RE-Jus - October 1, 2018.

The role of national judges through the lens of article 47, CFREU: independence, empowerment and access to justice between administrative and judicial enforcement mechanisms – the Belgian Market court.

1. The Belgian Market Court (MC) :

1.

In the drafting of various laws with economic impact (in the first decade of the 21st century) the Brussels Court of appeal (chamber 18) had been entitled as a last instance jurisdiction. Before the new *Code of Economic Law* (CEL) was codified (in 2013) there was an attempt to establish a MC in the form of an administrative authority. The criticism against it was that an administrative appeal before a new administrative authority couldn't offer the guarantees of an appeal before a civil court which is part of the judiciary. Finally the Minister withdrew his proposal. The jurisdiction of the Brussels court of appeal was retained (and no new court was established).

2.

2.1. creation :

The MC has been created by the act of 25 December 2016 "*to change the legal status of the detainees and the monitoring of the prisons and laying down various provisions on justice (art. 51, 56, 59, 60, 64, 75, 77, 107, 111-114, 157, 158, 160-166 Potpourri IV-law*)".

The MC is operational since January 9, 2017.

The bilingual MC with seat in Brussels provides a one instance judicial appeal against decisions of regulators and administrative authorities in the field of economic, financial and market law.

2.2. exclusive jurisdiction :

The MC has exclusive jurisdiction for the entire Belgian territory in all national languages on the basis of the following provisions:

- Law of April 12, 1965 concerning the transport of gaseous products and others by means of pipelines. Section 1.
- Law of February 22, 1998 establishing the organic statute of the National Bank of Belgium. (Art. 36/21).
- Law of April 29, 1999 concerning the organisation of the electricity market. Section 1.

• Law of January 17, 2003 on legal remedies and the treatment of disputes as a result of the act of January 17, 2003 relating to the statute of the regulator of the Belgian postal and telecommunications sector. (Art. 4).

• • Law of August 2, 2002 on the supervision of the financial sector and financial services. (Art. 83).

• Code of Economic Law (Enforcement of the competition law, Art. IV.26, 32, 33, 66, 79, 80, 81).

• Law of May 12, 2004 establishing the procedure of an appeal procedure in the framework of the protection against counterfeiting and the preservation of the quality of the money circulation. (Article 2).

• Law of July 9, 2004 laying down miscellaneous provisions (art. 2).

• Decisions of the regulator, referred to in article 1, 6 °, of the Royal Decree of May 27, 2004 on the transformation of BIAC in a public limited company of private law and of the airport facilities, taken with application of the same decision, with full jurisdiction be set to the Market Court by those who carry out activities referred to in article 1 of the Royal Decree of June 21, 2004 on the granting of the operating license of the Brussels National Airport to the N.V. BIAC.

• Law of 6 July 2005 on some of the legal provisions regarding electronic communications (Art. 2).

- Law of April 1, 2007 on public takeover bids (Art. 46).

- Law of August 30, 2013 establishing the Railway-law (Art. 221/1-221/5).

• Cooperation agreement of July 14,2017. Appeal against decisions of the dispute settlement body on network infrastructures ("the IGB").

• Cooperation agreement of July 14, 2017 between the Federal State, the Communities and the Regions in the framework of the transposition of the Directive 2014/61/EU. Art. 9.

• Law of December 3, 2017 establishing the data protection authority (art. 108).

• Law of January 26, 2018 on the postal services (art. 6 § 2).

There remain a number of gaps in the legislation where the 18th Chamber of the court of appeal retains his exclusive competence. As the chambers of the court are unilingual chambers, the Dutch-speaking and the French-speaking appeals are judged respectively by the chambers 18 N (= Dutch) and 18 F (French).

2.3. The composition and the place of the MC within the judicial

organisation :

2.3.1. Separate section :

In the Brussels court of appeal “chambers for market cases” are established. Together they form a new section “*the Market Court*”.

The MC is established as a separate section to facilitate the internal organization – such as the timetable and administrative support –.

Currently one chamber for “market cases” is operational (chamber 19A) – although the number of appeals is increasing - there are not enough files for the full-time use of the chamber, there is still no reason to set up a second permanent chamber of the court.

The MC has exclusive competence in both national languages.

2.3.2. Composition:

The seat of the MC always consists of three justices because of two reasons: the MC decides both in first and last instance and the cases are often very technical and usually have a multiple character with important economical (and sometimes political) incidence.

The seat can (partly) be composed of justices appointed on the basis of their professional experience, their specialized knowledge of the economic, financial or market law. These magistrates, of whom only six can be appointed within the existing framework of the magistrates of the court of appeal in Brussels, will take seat by priority in the MC sessions. For the appointment of these justices the balance of national languages shall be taken into account.

All councillors who take seat in the MC must be at least functionally bilingual.

2.4. The divergent rules of procedure – some examples:

The various laws that confer the exclusive jurisdiction to the MC determine that the MC shall treat the cases '***as in summary proceedings***'.

Different laws set ***strict requirements for the validity of the application initiating proceedings*** (such as the appeal period, the data that have to be mentioned in the application, the possibilities for intervention, …).

In different laws the MC gets the jurisdiction to make statements with ***full jurisdiction***. This means that the decision of the court can replace the contested decision. In contrast to the Council of State the jurisdiction of the MC is not limited to the possibility of an annulment on the grounds of violation of substantial form requirements, overrun of power or diversion of power. The legislator has not well-defined on an exhaustive way the grounds on which the contested decisions can be annulled by the MC. Permit me to mention that the full jurisdiction of the MC in economic and market cases -

which might have either an economic impact, or even a political impact – remains "*special*". The court – part of the judiciary – can take a final decision which should have been taken by an administrative authority (what we call the Executive power). Let's not forget that the principle of the separation of powers is one of the Belgian constitutional basics.

