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The International Comparative Legal Guide to: Cartels & Leniency 2011

A practical cross-border insight
into cartels and leniency

Published by Global Legal Group, in association with CDR,
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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 contained in the Act on the protection of economic competition (APEC) which was consolidated on 15 September 2006. The prohibition is civil in nature. Criminal sanctions provided for in the APEC 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 or the breaking of seals affixed by the competition authority during a dawn raid (article 84 APEC).

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

Article 2 of the APEC 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. Any agreements infringing article 2 of the APEC are null and void. Article 2 is substantively similar to article 101 of the Treaty on the Functioning of the European Union.

1.3 Who enforces the cartel prohibition?

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

- the Directorate General for Competition or Competition Service (*Service de la Concurrence/Dienst voor de Mededinging*); and
- the Competition Council (*Conseil de la Concurrence/Raad voor de Mededinging*).

The Competition Council consists of:

- the Council (*Conseil/Raad*);
- the College of Prosecutors (*Auditorat/Auditoraat*); and
- the Registry (*Grefje/Griffie*).

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 they 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 following a complaint, a leniency application, *ex officio* or following a request by the competent Minister. The opening of the investigation leads to the designation of a Prosecutor and of a team of investigators composed of members of the Competition Service. The investigation is conducted by the Competition Service under the direction of the Prosecutor.

If – based on the investigation – the College of Prosecutor believes a complaint has no merit or is inadmissible, it will inform the complainant thereof. The complainant will be given the opportunity to file written observations and will be heard, if necessary. The decision of the College of Prosecutors to reject the complaint will be notified to the complainant. It can be appealed with the Competition Council within 30 days following the notification.

If the complaint appears to be admissible and/or the investigation suggests the existence of an infringement, the Prosecutor will draft a report which will be filed with the Registry and notified to the undertakings concerned. The report will contain the findings of the investigation, the statement of objections and a proposal for a decision. At this stage, the undertakings concerned are also given access to a non-confidential version of the file.

The complainant will not automatically have access to the file and the Prosecutor's report but the Council can grant such access to a non-confidential version thereof. Third parties which demonstrate a sufficient interest can also be granted a similar access to the file and the Prosecutor's report.

The parties are invited to file written observations with the Council within the time frames determined by the President of the relevant chamber of the Council. The Council can – if need be – order a further investigation and/or require the Prosecutor to submit a separate report on commitments proposed by the undertakings concerned, if any.

The Council will organise a hearing during which the undertakings concerned, the Prosecutor, the complainant and possible third parties will be heard. Following the hearing, the Council will render its decision.

1.5 Are there any sector-specific offences or exemptions?

There are no national sector-specific offences or exemptions. However, the European Commission's sector-specific block exemption regulations also apply in the context of the APEC (article 5 APEC).

1.6 Is cartel conduct outside Belgium covered by the prohibition?

Cartel conduct outside Belgium will only be caught by article 2 of the APEC 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 APEC.

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	Yes	N/A
■ Right to require an explanation of documents or information supplied	No	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please Note: * indicates that the investigatory measure requires the 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.

If the undertaking gives inaccurate, untimely, misleading or incomplete information or obstructs the investigation, a fine of up to 1% of its turnover can be imposed (article 64 APEC).

A formal request for information can also be made subject to a periodic penalty payment of up to 5% of daily turnover, per day the response is delayed (article 63 APEC).

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 Prosecutors can call upon external experts in the course of the performance of their investigation (article 44 § 3 APEC).

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 Competition Service. 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 Prosecutors will accept 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.

However, the College of Prosecutors has announced in a letter to the Institute of In house Counsel dated 10 April 2008 that, following the developments in the *Akzo* case handled by the European courts, it would not accept legal privilege for correspondence by in house counsel in proceedings based on the APEC. This point of view is surprising, given the existence of an express legal basis for such privilege under Belgian law. Accordingly, the question of legal privilege for in house counsel in investigations based on the APEC will need to be tested in Court.

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 premises requires a mission statement from the Prosecutor and a prior authorisation by the President of the Competition Council. Searching 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?

See the response to question 2.2.

We are not aware of any instance in which the sanctions were applied in the context of a cartel investigation. However, the Council did impose a modest fine of €2,500 to a company for lack of cooperation in merger proceedings. In that case, the company condemned had failed to supply documentary evidence substantiating its turnover figures in Belgium.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The Council can impose a fine of up to 10% of the Belgian turnover of the undertaking concerned for infringement of article 2 of the APEC. 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

(article 86, §1 APEC).

3.2 What are the sanctions for individuals?

There are no sanctions for individuals who play a role in the infringement of the cartel prohibition. Criminal sanctions may however be imposed on individuals for offences such as the improper use of information obtained in the context of an antitrust investigation or the breaking of seals applied by the competition authority (article 84 APEC).

