# BELGIUM

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## 1. Relevant legislation

- Book IV of the Code of Economic Law of ("CEL") 28 February 2013, Belgian Official Gazette 29 March 2013, updated in March 2022.
- Royal Decree of 30 August 2013 on procedures with regard to the Protection of Economic Competition, Belgian Official Gazette 6 September 2013.
- Royal Decree of 30 August 2013 on the Notification of Concentrations of Undertakings in Accordance with Article IV.10 of the Code of Economic Law as inserted by the Acts of 3 April 2013, Belgian Official Gazette, 9 September 2013.
- The Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.
- The additional rules approved by the Belgian Competition Authority's Executive Committee regarding the simplified notification of concentrations of 8 January 2020.

## 2. Authority

Belgian Competition Authority.

https://www.belgiancompetition.be/en

## 3. Types of transactions caught

The following types of transactions are considered to be concentrations and are subject to Belgian merger control (Article IV.6. CEL):

- The **merger** of two or more **previously independent** undertakings;
- **The acquisition**, by one (or more) person(s) or undertaking(s), already controlling at least one undertaking, **of direct or indirect control** of the whole or parts of one or more other undertakings;
- **The creation of a 'full function' joint venture** performing on a lasting basis all the functions of an autonomous economic entity.

The concept of **control is defined fairly broadly** and encompasses the ability to exercise decisive influence on the activities of an undertaking, by contract or otherwise. The acquisition of minority shareholders can therefore be caught depending on the circumstances.

## 4. Thresholds

Concentrations **must be notified** if (Article IV.7 CEL):

- the undertakings, taken together, have a total aggregate turnover of more than **EUR 100 million** in Belgium **and;**
- at least two of the undertakings concerned have an individual turnover of at least **EUR 40 million** in Belgium.

The relevant turnover is the consolidated sales turnover in Belgium during the preceding financial year. The relevant turnover does not include VAT or any other turnover related tax. Where the acquisition concerns part(s) of an undertaking, the relevant turnover for the selling party is limited to the turnover related to the parts that are sold (Article IV.8 §1 and 2 CEL).

Foreign-to-foreign mergers will thus also be caught if the parties have no assets but have sales in Belgium.

There are specific rules for calculating the turnover thresholds for credit institutions and other financial institutions, as well as for insurance undertakings (Article IV.8 §3 CEL).

Note that if the concentration has a "Community dimension" it must be notified to the European Commission (Article IV.11 CEL).

## 5. Exceptions

A concentration is not brought about (Article IV.6 §5 CEL):

- Where **credit institutions**, other **financial institutions** or **insurance companies**, temporarily hold securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights regarding those securities to influence that undertaking's competitive behaviour.
- Where control is acquired by **law or a court-appointed official**, following a judicial decision or another form of compulsory liquidation.
- Where control is acquired by **financial holding companies** (see Article 5.3 of the fourth directive 78/660/EEC of the Council of 25 July 1978) solely to protect the full value of investments and not to determine directly or indirectly the competitive behaviour of these undertakings.

## 6. Notifying party(-ies)

In general, the notification obligation falls on the **party acquiring control through the concentration or upon both parties in the case of a merger between two formerly independent companies** (Article IV.10 §2 CEL).

For the notification itself, the parties must use the **'CONC C/C form'** that is annexed to the Royal Decree on the notification of concentrations.

In the case of a **simplified procedure** (Article IV.70 CEL), the parties must use the "**CONC C/C-V/S**" form that is annexed to the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.

- The notification must be submitted in **Dutch or French**. The documents attached must be filed in their original language. If that language is not Dutch, French or English, then a translation into the notification language must be added.
- The notification must provide **information such as:** the concentration, the parties, their economic activities, the relevant markets, and the effects of the concentration on the relevant market.
- It must be **sent to the Belgian Competition Authority** ("**BCA**") for the attention of the Prosecutor-General in three copies, either by registered post or by courier with acknowledgment of receipt, using the address indicated on the BCA's website (City Atrium, Rue du Progrès 50, 1210 Brussels).
- In addition, **an electronic copy of the notification** and its annexes must be sent by e-mail to the Secretariat of the BCA for the attention of the Prosecutor-General, using the e-mail address indicated on the BCA's website (info@bma-abc.be).

