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Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Belgium

5 December 2017

This document reproduces a written contribution by Belgium submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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Belgium

1. Does your jurisdiction rely on presumption and/or safe harbours in antitrust matters (there is a separate question further below for mergers)? If yes, can you describe the safe harbours rules (whether procedural, evidentiary or substantive) you use in your jurisdiction?

The BCA applies the EU block exemptions also in case the trade between Member states is not affected (article IV.4 Code of Economic Law (CEL)).

2. Are the presumptions and safe harbours identified in the question above absolute, or can they be rebutted? If they can be rebutted, what elements are required for a rebuttal to be successful? What is the standard of proof regarding evidence necessary for rebuttal, and who has the burden of proof? Does the answer to the questions above vary depending on whether the presumptions are procedural, evidentiary or substantive?

To the extent the EU block exemptions apply in application of EU law (i.e. when trade between Member states is affected), the benefit of the exemption can be withdrawn by the European Commission (we refer to the Commission's contribution).

The text of article IV.4 CEL stipulates that the block exemptions apply also in case trade between Member states is not affected to agreements, decisions of associations of undertakings and concerted practices "*qui auraient bénéficé de la protection d'un règlement (…) dans le cas où ils auraient affecté ce commerce ou restraint, empêché ou faussé cette concurrence".*

The Commission cannot withdraw the benefit of a block exemption when it is in any case not applicable. And Belgian law does not provide for a withdrawal of the benefit of EU block exemptions.

We have not yet had any case, but in view of the above we tend to conclude that the safe harbours offered by block exemptions are more absolute in case trade between Member states is not affected.

3. Which bodies are responsible for setting out which conducts infringe upon competition law without a detailed market analysis being required – the legislature, the courts, enforcement agencies? Does the answer to the questions above vary depending on whether the presumptions are procedural, evidentiary or substantive?

The Legislator can always change the law within the limits set by EU law.

The King (the Government) can also issue Belgian block exemptions by Royal decree after consulting the BCA and the Commission for competition (a consultative body with the social partners and consumer organisations within the Centrale Raad voor het Bedrijfsleven/Conseil Central de l'Economie). Such block exemptions might contain a withdrawal clause that would not require a detailed market analysis. This power (introduced in 1991) has never been used. And even in case the benefit of a block

exemption would be denied, infringements can only be established in accordance with existing procedures.

4. What are the justifications for prohibiting the conduct identified in your answers to the questions above without a detailed market analysis? Have there been any discussions regarding the appropriateness of these prohibitions, their justification, and any related presumption or rule of evidence? Are there any discussions currently ongoing on the topic? Do they involve institutional considerations, such as resources and capacity to conduct detailed market analyses?

N/A

5. Do your merger control rules provide a safe harbour for mergers meeting certain criteria? Is this safe harbour absolute or can it be rebutted? If it can be rebutted, what are the requirements for such a rebuttal to occur?

In accordance with article IV.61, §2, 2° CEL concentration must be declared admissible by the BCA when the undertakings concerned control not more than 25% on any relevant market (horizontal or vertical).

This safe haven is not absolute, because the Belgian competition act does not exclude that a non-notifiable transaction might constitute an abuse of dominance under article IV.2 CEL (the equivalent of article 102 TFEU). The Court of appeal has, however, confirmed in a recent judgement a decision of the BCA that the application of article IV.2 CEL to a non-notifiable merger requires the establishment of an abuse of dominance that is distinct from the concentrative effect (Court of appeal of Brussels, 28 June 2017).

6. What are the justifications for including certain conduct within a presumption or a safe harbour? Have there been any discussions on the topic? Do they involve institutional considerations, such as resources and capacity to conduct detailed market analyses?

With regard to the block exemptions, we refer to the EU contribution.

The 25% market share rule is the result of a compromise between the Government and the Federation of Belgian Enterprises when in 1999 the market share based notification threshold was replaced by a turnover defined threshold in accordance with OECD and ICN best practices.

The BCA follows actively the discussions in the ECN on appropriate thresholds for the control of significant transactions between parties with no or no significant turnover.

7. Have you pursued any study regarding the effectiveness and suitability of the applicable criteria? Are there any discussions currently ongoing regarding whether to extend or limit the reach of safe harbours or presumptions?

No.