In certain cases (e.g. Article IV § 2.79 CEL) the MC can, at the request of the concerned person, and by decision before to do justice, ***suspend the implementation of the decision*** (of the competition college authority) in whole or in part until the moment of final court decision.

The suspension of enforcement can only be ordered when severe means are relied to justify that the annulment of the appealed decision can have serious consequences for the concerned person.

This is a kind of summary judgment procedure, in which the MC - on the basis of a *prima facie* review - before the claim for annulment is exanimated, can suspend the implementation. In practice the suspension of a decision is a very useful instrument. When it's applied by the MC, in most cases the administrative authority urgently takes a new decision to meet the objections (with the effect that the MC has not to annul the decision).

The appeal (usually in the Dutch "beroep" or "hoger beroep", in French "un recours") is a legal recourse against an economic-administrative decision.

2.5. practical working:

The MC always decides 'in first and last instance'.

Cases can be introduced every Wednesday (NL + FR). At the date of the introduction, a calendar for communication of the written claims is determined. The date for the hearing is immediately fixed within three months from the date of introduction (the case can be determined within a shorter period for pleadings if the case has an urgent character).

The cause list of the MC allows this method of working.

To enable the magistrates of the MC to prepare the cases and to facilitate an interactive debate on the day of the hearing, the Court requires that the advocates should transfer at least two weeks before the date of the hearing all synthesis conclusions on the e-mail address of the MC: marketcourt@just.fgov.be

Through this address the lawyers can also make announcements to the Court relating to the organisation of the hearing.

The MC asks that the file documents should also be communicated under digital form preferably on three identical USB sticks.

The verdict is pronounced in principle within the month.

To avoid to trouble the progress of the treatment of the cases (determining a conclusion calendar and hearing and, if necessary, urgent and provisional measures) the MC does not interrupt the introduction sessions during the judicial leave (July and August). In these months an introduction session is provided every two weeks.

By way of these practical arrangements the MC tries to avoid judicial delays, tries to ensure efficient handling of the cases and, above all, to promote the digital administration of Justice.

2. The BCA decisions [i]:

2.1.

The Belgian Competition Authority [ii] is an independent administrative authority that contributes to the definition and implementation of competition policy in Belgium, by pursuing anticompetitive practices and reviewing the main merger operations. The BCA collaborates with the competition authorities of the other Member States of the European Union and with the European Commission within the framework of the European Competition Network (ECN).

The BCA comprises an Investigation Service (the Investigation and Prosecution Service) and a decision-making body (Competition College). The decision-making body is the Competition College for all infringement cases that are not settled or closed by the Investigation and Prosecution Service, as well as all non-simplified merger control procedures.

The BCA President presides over the Competition College. For each case, the Competition College consists of the president and two assessors, who are appointed in alphabetical order within their language group.

The Investigation and Prosecution Service is led by the Competition Prosecutor General. For each opened investigation file, a team of Investigation and Prosecution Service personnel members is designated and placed under the direction of a competition prosecutor, who looks after the day-to-day management of the investigation. The Investigation and Prosecution Service's personnel members also perform, when requested by the Competition Prosecutor General, information research work and analyses of informal complaints in order to identify potential investigation cases.

Legal powers of the BCA

The Belgian Competition Authority investigates competition restrictive practices in Belgium. On its own initiative or at the request of complainant, it investigates any case of distorted competition within a market, regardless

of the business in question or the public/private status of the operators.

The Belgian Competition Authority can adopt interim measures in case of emergency, while also declaring injunctions or fines, and accept commitments within the framework of an in-depth investigation.

It also conducts the preliminary investigation of merger operations that meet the turnover thresholds.

In parallel with its missions and powers with regard to mergers and competition restrictive practices, the Belgian Competition Authority among others promotes better knowledge of competition law in Belgium through:

- questions put to parliament;
- providing opinions on regulatory initiatives;
- contributing to the preparation of Belgian competition regulations;
- collaborating with external investigations;
- participating in meetings of the Commission for Competition

Moreover, the President of the Belgian Competition Authority informally rules on questions and disputes relative to the application of competition rules in cases in which no formal investigation has been initiated (Art. IV.20, §1st 2° CEL).

The Belgian Competition Authority has no jurisdiction with regard to unfair trade practices and actions that violate normal honest commercial practices, such as selling at a loss, bargains, public auctions, comparative advertising, remote contracts, liquidations and practices covered by Book VI of the CEL on market practices and consumer protection, such matters fall within the scope of the ordinary courts.

The priorities of the Belgian Competition Authority

The Board determines the provisions for the implementation of competition policy and the priorities. These provisions (in French) are published each year.

The formal procedures for pursuing infringements constitute the backbone of the BCA's deterrent mechanism. To make the best use of its resources, it concentrates its efforts in areas where they are expected to provide the greatest benefit, while also pursuing a fair balance:

- between relatively simple cases in which the most blatant infringements are pursued and more complex or innovative cases that add to the case law;
- between cartel agreements, vertical restrictions and abuse of dominant positions;
- between cases that can be completed relatively quickly and cases that require lengthier periods for investigation;
- between various economic sectors, with a view to guaranteeing a balance between strategic sectors with a macro-economic importance and other sectors in which competition law is equally applicable.

