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**Case Prioritisation and Prosecutorial Discretion – Note by Belgium**

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Ori SCHWARTZ  
Email : Ori.Schwartz@oecd.org

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## Belgium

### 1. Introduction

1. This note sets out the prosecutorial discretion vested in the Belgian Competition Authority (BCA), its enforcement priorities policy, and the manner in which that policy is applied in practice.

2. The BCA has the power to set its annual priorities and to decide whether to investigate a case. This prosecutorial discretion has evolved over time and is in line with Article 4(5) of Directive (EU) 2019/1 (ECN+) which states that:

*“National administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU as referred to in Article 5(2) of this Directive. To the extent that national administrative competition authorities are obliged to consider formal complaints, those authorities shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This is without prejudice to the power of national administrative competition authorities to reject complaints on other grounds defined by national law.”*

3. Prosecutorial discretion allows the BCA to fulfill its mandate independent of political interference and in accordance with its long-term strategic vision, making informed choices that reflect its experience and knowledge of the dynamics of the Belgian market.

4. It also presupposes that the BCA is equipped with adequate resources to effectively fulfil its mandate. In this respect, the BCA’s investigative capacity has significantly increased since 2022 following a significant budget increase that led to a two-fold increase in the number of staff members. The budget increase made it also possible to implement several structural adjustments, including a redesign of the internal organisational structure. The redesign provided for the creation of a number of specialised practice and sectoral focus groups, significant investments to further advance the digitalisation of the BCA, and the development of a more proactive advocacy and ex officio enforcement policy.

5. While infringement cases before the BCA still stem from complaints and leniency applications, *ex officio* enforcement has become increasingly important in recent years. The BCA is empowered to initiate *ex officio* investigations based on market monitoring, informal contacts with market participants, or upon the request of the Ministry of Economy. Reflecting a strategic shift towards more proactive detection, the BCA established a dedicated Detection Unit in 2025, responsible for the systematic analysis of market signals and tips, collected via an online reporting tool.<sup>1</sup>

6. These developments have further facilitated the establishment of an effective enforcement priorities policy. Since 2022, the vast majority of closing decisions were based on the NCA’s priorities.

7. The following sections explain how this priority policy was developed and set out the key pillars on which it is based.

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<sup>1</sup> For the reporting tool, see <https://www.belgiancompetition.be/en/report-competition-issue>.

## 2. Evolution of priority setting over time

8. Prior to the establishment of an independent competition authority in 2006, the enforcement of competition law in Belgium was vested with the Ministry of Economic Affairs, acting through its Competition Service. The Competition Service established the enforcement priorities that guided the activities of the Competition Council and the prosecutors.

9. After the reform of 2006, the Competition Service assumed a more supporting role in competition law enforcement, while the Prosecution Service (known as **Auditorat** in French and **Auditoraat** in Dutch) became independent. Nevertheless, the Ministry retained a degree of influence in the determination of priorities. For example, the meetings tasked with setting the priorities of the authority was chaired by the leading official of the Competition Service, rather than by the prosecutor-general.<sup>2</sup> At the time, the priorities were also not formally published as a standalone document, but were merely referred to in the BCA's annual report.<sup>3</sup>

10. Since 2013, following the establishment of the BCA in its current institutional form<sup>4</sup>, the BCA's annual priorities are set by the Management Board (**Comité de direction** in French and **Directiecomité** in Dutch), composed of the President, the Prosecutor General, the Director for Legal Affairs, and the Director of Economic Studies.<sup>5</sup> These priorities are published in a dedicated priorities paper, published at the beginning of each year. Prior to its publication, the Minister for Economic Affairs must still be informed of the proposed annual priorities and have the possibility to provide an opinion on the priorities paper.<sup>6</sup>

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<sup>2</sup> Article 29 of the law of 15 September 2006 : “*The Auditor General chairs the meetings of the Auditorate, with the exception of meetings whose purpose is to determine the priorities of the policy for implementing the law and to set the order in which cases are to be handled (...) Those meetings are chaired by the senior official heading the Competition Service.*” (own translation) (« *L’auditeur général préside les réunions de l’Auditorat, à l’exception des réunions qui ont pour objet la détermination des priorités de la politique de mise en œuvre de la loi et la fixation de l’ordre de traitement des dossiers (...) Ces dernières réunions sont présidées par le fonctionnaire dirigeant du Service de la concurrence.* »)

<sup>3</sup> It started with a couple of remarks (for example in the annual report of [2007](#) and [2008](#), p. 9) and expanded from 2009 in to a section explaining briefly how cases had been prioritised during the year.

