What are the applicable limitation periods?

The Chief-Prosecutor cannot open an investigation into facts that are more than five years old. For continued infringements, the limitation period starts when the last infringement ceases.

The Competition College's decision must in principle follow within five years from the opening of the investigation.

A new five-year limitation period starts whenever the BCA takes a procedural step with respect to the facts (e.g. a decision to open an investigation, a request for information, a decision to conduct a dawn raid, the issuance of a draft decision). The total (extended) limitation period can in principle never exceed 10 years. It will, however, be further extended with the duration of any appeals against decisions of the BCA with the Court of Appeal of Brussels.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. It should, however, be emphasised that agreements to do so made prior to the facts that give rise to the cost/penalty would run the risk of being considered as running against public order and hence being null and void.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

There are no provisions in the BPC dealing with employee liability. Under general employment law, employees can only be held liable towards their employer in case of bad faith or serious fault. Depending on the circumstances, participation by an employee in a cartel could amount to bad faith or serious fault and, hence, give rise to liability towards the employer.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The leniency programme is currently embedded in a notice from the previous Competition Authority which was published in the Belgian Official Journal on 22 October 2007 ("the Belgian Leniency Notice"). In a press release issued on the occasion of the entry into force of the BPC, the BCA confirmed that the Belgian Leniency Notice continues to apply.

The Belgian Leniency Notice is based on the Model Leniency Programme developed by the European Competition Network. It applies exclusively to cartels.

The leniency applicant can obtain full immunity for fines if:

- it is first to provide evidence which enables the authority to carry out targeted inspections in connection with the alleged cartel or which enables the finding of an infringement in respect of the alleged cartel; and
- it meets all other conditions to qualify for immunity (no ringleader, continued cooperation, no destruction of evidence, etc.).

Applicants who do not qualify for immunity can obtain a reduction of fines if they provide the competition authority with:

- evidence of the alleged cartel which represents significant added-value relative to the evidence already in the authority's possession at the time of the application; and
- meet all other conditions to qualify for immunity (continued cooperation, no destruction of evidence, etc.).

The reduction will be in the range of 30 to 50% for the first applicant for a reduction. Subsequent applicants can obtain a reduction of between 10 and 30%.

A leniency application by an individual (see below) does not preclude the grant of full immunity to an undertaking.

Leniency applications must be filed in person with the BCA. They can also be submitted by email, fax or registered letter but in such case they must be filed in person with the BCA no later than by close of business on the next working day. If the corporate statement is submitted in English, it must be translated into one of the national languages within two working days. The application must contain a description of the cartel and of the role played by the applicant in the framework of the cartel and be substantiated with relevant evidence.

Before making a formal application, the applicant may, on an anonymous and informal basis, approach the Chief-Prosecutor. Applicants that have or are in the process of filing an application for immunity with the European Commission may file summary applications with the Chief-Prosecutor. Summary applications can be filed without substantiating evidence.

Following receipt of a leniency application, the Chief-Prosecutor or a Prosecutor selected by him will submit a report requesting a leniency decision to the Competition College. The leniency applicant can file written observations regarding this request with the Competition College. If the Competition College agrees that all conditions are met it will grant provisional leniency to the applicant. In its final decision on the merits, the Competition College will grant full or partial leniency on condition that the applicant has continued to comply with the conditions for leniency.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

A marker system is available for immunity applicants. In order to obtain a marker, the applicant will have to file a written or oral request providing the Chief-Prosecutor with its name and address as well as the reason for its request and serious and credible information concerning the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel, the nature of the alleged cartel conduct and information on any past or possible future leniency applications to any other competition authorities within or outside the EU in relation to the alleged cartel. The Chief-Prosecutor will make a decision with respect to the request and, if granted, determine the deadline by which the application must be completed.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The Belgian Leniency Notice explicitly confirms that the Chief-Prosecutor can (but is not obliged to) accept oral leniency applications. Oral corporate statements will be recorded and transcribed by the BCA. The applicant will be given the opportunity to verify the accuracy of the recording and to make necessary adjustments within five working days.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The leniency applications will be treated confidentially. Access to the leniency application is restricted to the addressees of the statement of objections and granted subject to the condition that it will not be used for any other purposes but the procedure in which the leniency application was made. Third parties and/or private litigants do not get access to the leniency applications.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The requirement of continuous cooperation ends on the date of issuance of the decision on the merits by the Competition College.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there is not.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, under the BPC individuals can apply for immunity. Immunity can also be granted to individuals collaborating to a leniency application by their employer. The BCA has announced that it would apply the Belgian Leniency Notice by analogy to leniency applications by individuals.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Yes. The Case Cell can initiate the settlement procedure prior to the issuance of the draft decision. The settlement procedure requires the undertaking concerned to acknowledge the infringement and accept to be fined. In consideration for the settlement the undertaking can obtain a 10% reduction of its fine. The commitment of the undertaking to compensate the victims of the infringement can also be taken into account for the calculation of the fine. If the