Like other competition authorities, the BCA considers four factors when assessing its interest in a case:

- Impact—The Authority attempts to assess the damages directly caused by the alleged infringement within the sector in which it was committed, not only in terms of the applied price, but also from the effects on product quality or consumer services. It also considers various indirect effects, such as deterring other infringements within related sectors, or the effects on the value chain when the

alleged infringement affects the operation thereof.

- Strategic importance—Investigating an alleged infringement can, for example, be of strategic importance for the BCA because the affected sector has been identified as a priority (see below), or because it wants to clarify an interpretation of the law, with this case setting a precedent. However, if the Authority considers that other institutions are better suited to address the identified problem, its strategic importance is reduced.
- Risks—The BCA is less inclined to devote resources to investigating an infringement if there is a significant risk that the investigation may come to nothing.
- Resources—The BCA also considers the resources needed to initiate or continue an investigation, while determining the timetable for investigation.

2.2.

Cartels:

Agreements restricting competition

The Belgian Competition Authority (BCA) investigates agreements between undertakings, decisions by association of undertakings, and concerted practices which have as object or effect to appreciably prevent, restrict or distort competition on the relevant Belgian market or within a substantial part of it.

These restrictive practices are prohibited by Article IV.1, §1 of the CEL (Art. IV.1, §1 CEL), as well as by Article 101 TFEU if they are also likely to affect trade between Member States.

A prohibited agreement or concerted practice between undertakings can, for example, relate to the setting of prices, production limitations, the exclusion of a newcomer, or the distribution of markets or customers between parties. Instead of competing with one another and attracting their customers by virtue of their respective merits, the undertakings participating in a cartel implement a jointly agreed strategy, which reduces their incentive to develop new and improved products and services, and/or to offer their products or services at competitive prices. Accordingly, their customers pay more (and/or receive a product or service of lesser quality) than they would have in the absence of the restrictive competitive practice.

The European Commission's guidelines outline the principles underlying the assessment of horizontal and vertical cooperation agreements with regard to Article 101 TFEU. In essence, this article is identical to Article IV.1 CEL; accordingly, the BCA applies these guidelines by analogy.

The leniency programme

Cartels are generally secretive, which means that it can be difficult to uncover evidence. The leniency programme encourages companies to report cartels to the BCA; such reporting destabilises the cartels and so increases the effectiveness of the BCA's efforts. Undertakings or associations of undertakings that collaborate with the BCA in its efforts against cartels are eligible to be totally or partly exempted from the fines imposed by the Competition College or, in case of a settlement, by the Investigation and Prosecution Service.

Article IV.46 CEL and the Leniency guidelines of the BCA list the conditions that must be met by the undertakings or associations of undertakings in order to benefit from this leniency.

The leniency programme is described in greater detail in the leniency guidelines of the BCA (in French).

Request for interim measures

Undertakings whose interests have been harmed by anticompetitive practices can ask the Competition College to adopt interim measures that would suspend such practices if it is urgent to prevent serious, imminent and difficult to overcome damages to the applicant undertakings or if the practices are not in the general economic interest (Art. IV.64, §1 CEL).

Applications for interim measures can be submitted to the President by the complainant, the Investigation and Prosecution Service, the Minister or the competent Minister depending on the sector in question. At the same time, the complainant must also submit a complaint on the merits to the Investigation and Prosecution Service for the same facts.

The President decides on the composition of the Competition College that will examine the case and sets a hearing within a period of one calendar month after the request for interim measures has been filed (the time limit can be extended by up to two weeks).

The Competition Prosecutor General submits any written observations at the latest six working days before the hearing date.

During the hearing, the Competition College hears the applicant and the defendant. At their request, it also hears the Competition Prosecutor General or the competition prosecutor delegated by the latter, the Chief Economist and the General Counsel.

The Competition College issues a ruling in a well-founded decision within one calendar month after the hearing. The time limit can be extended by up to two weeks. In the absence of a decision within the time limits, the request for interim measures is deemed to have been rejected.

Investigation and decision - Investigation and inspections

The Competition Prosecutor General initiates investigation files while taking into consideration the priorities of the Authority (in French), after having consulted the Chief Economist.

Within the BCA, investigations are carried out by the Investigation Service, under the direction of the Competition Prosecutor General. For each opened investigation file, a team composed of Investigation and Prosecution Service personnel members is designated and placed under the direction of a competition prosecutor, who looks after the day-to-day management of the investigation.

The BCA personnel members are authorised to conduct inspections, with the prior authorisation of an examining magistrate. As part of their mission, they can access the premises of the undertakings, their transport means and other locations in which they have reason to believe that relevant information may be found. When necessary, they can also access the homes of the directors of undertakings and other persons. Moreover, they can question the undertaking's personnel regarding facts or documents relating to the purpose of the mission order.

Settlement

During an investigation, but before filing the draft decision, the Investigation and Prosecution Service can ask the parties if they wish to initiate discussions for the purposes of reaching a settlement (i.e., an agreed settlement). If the answer is positive, the Investigation and Prosecution Service identifies the agreed grievances and allows the parties to access the material evidence used for this purpose. The Investigation and Prosecution Service also indicates the maximum and minimum fines that it plans to propose to the Competition College.

In order to reach a settlement, the undertaking or association of undertakings must acknowledge its participation in the infringement, admit its responsibility and accept the indicated penalty. The Investigation and Prosecution Service may then reduce the fine by

10%.