<sup>4</sup> Loi du 3 Avril 2013 portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution, dans le livre IV « Protection de la concurrence » et le livre V « La concurrence et les évolutions de prix » du Code de droit économique et insérant les définitions propres aux livres IV et V et les dispositions répressives propres aux livres IV et V dans le livre Ier du code économique, *MB* 26 April 2013, 25216.

<sup>5</sup> Art. IV.25 Code of Economic Law (hereafter « CEL ») : “*The Management Board is responsible, inter alia, for drafting an annual note in which the management priorities are established and communicated to the Minister.*” (own translation) (« *Le Comité de direction est chargé notamment : - de la rédaction d'une note annuelle dans laquelle les priorités en matière de gestion sont établies et communiquées au ministre.* »)

<sup>6</sup> Art. IV.25, 3°, CEL.

### 3. BCA's power to rely on enforcement priorities to exercise its discretionary power

11. The BCA may rely on its enforcement priorities to determine which cases (not) to pursue.

12. In 2009, the BCA was granted the power to reject complaints based on its enforcement priorities or its available resources.<sup>7</sup> This reform significantly enhanced the BCA's discretion, providing it with greater flexibility to define its own policy goals and to allocate its resources accordingly.

13. As regards ex officio cases, it is only with the Law of 22 February 2022 transposing the ECN+ Directive<sup>8</sup> that the BCA was formally empowered with the ability to close ex officio proceedings based on its enforcement priorities or due to lack of resources.<sup>9</sup> Prior to 2022, ex officio cases could be closed solely on the merits as there was no legal basis allowing the BCA to close an investigation on the basis of its priorities.<sup>10</sup>

14. Prior to opening formal proceedings, the BCA always conducts a thorough preliminary assessment using several investigative tools, depending on the circumstances of the case. The extent to which the case aligns with the current enforcement priorities is a key factor weighing in favour of, or against, opening proceedings. Thus opening a case there requires an alignment at the level of sectors (e.g. digital, health, food), instruments (e.g., formal case vs. informal advice), and/or enforcement themes (e.g. cartels, vertical restrictions, ...). There is no a strict one-to-one mapping between priorities and individual cases, however.

15. Although the BCA has a large discretion when deciding not to pursue a case, it must nevertheless provide adequate reasoning when closing a formal investigation. Prior to 2012, closing decisions were often characterized by limited or insufficient justification. Following the annulment of several closing decisions on appeal due to inadequate reasoning, the BCA enhanced the depth and clarity of the motivation underpinning such decisions.<sup>11</sup>

### 4. The methodology for the determination of enforcement priorities

16. The application of competition law enables the BCA to address the conduct of market participants, *inter alia* by sanctioning and deterring infringements by means of the

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<sup>7</sup> The law of 22 February 2022 inserted article IV.45 CEL and provides that the BCA could close an ex officio case based on its priorities. The decision to close can be appealed before the College of the BCA.

<sup>8</sup> In particular, Article 4(5) of Directive (EU) 2019/1.

<sup>9</sup> Art. IV.45 CEL : "3° if the case is not regarded as a priority or does not warrant an investigation in view of the available resources. (...) The decision to discontinue the ex officio investigation is not open to appeal." (own translation) (« 3° si l'affaire n'est pas considérée comme une priorité ou ne justifie pas une instruction eu égard aux moyens disponibles. (...) La décision de mettre fin à l'instruction d'office n'est susceptible d'aucun recours. »).

<sup>10</sup> Even that was rather unclear as the law did not address the question of closing an ex officio case: see BCA, 17 February 2015, BMA-2015-I/O-03-AUD, [Vrachtafhandeling](#), in which the BCA concludes that there does not seem to be an infringement and closes the case based on the principle of good administration.

<sup>11</sup> See BCA, 2 October 2012, BMA-[2012-P/K-25](#).

imposition of fines, but also by adopting proportionate remedial action, including interim measures, or by making commitments offered by undertakings legally binding.

17. In line with the approach followed within the European Competition Network<sup>12</sup>, and in order to ensure the effective and efficient use of its resources, the BCA will prioritise cases where its intervention is expected to generate the greatest overall impact. This assessment takes into account, in particular, the nature and gravity of the suspected infringement, its likely effects on competition and consumers, the deterrent value of enforcement action, and the resources required to pursue the case successfully. In doing this, it strives to find the right balance between:

- relatively simple cases involving prosecutions for the most obvious infringements and more complex or innovative cases where there is added value in terms of precedents;
- cartel agreements, vertical restrictions and abuses of dominance and economic dependency;
- cases that can be concluded within a relatively short period of time and those requiring a longer period of investigation;
- different economic sectors, to ensure a balance between strategic sectors of macroeconomic importance, on the one hand, and other sectors that may be of less strategic importance, but which involve specific risks or infringements that could set a precedent.

