

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 6 May 2019

Working Party No. 3 on Co-operation and Enforcement**The standard of review by courts in competition cases – Note by Belgium**

4 June 2019

This document reproduces a written contribution from Belgium submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.
Email: Despina.Pachnou@oecd.org

JT03447611

Belgium

1. Legal framework and standard of review

a. Is your jurisdiction an adversarial or an administrative competition enforcement system? Please describe the main features of your public enforcement regime.

1. It is an administrative competition enforcement system in which the powers of the BCA are very similar to the competition law enforcement powers of the European Commission, but with a separation within the BCA of the powers of investigation and prosecution (Investigation and Prosecution Service), and decision making in cases (the Competition College), with the exception of settlement and simplified merger control decisions that are taken by the Investigation and Prosecution Service.

b. What is the standard of review for courts reviewing public competition decisions in your jurisdiction? Does the review court perform a full review on the merits or a review of legality on specific grounds? Is there a different standard for questions of fact than for questions of law? If the review is one of legality, what are the grounds for challenge? Please provide case examples.

2. The Market Court, a specialized section within the Brussels Court of Appeals, has exclusive jurisdiction to review the decisions of the BCA.

3. The Market Court has the power of a full review on the merits (*pleine juridiction*). This means that the Court can not only annul the BCA decision, but may also replace it by its own decision. There were three exceptions to this general rule: the Court has only the power to annul (and must refer back to the BCA) in cases regarding the authorization of concentrations, the imposition of remedies and commitments and in cases where, contrary to the BCA decision, the Court finds an infringement of Articles 101 and 102 TFEU. The new article IV.90, §2 of the Code of Economic Law (“CEL”) that is expected to into force in June 2019 deleted the exception in respect of remedies and commitments. A In the event of referral, the case will have to be decided by the Competition College in a different composition.

4. According to well established case law the reviewing Court appreciates infringement decisions *ab novo*: it will examine and assess all the evidence, independently from the interpretation and assessment made by the BCA. The Court can also autonomously appreciate the proportionality of fines. Furthermore, it may order the production of documents and hear witnesses (see e.g. Brussels Court of Appeal, 30 June 2016, *Holcim et al.*)¹.

¹ https://www.mededinging.be/sites/default/files/content/download/files/20160630_arrest_holcim_pub.pdf.

5. Also according to well established case law, the reviewing Court examines in respect of interim measures decisions whether the BCA erred in law or made a manifest error when appreciating the facts (see e.g. Market Court, 28 June 2017, *Alken-Maes*)²

6. In a recent judgement of the Market Court has repeated the abovementioned standard of review in more general terms and emphasized that it has the power, but not the obligation to replace a decision in case it decides that a decision must be annulled³. The decision was taken in respect of interim measures⁴ but now also seems to apply to merger control and infringement cases.

7. The Market Court will also review whether the BCA decisions are duly motivated. Administrative authorities are not required to answer the arguments of the plaintiff and third parties. But they must clearly indicate the reasons for their decisions in order to enable the interested parties to assess the legality of a decision.

c. What competition enforcement acts and decisions are subject to review?

8. Art. IV.90, §1 of Book IV of the Code of Economic Law (“CEL”)⁵ (the Belgian Competition Act) provides that all substantive decisions of the BCA in infringement and merger control cases are subject to review, with the notable exception of settlement decisions that cannot be appealed.

9. Appeals are brought before the Market Court, a special section of the Brussels Court of Appeals, except for appeals against decisions of the Investigation and Prosecution Service to close a case that can be appealed before the Competition College.

10. Decisions of the Investigation and Prosecution Service to use specific evidence collected in a dawn raid can also be appealed before the Market Court after the issuing of a statement of objections relying on such evidence.

d. Is the review of decisions imposing fines or jail sentences subject to a different standard?

11. The BCA has only the power to impose fines. The Market Court’s review of fining decisions is not subject to a different standard.

e. Is it possible to challenge charging documents (e.g., statements of objections in administrative systems; complaints in prosecutorial systems) and procedural acts,

² https://www.mededinging.be/sites/default/files/content/download/files/20170628_hvbb_2016mr2_alkenmaes_abi.pdf.

³ Market Court, 8 May 2019, *Great Circle*.

⁴ See in this direction the only case on merger control decision in the last 10 years: Brussels, 11 March 2015, *Touring*, https://www.mededinging.be/sites/default/files/content/download/files/20150311_cab_hvbb_2013mr31_touring.pdf. A couple of other recent cases concerning decisions on the prolongation or withdrawal of remedies remedies imposed in a 1997 case were decided on issues of procedure.