The Investigation and Prosecution Service's settlement is equivalent to a decision by the Competition College (Article IV.57 CEL).

Decision of the Competition College

Once the investigation is concluded (except in case of a settlement), the competition prosecutor files a draft decision with the Competition College. He also sends a copy to the undertakings and natural persons whose activity has been investigated. When they have had access to the file, the parties have two months in which to submit their observations.

The President then organises a hearing within no less than one month and no more than two calendar months.

During the hearing, the Competition College hears the competition prosecutor and the undertakings and natural persons whose activities have been investigated, as well as from the complainant, if the latter wishes to be heard. At their request, the Competition College also hears the Minister for the Economy, the Chief Economist and the General Counsel.

Except in certain specific cases, the Competition College can find:

- that there is a restrictive competitive practice, and then order its cessation; this decision may include fines and/or periodic penalty payments [insert link];
- that there is no restrictive competitive practice;
- in view of the commitments offered by the parties, decide to make these commitments mandatory. In this case, the College does not express itself on the existence of an offence, and the decision implies no damaging admission on the part of the undertaking concerned.

Fines and periodic penalty payments

The Competition College can impose fines and periodic penalty payments.

For infringements under Article IV.1 CEL, fines can be imposed on the undertakings, of up to 10% of their turnover.

When undertakings do not comply with the prohibition decisions or the decisions adopted within the framework of interim measures, periodic penalty payments can be imposed on them of up to 5% of their average daily turnover.

For infringements under Article IV.1, §4 CEL, fines of between EUR 100 and EUR 10,000 can be imposed on natural persons.

When undertakings do not cooperate in the investigation of a case or a sector investigation, fines can be imposed on them of up to 1% of their turnover.

Periodic penalty payments can also be imposed as part of a procedure for interim measures.

Appeals

The undertakings in question, the complainant and the Minister as well as any person justifying an interest (and who has asked the Competition College to be heard) can lodge an appeal against a decision by the Competition College within 30 days as of the notification of the decision in question. However, the undertakings in question cannot lodge an appeal against the Investigation and Prosecution Service's settlement decision.

In principle, an appeal does not suspend the appealed decisions; however, in certain circumstances, the MC may suspend all or part of the Competition College's decision.

2.3.

Abuse of a dominant position

Abuse of a dominant position is prohibited by Article IV.2 of the CEL and by Article 102 TFEU. In compliance with case law, it is not illegal for an undertaking to occupy a dominant position, and an undertaking can participate in open competition on the basis of its merits within the market in which it holds a dominant position. However, it is incumbent upon this undertaking to ensure that this behaviour does not serve to undermine effective and fair competition within this market.

The prohibition of the abuse of a dominant position is an essential component of competition policy, and its effective application enables markets to operate better, for the benefit of undertakings and consumers.

The European Commission's guidelines lay out the principles underpinning the assessment of exclusionary conduct practices by dominant companies. However, these guidelines do not deal with the abusive exploitation practices of undertakings in dominant positions that are also prohibited by Article IV.2 CEL and by Article 102 TFEU.

Request for interim measures

Undertakings whose interests have been harmed can ask the Competition College to apply interim measures that would suspend such practices, if it is urgent to it is urgent to prevent serious, imminent and difficult to overcome damages to the applicant undertakings or if the practices in question are not in the general economic interest (Art. IV.64, §1 CEL).

Requests for interim measures can be submitted to the President by the complainant, the Investigation and Prosecution Service, the Minister or the competent Minister depending on the sector in question. At the same time, the complainant must also submit a complaint on the merits to the Investigation and Prosecution Service for the same facts.

The President decides on the composition of the Competition College that will examine the case and sets a hearing within a period of one calendar month after the request for interim measures has been filed (the time limit can be extended by up to two weeks).

The Competition Prosecutor General submits any written observations at the latest six business days before the hearing date.

During the hearing, the Competition College hears the applicant and the defendant. At their request, it also hears the Competition Prosecutor General or the competition prosecutor delegated by the latter, the Chief Economist and the General Counsel.

The Competition College issues a ruling in a well-founded decision within one calendar month after the hearing. The time limit can be extended by up to two weeks. In the absence of a decision within the time limits, the request for interim measures is deemed to have been rejected.

Investigation and decision - Investigation and inspections

The Competition Prosecutor General initiates investigation files while taking into consideration the priorities of the Authority (in French), after having consulted from the Chief Economist.

Within the BCA, investigations are carried out by the Investigation and Prosecution Service, under the direction of the Competition Prosecutor General. For each opened investigation file, a team composed of Investigation and Prosecution Service personnel members is designated and placed under the direction of a competition prosecutor, who looks after the day-to-day management of the investigation.

The BCA personnel members are authorised to perform inspections, with the prior authorisation of an examining magistrate. As part of their mission, they can access the

premises of the undertakings, their transport means and other locations in which they have reason to believe that relevant information may be found. When necessary, they can also access the homes of the directors of undertakings and other persons. Moreover, they can question the undertaking's personnel regarding facts or documents relating to the purpose of the mission order.

The guidelines describe the inspection procedures in greater detail.

Settlement

During an investigation (but before filing the draft decision), the Investigation and Prosecution Service can ask the parties if they wish to initiate discussions for the purposes of reaching a settlement (i.e., an agreed settlement). If the answer is positive, the Investigation and Prosecution Service identifies the agreed grievances and allows the parties to access the material evidence used for this purpose. The Investigation and Prosecution Service also indicates the maximum and minimum fines that it plans to propose to the Competition College.