18. A key factor in this assessment is the strategic importance of the investigation, notably where it concerns sectors that the BCA has identified as priority areas for enforcement. In establishing this list, the BCA relies, *inter alia*, on its institutional expertise and experience from previous and ongoing investigations, the results of its sectoral screening activities, including those of the Price Observatory,<sup>13</sup> as well as information and signals received from stakeholders, other public authorities,<sup>14</sup> research institutions, and the academic community.

19. Without prejudice to its mandate to enforce competition law across all sectors of the economy, the BCA typically grants priority to the sectors identified in its annual priorities paper. The fact that a particular case falls within a priority sector does not, however, preclude the BCA from deciding not to pursue the case where it does not constitute an enforcement priority or where, in light of the available resources, further investigation is not justified.

## 5. Four-step analysis for determining the interest in pursuing an investigation

20. The BCA's methodology to prioritize investigations is inspired by the UK OFT's 2008 prioritisation principles,<sup>15</sup> and relies on the following four criteria: (i) the impact on

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<sup>12</sup> [Commission Notice on Cooperation within the Network of Competition Authorities.](#)

<sup>13</sup> <https://economie.fgov.be/fr/propos-du-spf/organisation/observatoires/observatoire-des-prix>.

<sup>14</sup> For instance, the National Bank of Belgium alerted the BCA in 2016 on the increased price in the services sector. Other examples are the BIPT (Post and Telecom regulator in Belgium) who alerted the BCA in possible infringements of competition law in several cases or cooperated in providing information on a pending file (see e.g. [20240726 Press release 32 BCA 0.pdf](#) and

<sup>15</sup> [OFT Prioritisation Principles](#), 8 October 2008.

competition, (ii) the strategic importance of the sector at hand, (iii) the risk of non-finding an infringement and (iv) the amount and availability of resources to be used.

21. In terms of **impact on competition**, the BCA assesses the potential harm caused by the alleged infringement that is brought to its attention in the industry in question. This considers both direct effects on pricing and non-price related parameters such as product or consumer service quality or innovation. Its assessment will also take into account several indirect effects, such as the dissuasive effect with respect to infringements in related sectors, and the effect on the entire value chain involved. For instance, the BCA closed a case based on its priorities because the contentious contracts had been terminated, the investigated company was about to delete a problematic clause, and the affected turnover was limited.<sup>16</sup> Similarly, the BCA closed a case because the positive effects of finding an infringement were minimal in that the potentially infringing companies ceased to exist.<sup>17</sup>

22. The initiation of an investigation into an alleged infringement may be of **strategic relevance** to the BCA where the sector concerned is identified as a priority (see the list of priority sectors for 2026 above), or where the case is likely to establish a meaningful precedent from a legal or policy perspective. For instance, the BCA currently tends to consider cases that concern digital platforms to be strategic, even if they are active only in the Belgian market or in even smaller markets.<sup>18</sup>

23. In terms of **risks**, the BCA evaluates the likelihood of finding an infringement, based on the available evidence, the risks of annulment and practical difficulties, such as market opacity or complex data access. The BCA is less inclined to devote resources to investigating an infringement when there is a real risk that the investigation will not yield a useful result.

24. In terms of **resources**, the BCA considers the resources that are needed to initiate or continue an investigation, as well as the calendar of all ongoing investigations.

## 6. Conclusion

25. The Belgian framework on case prioritisation has evolved towards a mature system of prosecutorial discretion that is now firmly anchored in both national law and the ECN+ framework. In practice, the BCA uses this discretion to allocate its resources to matters that are most likely to generate the largest enforcement impact, taking into account the seriousness of the suspected infringement, the strategic relevance of the sector concerned, the likelihood of a meaningful outcome and the resources required. While there is no one-on-one correspondence (as cases may originate from complaints or leniency) there is an overall alignment between actual cases and priorities set by the BCA. This approach enables the BCA to act more effectively, more proactively and with greater consistency, while ensuring that decisions not to pursue a case remain reasoned and subject to an appropriate legal and institutional framework.

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<sup>16</sup> BCA, 15 October 2014, BMA-2014-P/K-22-AUD 1, [Spira / De Beers](#).

<sup>17</sup> BCA, 27 June 2025, BMA-2025-RPR-24-AUD, [Fruitveilingen](#).

<sup>18</sup> BCA, 3 July 2025, ABC-2025-RPR-26-AUD, [Scolares](#). In this case it concerned school management platforms. See also AutoScout24, [20260313\\_Press\\_release\\_9\\_BCA.pdf](#).