

Reform of Belgian Competition Law

VAN BAEL
&
BELLIS

On 25 April 2019, the Chamber of Representatives of the federal Parliament approved in plenary session a bill reforming Book IV of the Code of Economic Law (Wetboek van Economisch Recht / Code de droit économique) (“CEL”) (See Van Bael & Bellis on Belgian Business Law, Volume 2018, No. 11, p. 3; Volume 2019, No. 2, p. 4; and Volume 2019, No. 3, p. 4, available at www.vbb.com).

This bill (bill 3621 – Wetsvoorstel houdende wijzigingen aan boek I “Definities”, boek XV “Rechtshandhaving” alsmede vervanging van boek IV “Bescherming van de mededinging” in het Wetboek van Economisch Recht / Proposition de loi portant modifications au livre Ier “Définitions”, au livre XV “Application de la loi” ainsi que le remplacement du livre IV “Protection de la concurrence” dans le Code de droit économique”) will not bring about major substantive or procedural changes to the current competition regime and will also maintain the prevailing institutional architecture. However, it replaces in full Book IV of the CEL entitled “Protection of Competition”. New definitions will also be added to Book I of the CEL. Finally, the bill will modify Book XV of the CEL which governs the enforcement of laws.

The following new provisions are noteworthy:

- Increased cap on fines – The maximum amount of fines that the Belgian Competition Authority (Belgische Mededingingsautoriteit / Autorité belge de la Concurrence) (“BCA”) is allowed to impose will be increased from 10% of the Belgian turnover of the company concerned to 10% of its worldwide turnover. This is in line with a requirement imposed by the “ECN+ Directive” recently adopted by the European Commission (and which has to be implemented by the Member States by February 2021). The new ceiling for fines will only apply to competition law infringements that started after the date of entry into force of the bill. Conversely, infringements that ended before the entry into force of the bill will remain subject to the old ceiling. A specific transitory regime applies to infringements that started before the entry into force of the bill but end after this date: the old (Belgian) turnover will apply to the part of the infringement that took place before the entry into force of the new law, and the new (worldwide) turnover will apply after this date, the total being subject to a ceiling of 10% of the worldwide turnover.
- Competition infringements by individuals – Unless the individual should be regarded as a firm, an individual will only be found in breach of the competition rules if there is also a finding of infringement against the firm (or association of firms) on behalf of which the individual acted. An exception applies if that firm no longer exists. Additionally, the competition rules applying to individuals only extend to cartel-like conduct. These rules

expressly cover cartel negotiations, including aborted cartel discussions.

- Commitments in behavioural cases – The competition prosecutor (auditeur / auditeur) will have the power to formally terminate proceedings in response to commitments offered by the party under investigation (this is currently the exclusive right of the Competition College (Mededingingscollege / Collège de la concurrence)).
- Amended notion of turnover for the calculation of merger thresholds – The definition of turnover used to calculate the merger thresholds will change. Instead of the turnover realised during the previous year as defined in the Company Code (Wetboek van vennootschappen / Code des sociétés), the turnover will include the amount derived from the sale of products by the firms concerned during the preceding financial year, after deduction of sales rebates, of value added tax and of other taxes directly related to turnover and without including transactions between entities belonging to the same group or between a joint venture and its parent companies. This new definition is in line with the definition of aggregate turnover under the EU Merger Control Regulation.
- Extended deadline and stop-the-clock mechanism in merger control procedure – The competition prosecutor will have the power to stop the clock when it requests additional information until the information is actually provided (currently, it can only stop the clock until the expiry of the deadline mentioned in the request for information). Also, the time-period of 25 business days within which the competition prosecutor has to submit its draft decision (in phase I) will be extended by 10 business days when the notifying parties offer commitments (instead of 5 business days currently). Further, when the notifying parties submit to the Competition College an exhibit that is not included in the investigation file, the Competition College can stop the clock to give the competition prosecutor enough time to file written observations on this new exhibit and to allow the notifying parties to reply to such observations.
- New rules governing requests for interim measures – The Competition College will be expressly required to balance all interests at stake when assessing the merits of a request for interim measures. The new rules also address lacunae in the existing rules, such as a ban on the plaintiff to submit further arguments and exhibits except if expressly authorised to do so in order to respond to specific arguments of the defendant. In that case, the defendant will be granted the same amount of time to respond to the claimant's arguments.
- Dawn raids – The investigating magistrate for Brussels (the Dutch- or French-language Court of first instance (Nederlandstalige rechtbank van eerste aanleg / Tribunal de première instance francophone)) will be exclusively competent to authorise on-site inspections over the entire Belgian territory.
- Extended time-period to reply to statements of objections – Defendants in antitrust proceedings will be granted two months to reply to the statement of objections (instead of one month). This time-period can be extended at the reasoned request of the targeted party.
- New rules governing confidentiality before the Brussels Court of Appeal (Markets Court) – The Markets Court (Marktenhof / Cour des marchés) will be given the express task of protecting confidential information.
- Detailed new rules on the use of languages in competition proceedings.

Subject to narrow exceptions, the new law will enter into force 10 days following its publication in the Belgian Official Journal.

By **Martin Favart** and **Valérie Lefever**