settlement discussions are successful, the Case Cell will issue a settlement decision. This settlement decision cannot be appealed. The Prosecutor-General has adopted its first settlement decision in a cartel investigation on 22 June 2015 (Supermarkets – Case CONC-I/O-06/0038).

It should be noted that the College of Prosecutors has expressed a marked reluctance to consider hybrid cases in which some parties to the cartel settle while others do not.

7 Appeal Process

7.1 What is the appeal process?

An appeal can be lodged with the Brussels Court of Appeal within 30 days of the notification of the Competition College's decision. The Court is entitled to decide on both the facts and the law and can substitute its own decision to that of the Competition College. New facts and developments that occurred after the issuance of an appealed decision can be taken into account, but cannot form a basis for "new" formal objections that were not raised before the Competition College. Although some uncertainty exists in this respect, it seems clear that the Court cannot impose fines in cases where the Competition College did not, nor can it increase the amount of the fine imposed by the Competition College.

The BCA will be represented during the appeals by its President, assisted by the Chief Legal.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The appeal does not suspend the decision against which it is made. The Court can nevertheless order such suspension pending the appeal provided (i) serious arguments are made with respect to the nullity of the appealed decision, and (ii) it is shown that the enforcement of the decision pending the appeal would be likely to have serious consequences for the appellant.

7.3 Does the appeal process allow for the cross-examination of witnesses?

No, it does not.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Plaintiffs can file a complaint with the national courts, typically the commercial courts. They will need to establish the existence of a fault (contractual or in tort), damage and causal link. The burden of proof essentially rests on the plaintiffs and should primarily be met by documentary evidence. The Court can, however, order the defendant and/or third parties to produce specific documents. Follow on actions should normally be easier than stand alone actions because of the fact that the decision finding the infringement will facilitate the establishment of the fault.

The quantification of damages will typically be done by a court-appointed expert based on input provided by both parties. Only damages actually incurred will be compensated. There are no double, treble or punitive damages but interests will be awarded as from the date of the facts giving rise to liability.

8.2 Do your procedural rules allow for class-action or representative claims?

Since 1 September 2014, a collective redress mechanism is available in Belgium to consumers that have been injured by infringements of competition law. The collective actions can be opt-in or opt-out. The consumers must be represented by an accredited consumer association acting as (non-profit) group representative.

8.3 What are the applicable limitation periods?

The limitation period for claims in tort is five years as from the moment the plaintiffs knew or should have known of the facts giving rise to liability (or their aggravation) and the identity of the person liable, without ever exceeding 20 years as from the facts giving rise to liability. Except for specific subject matters, the limitation period for contractual claims is 10 years.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Only damages actually incurred will be compensated and, as a consequence, the courts will have to look into the passing on defence.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The losing party has to bear the legal costs (bailiff, registry, court-appointed expert, etc.). It also has to cover the legal fees of the winning party. The amount to be paid for legal fees is, however, based on a pre-determined scale and varies according to the amount of the claim without ever exceeding €33,000.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Several follow on civil damages claims are currently pending with the Belgian courts (e.g. in the lifts cartel and in the payment cards interchange fee cases). The claim for compensation filed by the European Commission and the Belgian Government in the lifts cartel were rejected by the Commercial Court of Brussels on 24 November 2014 and 24 April 2015 respectively. Appeals against these decision are said to be currently pending. We are not aware of the existence of any final decisions or major settlements.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

There are none.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There are none.

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