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 APEC dealing with financial hardship and/or the ability to pay.

3.4 What are the applicable limitation periods?

The College of Prosecutors cannot open an investigation into facts that are more than 5 years old. In case of continued infringements, the limitation period starts when the infringement ceases.

The Council's decision must in principle follow within 5 years from the opening of the investigation.

A new 5-year limitation period starts whenever the Competition Authority 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 search, the filing of a statement of objections). The total (extended) limitation period can however never exceed 10 years.

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 APEC 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 to 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 based on article 49 of the APEC. It is currently embedded in a notice which was published in the Belgian Official Journal on 22 October 2007 (the Belgian Leniency Notice). 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 of article 2 of the APEC in respect of the alleged cartel; and
- it meets all other conditions to qualify for immunity (no ringleader, continued cooperation, no destruction of evidence, ...).

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
- they meet all other conditions to qualify for immunity (continued cooperation, no destruction of evidence, ...).

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%.

Leniency applications must be hand delivered to the Registry of the Council. They can be also submitted by email, fax or registered letter but in such case they must be hand delivered to the registry no later than by close of business of the next working day. If the corporate statement is submitted in English, it must be translated in one of the national languages within 2 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 College of Prosecutors. Applicants that have or are in the process of filing an application for immunity with the European Commission may file summary applications with the College of Prosecutors. Summary applications can be filed without substantiating evidence.

Following receipt of a leniency application the Prosecutor will submit a report requesting a leniency decision to the Council. The leniency applicant can file written comments regarding this request with the Council. If the Council agrees that all conditions are met it will grant provisional leniency to the applicant. In its final decision on the merits, the Council 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 College of Prosecutors 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 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

Prosecutor can (but is not obliged to) accept oral leniency applications. Oral corporate statements will be recorded and transcribed by the Registry. 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?

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 undertaking that it will not be used for any other purposes but the procedure in which the leniency application was made. Third parties do not get access to the leniency applications. However, the protection of the confidentiality of the corporate statement will no longer apply if the leniency applicant has disclosed the content thereof to third parties.

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 Council.

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.

No, there are not.

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?

No, there are 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 Council's decision. The Court is entitled to decide on both the facts and the law. However, it has developed a restrictive view of its role as an appellate body. The Court will generally limit itself to verifying compliance with procedural requirements, whether the facts have been correctly established and whether the Council has not made any manifest error of appreciation or exceeded its powers. If the Court disagrees with the appealed decision, it will, except for a number of limited circumstances, refer the case back to the Competition Council. The clearest exception to this rule relates to

the decision on the fines. The Court has explicitly confirmed that it believes it can replace the Competition Council's decision on the fines by its own decision (Brussel, 2 February 2009, *Honda*).

The Court can, in the course of the appeal, request the College of Prosecutors to perform further investigations and submit a report thereon. New facts and developments that occurred after the issuance of the appealed decision can be taken into account, but cannot form a basis for "new" formal objections that were not raised before the Competition Council.

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 cause a serious damage that is difficult to repair.

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 primarily 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?

No, they do not.

8.3 What are the applicable limitation periods?

The limitation period for claims in tort is 5 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, ...). 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 €30,000.

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 national courts but we are not aware of any published decisions or out-of-court settlements in this respect.

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.

A debate has been ongoing in Belgium with respect to: (i) the opportunity to introduce criminal sanctions for breaches of competition law; and (ii) means to facilitate collective redress. This debate is currently still in its early stages.

The last couple of years have been characterised by increased enforcement of the cartel prohibition in Belgium. In the course of 2010, the College of Prosecutors has conducted several dawn raids (for example in the sector of air cargo handling) and issued statements of objections with respect to alleged cartel activity in sectors as diverse as food retail, cement and laboratories for BSE testing. For the first time in its history, the Council has also imposed significant fines in a cartel case. Fines totalling €3.5 million were imposed on 4 manufacturers of radiators (Competition Council, 20 May 2010, Cases MEDE-I/O-04/0063 and MEDE-I/O-06/0032).

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

There are no other issues other than those covered above.



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Thomas De Meese is a partner in the Brussels office of Crowell & Moring and has been a member of the Brussels bar since 1993. He specialises in competition, telecommunications, media and technology law. Thomas' expertise includes day-to-day counselling on distribution issues, technology licensing, patent pools, joint bidding, standard setting, pricing strategies by dominant companies, the activities of trade associations, etc. He has developed and implemented pan-European antitrust compliance and training programmes for multinational companies. He represents complainants and defendants in competition investigations with both the Belgian Competition Council and the EC Commission. Thomas regularly litigates competition cases before national courts.



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