In order to reach a settlement, the undertaking or association of undertakings must acknowledge its participation in the infringement, admit its responsibility and accept the indicated penalty. The Investigation and Prosecution Service may then reduce the fine by 10%.

The Investigation and Prosecution Service's settlement is equivalent to a decision by the Competition College (Article IV.57 CEL).

Decision of the Competition College

Once the investigation is concluded (except in case of a settlement), the competition prosecutor files a draft decision with the Competition College. He also sends a copy to the undertakings and natural persons whose activity has been investigated. When they have had access to the file, the parties have two months in which to submit their observations.

The Competition College then organises a hearing within no less than one month and no more than two calendar months.

During the hearing, the Competition College hears from the competition prosecutor and the undertakings and natural persons whose activities have been investigated, as well as from the complainant, if the latter wishes to be heard. At their request, the Competition College also hears the Minister for the Economy, the Chief Economist and the General Counsel.

Except in certain specific cases, the Competition College can find:

- that there is a restrictive competitive practice, and then order its cessation; this decision may include fines and/or periodic penalty payments [insert link];
- that there is no restrictive competitive practice;
- in view of the commitments offered by the parties, decide to make these commitments mandatory. In this case, the College does not express itself on the existence of an infringement, and the decision implies no damaging admission on the part of the undertaking concerned.

Fines and periodic penalty payments

The Competition College can impose fines and periodic penalty payments.

For the infringements under Article IV.1 CEL, fines can be imposed on the companies, of up to 10% of their turnover.

When undertakings do not comply with the prohibition decisions or the decisions adopted within the framework of interim measures, periodic penalty payments can be imposed on

them of up to 5% of their average daily turnover.

For the infringements under Article IV.1, §4 CEL, fines of between EUR 100 and EUR 10,000 can be imposed on natural persons.

When undertakings do not cooperate in the investigation of a case or a sector investigation, fines can be imposed on them of up to 1% of their turnover.

Periodic penalty payments can also be imposed as part of a procedure for interim measures.

Appeals

The undertakings in question, the complainant and the Minister as well as any person justifying an interest (and who has asked the Competition College to be heard) can lodge an appeal against a decision by the Competition College within 30 days as of the notification of the decision in question. However, the undertakings in question cannot lodge an appeal against the Investigation and Prosecution Service's settlement decision.

In principle, an appeal does not suspend the appealed decisions. However, in certain circumstances, the MC may suspend all or part of the Competition College's decision.

2.4.

Mergers :

Concentrations with a Belgian dimension

Concentrations between undertakings (commonly referred to as "mergers") can have many industrial or commercial objectives such as extending into new markets, which can be beneficial to consumers and to the economy. For example, by combining their activities, undertakings can develop new products or reduce their production or distribution costs, which can improve the operation of the market to the benefit of consumers.

However, certain mergers can impede the operation of the market, in particular by creating or strengthening a dominant actor. In these cases, such mergers could lead to higher prices as well as reduced choices or innovation.

As such, any merger of a certain scope in terms of turnover (see below) requires the prior approval of the BCA and, in certain cases, of the European Commission.

A "merger" within the meaning of CEL IV refers to an operation that results in a lasting change of control of an undertaking, in other words, the possibility of exercising decisive influence over its activity. A merger can in particular occur when two independent undertakings decide to integrate, when one undertaking or one person having control of an undertaking purchases another undertaking or part of its activities (acquisition), or when two undertakings create a lasting common undertaking between them (joint venture).

It is only necessary to notify the BCA of mergers that meet the following turnover thresholds as laid out in IV.7 CEL:

- undertakings with a total turnover in Belgium of more than EUR 100 million; and
- at least two of the undertakings each generate a turnover in Belgium of at least EUR 40 million.

Concentrations with a European dimension

Large-scale operations generally have effects that extend beyond national borders. In such cases, they require an examination by the European Commission. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings defines under which conditions a merger is said to have a European dimension. There are two options:

The first requires:

(i) a combined worldwide turnover of the undertakings concerned of more than EUR 5,000 million

(ii) a turnover of more than EUR 250 million within the European Union for at least two of the undertakings concerned.

The second requires:

(i) a combined worldwide turnover of the undertakings concerned of more than EUR 2,500 million

(ii) a combined turnover of the undertakings concerned of more than EUR 100 million in at least three Member States

(iii) a turnover of more than EUR 25 million for at least two of the undertakings concerned in each of the three Member States referred to in point (ii), and

(iv) a turnover of more than EUR 100 million within the European Union for at least two of the undertakings concerned.

Nevertheless, mergers reaching these thresholds do not have to be declared to the European Commission if each of the undertakings concerned generates more than two thirds of its total European Union turnover within a single Member State.

Mergers subject to investigation by the European Commission do not require to be investigated by the BCA. However, under certain conditions, the Commission may refer a merger that had been submitted to it to the BCA. One of these conditions is the fact that the merger could appreciably affect competition within the Belgian market.

Concentration notifications

The Competition Prosecutor General must be informed of mergers by means of the form appended to the royal decree relative to the notification of corporate mergers, indicated in Article IV.10 CEL. Undertakings must declare the merger after the signing of the agreement or of the draft agreement, and before the merger comes into effect. The undertakings cannot carry out the merger operation until the BCA has cleared the merger. However, in certain cases, the President can grant an exemption to this prohibition (Art. IV.10, §§5 and 7 to 8 CEL).