## 7. Submission deadline

The parties must declare the merger **after the signing of the agreement or of the draft** agreement and **before the merger comes into effect** (article IV.10 CEL).

## 8. Filing fee

EUR 17,450 (simplified) / EUR 52,350 regular (article IV.10 §2 CEL)

## 9. Proceedings timetable

On 1 October 2006, the simplified merger procedure was introduced into Belgian competition law in addition to the regular procedure.

The parties can choose the simplified procedure for specific categories of concentrations (see Point II.1 of the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 and the additional rules approved by the Belgian Competition Authority's Executive Committee regarding the simplified notification of concentrations of 8 January 2020 further extending the scope of the simplified procedure).

Following the **simplified procedure** (Article IV.70 CEL) :

- After the parties submitted the notification, the Prosecutor must, **within 15 business days from the day after the notification**, decide whether the conditions for the simplified procedure apply and whether the concentration raises any objections or doubts about its permissibility.
- If the Prosecutor concludes that either the conditions for applying the simplified procedure are not fulfilled or the concentration raises objections, then the use of the simplified procedure will be **rejected** and a full notification under the regular procedure must be made.
- If the Prosecutor accepts that the conditions for the simplified procedure apply and does not find any objections, then the merger must be **approved**. The Prosecutor informs the parties of the decision by a letter, which is deemed by law to have the value of a decision of the Competition College.
- If the Prosecutor fails to come to a decision before the deadline, the merger is **deemed to have been approved.**

If the simplified procedure cannot be followed, then the **regular procedure** will apply, which is divided into two phases.

**In phase I** (Article IV.63 – IV.66 CEL):

- Once the concentration has been notified (or in the case of a rejection of the simplified procedure), the Prosecutor must submit a reasoned draft decision to the Competition College **within 25 business days** of the day after the notification.
- If the file is incomplete, then the time period only starts when all the complete information is received. If commitments are proposed, then the time limit is extended by fifteen business days.
- **No less than 10 business days** after the communication of the Prosecutor's reasoned draft decision to the parties, the Competition College organises a hearing during which the parties and any interested third parties are heard.
- The Competition College must decide whether to approve the merger **within 40 business days** from the day after the notification.

- This deadline is extended by **15 business days** in cases where commitments are proposed or modified. Furthermore, the parties can request an extension of the deadline after the investigation has ended.

If the Competition College has serious doubts as to the effects of the transaction on competition, it can decide to open a **Phase II** procedure (Articles IV.67 to IV.69 CEL):

- In this context, the Competition College can order an additional investigation. The parties **have 20 business days** after such a decision to propose commitments and the Prosecutor can extend that deadline with 20 business days.
- The Prosecutor must submit its revised draft decision **within 30 business days** of the decision to open the Phase II investigation.
- The parties may submit their written observations **within 10 business days** of the submission of the revised draft decision.
- If the parties submit written observations, then the Prosecutor may submit an additional draft decision **within 5 business days**.
- A hearing must be held **no less than 10 business days** after the submission of the revised draft decision.
- The Competition College must decide whether to approve the merger **within 60 business days** of initiating the Phase II procedure.
- This deadline can be extended at the parties' request.

The legislative modification of April 2019 introduced a "**stop-the-clock mechanism**" (Articles IV. 40, IV.64 and IV.66 CEL (Phase I) and IV.67 and IV.69 CEL (Phase II)). When the information provided by the parties is incomplete and the Prosecutor requires complementary information, or when the Prosecutor gives parties more time to offer commitments in certain specific situations, this mechanism provides for the suspension of the time frames in which decisions must be taken as set out above.

If the Competition College fails to make a Phase I or Phase II decision by the deadlines set out above, then the merger is deemed to have been approved.

Decisions of the Competition College with regard to concentrations can be **appealed** before the Brussels Court of Appeal, more specifically before the Market court (Article IV.90 CEL) within 30 calendar days from the notification of the contested decision (Article IV.90 §5 CEL). The appeal can be introduced by the parties concerned and by any other person with a legitimate interest. The Market court rules in law and in fact following a procedure "as in summary proceedings".

