

The International Comparative Legal Guide to:

Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



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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.

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

Article 2 of the APEC prohibits agreements 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 2 is substantively similar to article 81 of the EC-Treaty.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the Belgian Competition Authority which is composed of the Directorate General for Competition (Competition Service) and the Competition Council. The latter consists of the tribunal (hereafter the Council), the College of Prosecutors (Auditorat) and the Registry (Greffie).

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 nor the possibility to 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 Minister for Economic Affairs. The opening of the investigation supposes the designation of a Prosecutor and of an investigatory team composed of members of the Competition Service. The investigation is conducted by the Competition Service under the direction of the

designated Prosecutor.

If - based on the investigation - the College of Prosecutors 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. 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.

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 Specific or unusual features of the investigatory powers referred to in the summary table.

A formal request for information can be made subject to a penalty payment of up to 5% of daily turnover per day the response is delayed.

Dawn raids can only take place between 8 am and 6 pm.

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 Prosecutor can call upon external experts in the course of the performance of his 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 Competition Service. The Prosecutor can ask for the assistance of police forces.

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

In-house legal advice is protected by the rules of privilege if provided by a member of the Institute of In-House Counsel (Institut des Juristes d'Entreprise).

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

Searching business premises requires prior authorisation by the President of the Competition Council. Searching residential premises requires prior authorisation by a judge (Juge d'Instruction). 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.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

The Competition Council can impose a fine of up to 1% of the undertaking's annual turnover for failure to respond within the timeline determined in a formal request for information and/or as a sanction for the supply of incorrect, inaccurate or incomplete information. We are not aware of any instance in which such 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.

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.

3.3 What are the applicable limitation periods?

The College of Prosecutors cannot open an investigation into facts that are more than 5 years old. The Council cannot impose fines for facts that are more than 5 years old. 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, and the filing of a statement of objections). The total (extended) limitation period can, however, never exceed 10 years.

3.4 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.

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 October 22, 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 the 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.

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. 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%.

Applications must be submitted to the College of Prosecutors. They 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.

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.

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.

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)?

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, in the context of merger proceedings it has developed a restrictive view of its role as an appellate body. The Court will 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 eventually annuls the appealed decision, it refers the case back to the Competition Council. There are reasons to believe that the Court will follow a similar restrictive view in the context of appeals against decisions rendered in cartel cases.

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 appealed decision can be taken into account, but cannot form a basis for "new" formal objections that were not raised before the Competition Council.

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.

7.2 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?

Plaintiffs can file a complaint with the national courts, typically the commercial courts. They will need to establish the existence of a fault, 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. 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 is 5 years as from the moment the plaintiffs knew or should have known of the facts giving rise to liability and the identity of the person liable, without ever exceeding 20 years as from the facts giving rise to liability.

8.4 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 €30,000.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

Several follow on civil damages claims are currently pending with the national courts but we are not aware of any published decisions in this respect.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The year 2008 was characterised by increased cartel enforcement in Belgium. Several professional bodies and trade associations (pharmacists, interior architects, bakers, driving schools, etc.) were fined for organising or favouring anticompetitive practices among their members. The Council also adopted its first decision in a cartel case following a leniency application. It fined several chemical companies a total of €487,755 for operating a cartel regarding BBPs. It confirmed doing several dawn raids throughout the year.

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

N/A.



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