For the practical provisions of the notification, prior contact with the BCA secretariat is recommended. Until the BCA adopts specific guidelines, the European Commission's Best Practices Guidelines on merger control are applied by analogy.

Like the European Commission, the BCA strives to make the best possible use of the time prior to the actual notification, and it invites the notifying parties to contact the Investigation and Prosecution Service before announcing the merger. The contacts during the pre-notification period are intended to informally help the notifying parties to ensure that the notification form has been duly filled in prior to being submitted, in the absence of which the strict time limits for investigation of a merger cannot begin. During these initial exchanges, any competition problems (damage theories) can be flagged and discussions can be started with regard to the information to be provided by the notifying parties for examination purposes.

Investigation and decision - Simplified procedure

In view of their nature or of the small market shares of the undertakings concerned, certain mergers are unlikely to raise competition problems. The notifying parties can then request the application of the simplified procedure (Art. IV. 63 § 1 CEL):

- If the competition prosecutor finds that the application conditions for the simplified procedure have been met, he provides the notifying parties with a decision indicating the clearance of the merger within 15 business days. The Competition College accepts this decision as a clearance decision.
- If the application conditions for the simplified procedure are not met or if there are serious doubts regarding the clearance of the merger, the competition prosecutor sends a decision to the notifying parties within 15 business days, which terminates the simplified procedure.

First phase of the procedure

The first phase begins when the Competition Prosecutor General receives the notification, provided that it is complete. The competition prosecutor defines the markets concerned and examines the merger's likely effects on them. To this end, he can request information from the notifying parties and can also send information requests to competitors, customers and suppliers.

In his analysis, the competition prosecutor in particular considers the need to protect effective competition within the relevant markets, to uphold the choice possibilities of suppliers and users, and to protect the interests of consumers.

Within 25 business days after the notification, the competition prosecutor files a draft decision with the Competition College. This time limit can be extended by five business days if commitments are offered in response to the concerns expressed in the competition prosecutor's letter that informs the notifying parties of his opinion that the proposed merger would significantly impede competition within the Belgian market.

Decision

The Competition College hears the parties during a hearing, and adopts a decision within 40 business days after acceptance of the notification. This time limit is extended by 15 business days if the undertakings submit commitments in an effort to ensure the clearance of the merger (Art. IV.61, §2 CEL). It can also be extended at the request of the parties (Art. IV.61, §3 CEL).

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.

When necessary, the undertakings can offer commitments in order for the merger to be authorised. These commitments consist of the conditions that the undertakings undertake to respect in order to ensure that the operation will have no harmful effects on competition.

However, if there are serious doubts as to the merger's eligibility, the Competition College can decide to launch an additional investigation procedure (also known as the "second phase").

Second phase procedure and decision

When there are serious doubts as to the merger's eligibility, the Competition College can decide to launch the so-called second phase procedure. In this case, the competition prosecutor performs an additional investigation and provides the Competition College with a reviewed draft decision within a time limit of 30 business days (after the decision to launch the second phase procedure).

At the latest 20 business days after the start of the procedure (i.e. the second phase), the

notifying undertakings can submit commitments in order to obtain an eligibility decision. When this is the case, the procedure is extended at the request of the notifying parties and for the duration that they propose, but no more than 20 business days.

The Competition College issues its decision within a time limit of 60 business days after its decision to launch a second phase. When the parties propose commitments, the procedure is extended by a maximum of 20 business days.

At the end of the second phase, the Competition College issues one of the following decisions:

- the merger is eligible without conditions;
- the merger is eligible, but with conditions or requirements guaranteeing that the undertakings concerned will respect the commitments offered by them; or
- the merger is not eligible.

Fines and periodic penalty payments

The Competition College can also impose the following fines and periodic penalty payments (Art. IV. 70 ff CEL):

fines amounting to 10% of the turnover for undertakings that proceed with the merger before it has been deemed truly eligible; or that do not adhere to prohibition decisions or to conditional clearance decisions;

- 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;
- fines of up to 1% of the turnover for undertakings that do not declare a merger that falls within the scope of Book IV CEL;
- fines of up to 1% of the turnover for persons, undertakings or associations of undertakings that do not collaborate within the framework of an investigation.

Appeals

The undertakings concerned, the Minister and third parties justifying an interest (and that have asked to be heard by the Competition College) can appeal the decisions of the Competition College – including tacit clearance decisions resulting from the expiry of the time limits – before the MC of Brussels. This appeal must be filed within 30 days of the notification of the appealed decision.

2.5.

Competition and price evolutions

In 2013, the Belgian Competition Authority received additional powers with regard to competition and price evolution. This competence is described in Book V CEL. The prices of goods and services applied by undertakings are determined by open competition, except for the prices of medicinal and similar products, which are defined in Article V.9 CEL.

Book V of the CEL establishes a system within which: the Price Monitoring Authority analyses prices and margins, on its own initiative or at the Minister's request, in order to identify any structural problems within the market, and when this is the case, the Competition College has the power to issue decisions for interim measures as required.

Thus, a referral is made to the Competition College when the Price Monitoring Authority submits its report identifying a problem with prices or margins, an abnormal price evolution or a structural problem within a market. During its hearing, the Competition College hears from the Price Monitoring Authority, the concerned parties mentioned in the latter's report, and in the absence of such report, the organisations represented within the Central

Economic Council and that represent the sector in question.

When the Competition College decides on interim measures, these will apply for up to six months. The Competition College informs the Minister of such measures, who within six months presents to the government a plan including a structural change of the operation of the market within the sector in question.