⁵ Formerly article 79, §1 CEL.

like requests for information, requests for interviews, and dawn raids? What is the standard for their review?

12. Please see answer sub (c) in respect of dawn raids. The standard for review is as indicated sub (b) for infringement decisions.
13. Requests for information, statements of objections and requests for interviews cannot be appealed.

f. Are commitments or settlements common in your jurisdiction? Can they be appealed, including by third parties, and is the standard of review the same as that applicable to infringement decisions? Do courts review them before they become binding?

14. Settlement decisions are common and cannot be appealed.
15. Commitment decisions are not common and cannot be appealed.

g. Are the opening or closing of enforcement proceedings or merger remedies appealable in your jurisdiction? What is the standard for their review?

16. The decision to open enforcement proceedings cannot be appealed.
17. The decision of the Investigation and Prosecution Service to reject a complaint and close the enforcement proceedings can be appealed before the Competition College. Where the rejection of the complaint is based on the BCA's priority policy, the College will examine whether the motivation to reject the complaint is not manifestly unreasonable. Where the complaint is rejected as unfounded, the College will review whether the Investigation and Prosecution Service manifestly erred in law or in its assessment of the facts in the motivation of the decision to reject the complaint and close the case (see e.g. decision of the Competition College, 1 July 2015, E. Cuyckens v. Omega Pharma NV).

h. What is the margin of appreciation reserved by case law to the decision-maker?

18. Please see the response sub (b) and (g).

i. Is the review of economic evidence subject to a different standard? Is the review court free to interpret economic assessments?

19. No, the review of economic evidence is not subject to a different standard. The reviewing Court will assess the value of economic evidence.

j. What is the average duration of a court case? Is there a possibility to expedite the court's review or use a simplified procedure?

20. The market Court always must review BCA decisions in an accelerated procedure (as in *référé*).
21. The average duration of annulment proceedings before the Market Court is 7 months.

2. Courts' access to competition expertise

a. In your jurisdiction, how do the courts acquire sufficient expertise to adjudicate competition law and economic matters? Have any cases posed particular problems as a result of the court's lack of understanding of technical or economic concepts? Please provide examples.

22. The Market Court was created as a special section within the Brussels Court of Appeals by the Law of 25 December 2016. The Market Court is composed on the one hand of judges who came from other sections of the Court of Appeals or from other courts and , on the other hand, of judges who are to be selected on the basis of expertise acquired in the field of economic, financial and market law.

23. Judges in other courts may be experts because of previous professional experience.

24. Training programs organized by the judiciary or academia unfortunately tend to attract only judges who are already interested in competition law. And in our experience only expert judges tend to ask for an *amicus curiae* intervention.

b. Does your competition authority take action, alone or with other authorities, to ensure that judges have the knowledge and the expertise required in each case?

25. The judges training program organized by the Institute for the training of the judiciary provides occasionally (not every year) competition law training for judges in which we participate. Judges in the Market Court will not attend but can be invited as speakers. The BCA board members and the judges of the Market Court regularly meet in conferences but judges can be reluctant to be trained by an authority of which they review the decisions

c. Does your jurisdiction provide for external expert advice to the court? If so, how does this work? Who can request it — the judge, the parties, or both?

26. The Belgian Competition Act provides that the BCA can submit written observations with regard to the application of Article 101 and 102 TFEU (and the corresponding national provisions) to the courts that hear a competition case. The BCA can act on its own initiative or at the request of the court. The BCA may request the court for the transmission of any documents that are necessary to submit observations. With the permission of the court, the BCA can also make oral observations. Where the BCA submits written observations, the other parties must have the opportunity to reply thereto.

27. In practice, BCA intervened as *amicus curiae* in only 4 cases. We only intervene at the request of a judge. When parties ask us to intervene, we may offer to intervene to the judge, but will only do so if the judge asks us.

d. For judicial review, is there a specialized competition court, or a competition chamber in a general court? Was this always the case or was there a reform of the system (or is a reform contemplated) based on considerations linked to the effectiveness of the review?

28. The Market Court, a special section within the Brussels Court of Appeals, hears appeals against decisions of the BCA and sector regulators (energy, telecoms and

banking/financial). This section was created by the Law of 25 December 2016. Previously, these cases were heard already for many years by the same two chambers (one French speaking the other Dutch speaking) within the Court of Appeal in Brussels. The Market Court hears both French and Dutch speaking cases.

e. What are the advantages and disadvantages of your review system? How could the effectiveness of review improve?

29. The advantage is a welcome degree of specialization. The disadvantage a high concentration of power with very few persons.

30. The advantage is a welcome degree of specialization. The disadvantage a high concentration of power with very few persons.