If the Market court annuls a decision in whole or in part, the case is sent back to the BCA. In that case, the concentration shall be reviewed and reassessed in light of the conditions prevailing on the market at that moment in time. The notifying parties submit a new notification or complete the original notification immediately if the notification has become incomplete due to changes in the market conditions or information provided.

The appeal does not suspend the contested decision.

By way of exception, the decisions by which the Prosecutor or the Competition College decide that the simplified procedure cannot be used or that a Phase II investigation needs to be started, are not open for appeal.

Decisions of the Market court can be appealed before the Supreme Court, but on legal issues only.

## 10. Availability of pre-notification/informal consultation

- Pre-notification contacts are not imposed by law but **highly recommended and standard practice** as, in principle, the formal notification may only be submitted after the informal

approval of the Prosecutor-General has been obtained in the context of such pre-notification contacts.

- Pre-notification contacts are conducted with the Prosecutor-General and the case team at least two weeks before notification.
- The contacts take place via telephone, e-mail and/or face-to-face meetings and are usually based on a draft notification.
- These contacts have **several purposes**: (a) the parties and the Prosecutor can discuss a number of essential points (such as whether the concentration must be notified, whether the simplified procedure could be used and what information must be provided); (b) reducing the risk of the Prosecutor finding the notification to be incomplete (which has a significant impact on the notification's timing); (c) the Prosecutor can, at the parties' request, exempt the notifying parties from providing certain information, which can make the notification less onerous; and (d) they allow the parties to understand the Prosecutor's point of view on, for example, the market definition, and to more accurately estimate whether Phase I clearance is likely to be granted.

## 11. Test for clearance/prohibition

The Competition College declares as cleared:

- Mergers that do not **significantly impede effective competition**, in particular by creating or reinforcing a dominant position; **and**
- Mergers in which the undertakings concerned **jointly control less than 25% of any relevant market**, whether through horizontal or vertical relations.

## 12. Conditional clearance - remedies

The BCA can make its approval subject to conditions.

- These remedies can be behavioural and/or structural.
- When parties propose remedies the deadlines for the decision can be extended (see above).
- If the College would like to consider remedies that were not yet discussed in the detailed draft decision submitted to the College and the parties by the Prosecutor, then the parties and the Prosecutor will be heard again.

## 13. Stand-still obligation

- The undertakings cannot carry out the merger operation until the BCA has cleared the merger (Article IV.10 §4 CEL).
- Failure to respect this stand-still obligation can result in fines amounting to 10% of the notifying parties' annual turnover (Article IV.79 §1 CEL) and/or daily penalty payments of up to 5% of the average daily turnover (Article IV.80 CEL).
- Exception: the President can permit the parties to implement the merger before it has been approved, but such a waiver must be requested before the merger's implementation (Article IV.10 §6 CEL and IV.82 CEL).

## 14. Failure to notify/obtain clearance

The Competition College can impose the following fines and periodic penalty payments:

- fines of **up to 1% of the turnover** for undertakings that do not notify a merger that falls within the scope of Book IV CEL (**failure to notify**) (article IV.82 §3).
- fines of **up to 1% of the turnover** for persons, undertakings or associations of undertakings that: do not cooperate within the framework of an investigation; or provide **incorrect or**

**incomplete information** in a notification or in a reply to a request for information or if the information is not provided on time (Article IV.82 CEL).

- fines **amounting to 10%** of the turnover for undertakings that proceed with the merger before it has been approved; or that do not adhere to prohibition decisions or to conditional clearance decisions (**failure to respect the stand-still obligation**) (Article IV.79 CEL).
- periodic penalty payments of **up to 5% of the average daily turnover** for undertakings that do **not comply with prohibition decisions or conditional clearance** decisions, or that proceed with a merger before it has been cleared.

The new Act of April 2019 provides that the fines imposed for infringements committed after the entry into force of the new law, will be calculated based on the undertakings' **worldwide** turnover. Until now, only the Belgian turnover was being taken into account for the calculation of the fines.