3. The jurisdiction of the Market Court on appeals against decisions of the BCA decisions according to the Code of Economic Law :

3.1.

The question is ruled by the CEL, in article IV.79.

I first try to give a translation of the content of that text [i].

> *"BOOK IV — Protection of competition ; Title 2. Competition law enforcement ; Chapter 3. Appeals.*
>
> *Art. IV.79. §1. Against the decisions of the Competition College referred to in articles IV.47, IV.48, IV.50, IV.61 §1,1° and 2°,and §2,1°and 2°, IV.62 § 6,IV.63 §3 and IV.64 as well as tacit decisions on the admissibility of a concentration by allowing the terms, referred to in articles IV.61 and IV.62, to expire and the tacit rejection of a request of interim measures by allowing the term, referred to in article IV.64, to expire ,is further appeal only possible before the Market Court.*
>
> *The decisions of the College of Competition Prosecutors concerning the use of data in an investigation obtained by an inspection referred to in art. IV 41 § 3 fourth clause can be subject of appeal at the Brussels' Court of Appeal after communication of the grievances referred to art. 42 § 4 and art. IV 59 first clause as far as these data are used to prove the grievances.*
>
> *Against other decisions of the Competition College, the College of Competition Prosecutors or a competition prosecutor, appeal is only possible which is provided for by the book, without prejudice to the possibility to employ every means in an appeal procedure before the Market Court, referred to in this paragraph.*
>
> *§ 2. The Market Court decides, as in summary proceedings on both points of law and fact, on the case such as submitted by the parties.*
>
> *The Market Court decides, except for the cases referred to in the third clause, with full jurisdiction including the power to substitute the contested decision by his own decision.*
>
> *In cases regarding the admissibility of concentrations or the by the Competition College imposed conditions or obligations, and in cases in*

which the Court, contrary to the contested decision, finds an infringement of articles 101 or 102 TFEU, the Court will only rule on the contested decision, with the power of annulment.

The appeal does not suspend the contested decisions.

The Market Court may, on request of the interested party and by decision before judgment is given, suspend entirely or partially the execution of the court decision to the day judgment is rendered.

The suspension of the execution can only be ordered when serious means are called upon which can justify the annulment of the contested decision and on condition that the immediate execution of the decision could have serious consequences for the party concerned.

The Market Court may, when the occasion arises, order that the paid amount of the fines is reimbursed to the party concerned.

§ 3. The appeals may be lodged against the Belgian Competition Authority by the interested parties before the Market Court, as well as by any other person demonstrating a valid interest in accordance with article IV. 45,§ 5, or article IV.60, § 2, and having asked the Competition College to be heard. The appeal may also be lodged by the minister, who shall not however have to justify an interest or having had to be represented before the Competition College.

§ 4. Appeals must be lodged, under penalty of being automatically void, in the form of a signed application lodged with the registry of the Brussels Court of Appeal within 30 days after notification of the contested decision.

Under penalty of being automatically void, the application shall contain:

> *1° the day, month and year;*
> *2° if the applicant is a natural person, his surname, given names, profession and domicile, and, if applicable, his or her company number; if the applicant is a legal person, its name, legal form, registered address and the capacity of the person or body that represents it, and, if applicable, its enterprise number; if the appeal is lodged by the minister, the name and address of the service which represents him;*
> *3° the decision against which the appeal is lodged;*
> *4° a list of the names, capacity and address of the parties to whom the decision was notified ;*
> *5° a presentation of the grounds for the appeal;*
> *6° the place, date and time of the hearing fixed by the registry of the Market Court;*
> *7° the signature of the applicant or that of the applicant's lawyer.*

Within five days of lodging the application, the applicant must, under

penalty of the appeal being automatically void, send a copy of the application by recorded delivery to the secretariat of the College of Competition Prosecutors, informing the President and the competition prosecutor general , as well as the parties to whom the disputed decision has been notified, evidenced by the notification letter and to the minister if the latter is not the applicant.

§ 5. A counter appeal may be lodged. It is only admissible if it lodged within one month after receipt of the letter referred to in the previous clause. However, the counter appeal shall be inadmissible if the main appeal is declared void or is not lodged within the prescribed time.

The Brussels Court of Appeal may at any time at its own initiative call to the case the persons that were parties before the Competition College when there is a risk that the main appeal or the counter appeal may affect their rights or obligations. The Court may ask the Belgian Competition Authority to communicate the procedural file and other documents which were deposited at the Competition College.

The minister may file his written observations to the registry of the Brussels Court of Appeal and consult the file there. The Brussels Court of Appeal shall fix the deadlines for submitting these observations. The registry shall inform the parties of their content.

§ 6. When a decision imposing a fine is not annulled, interest is due from the date of the contested decision.

The concerned decisions in Art. IV.79 are the following:

Art. *IV.47. The Competition College may, after the procedure referred to in article IV. 45 concerning a complaint, a request or an investigation at its own initiative declare , by reasoned decision, that according to the elements in its possession, there are no grounds for acting.*

Art. IV.48. After the procedure referred to in article IV.45 the Competition College, may come to the conclusion by reasoned decision :

1° that an anti-competitive practice exists and order it to cease, if applicable, in accordance with the conditions the Competition College may stipulate;

2° that no anti-competitive practice exists, provided that it does not affect trade between Member States of the European Community;

3° that article IV.4, clause 2, or a royal decree within the meaning of articles IV.4, clause 3 and IV.5 does not apply in an individual case, where the anti-competitive practice in question produces effects that are incompatible with article IV.1, § 3;

4° that a regulation within the meaning of article IV.4, clause 1, does not apply in an individual case, where the anti-competitive

practice produces effects incompatible with article 101, paragraph 3, of the TFEU, in the national territory or part of it, which has all the characteristics of a separate geographic market.

Art. IV.50. If the agreement, decision or concerted practice which has been investigated is the subject of a regulation of the Council of the European Union or the European Commission declaring article 101 , paragraph 1, of the EC Treaty inapplicable or of a royal decree within the meaning of article IV.5, the Competition College shall record that fact and issue a decision to dismiss the case.

Art. IV.61. § 1. The Competition College hearing the case shall rule, by way of a reasoned decision:

1° either that the concentration falls within the scope of application of this book;

2° or that the concentration does not fall within the scope of application of this book.

§ 2. If the concentration falls within the scope of application of this act, the competent Competition College shall adopt one of the following reasoned decisions:

1° either it may decide that the concentration is permissible.

It may make its decision subject to conditions and/or obligations intended to ensure that the undertakings concerned respect the commitments that they have presented for the concentration to be declared permissible. When the competent Competition College wishes to take into consideration conditions and/or obligations that are not discussed in the report,(draft of decision) the undertakings concerned and the competition prosecutor shall be heard on this point and shall have at least two working days to communicate

their views in this regard. The notifying parties may modify the conditions of the concentration, up to the time when the Competition College hearing the case has taken its decision. In such a case, the permissibility decision shall relate to the modified concentration;

2° or it declares the concentration permissible when the undertakings concerned do not control together more than 25% of any relevant market for the transaction, whether it concerns horizontal or vertical relationships;

Art. IV.62. § 6. The Competition College 's decision on the admissibility of the concentration shall be taken within 60 working days after the

decision to initiate the procedure, if applicable extended in accordance with paragraph 2. Its decisions may be made subject to conditions and/or obligations, with a view to ensuring that the undertakings concerned respect the commitments presented by them in order for the concentration to be declared permissible. When the Competition College hearing the case wishes to take into consideration conditions and/or obligations that are not discussed in the draft decision, the undertakings concerned and the competition prosecutor shall be heard on this point and shall have at least two working days to express their views in this regard. The concentration shall be deemed to be approved when the Competition College has not taken its decision within the time limit of 60 working days, extended if applicable in accordance with paragraph 2, where the undertakings concerned present commitments in accordance with paragraph 2.

The time-limit may only be extended at the express request of the parties, and for a period that may not exceed that proposed by the parties. The Competition College hearing the case shall in any event grant an extension of 20 working days, as well as a new hearing at the request of the notifying parties in order to allow them to present new commitments. The King may, after consulting the Belgian Competition Authority, modify the time-limit referred to in clause 1.

Art. IV.63. § 3. When the competition prosecutor reaches the conclusion that the conditions for the application of the simplified procedure are satisfied and that there are no objections to the notified concentration, he shall record that in a letter to be sent to the notifying parties. The competition prosecutor shall transmit at the same time a copy of that letter to the secretariat of the Belgian Competition Authority for publication.

Art. IV.64. § 1. The Competition College may, in accordance with the conditions specified in this article, adopt interim measures intended to suspend the anti-competitive practices under investigation, if there is an urgent need to avoid a situation likely to cause serious, imminent and irreparable damage to undertakings whose interests are affected by such practices or likely to harm the general economic interest.

§ 2. Reasoned requests for interim measures may, together with the related documents, be submitted to the president by the complainant ,the College of Competition Prosecutors, the minister or the minister with responsibility for the sector concerned. Without delay the president will constitute the Competition College that will rule on the request and submits to the College the request. Under penalty of nullity the applicant

transmits on the same day as the deposition, by registered letter or e-mail with receipt-note, a copy of his request and the supplementary documents to the undertakings or associations of undertakings against which it has been requested to adopt interim measures .The secretariat transmits to the competition prosecutor general, a copy of this request and the supplementary documents if he is not the applicant. It transmits also a copy of the documents to the competition prosecutor general, and if necessary to the minister when he is the applicant.

§ 3. The president or the assessor vice-president or assessor, who he delegates, fix the date of a hearing which shall take place within a calendar month after depositing the request where upon the applicants and the competition prosecutor general or a competition prosecutor by him designated can be heard. The secretariat informs the applicants, the undertakings or association of undertakings against which it has been requested to adopt interim measures, the competition prosecutor general and the minister of the decision. The competition prosecutor general must submit written observations not later than six working days before the day of the hearing. The parties need to dispose of a time limit of five working days before the hearing, to inspect the documents and the submitted observations, except for the extracts of which, the president of the Competition College or the assessor vice-president or assessor who he delegates, the confidentiality with regard to them is accepted. According to art. IV 31 written remarks must be deposited at the secretariat, which are send on to the president and the competition prosecutor general. The party who submits remarks must send a copy by recorded delivery letter or e-mail to all other parties concerned.

§ 4. The terms referred to in § 3 and § 6 can only be extended with maximum two weeks. If these terms are extended to allow the applicants to answer to the written observations of other parties, the other parties need to dispose , as the applicants, of an equal period of time to reply.

§ 5. The parties who submit documents may indicate which extracts they consider confidential provided it is well-reasoned and they submit a nonconfidential summary. The president of the Competition College or the assessor vice-president or assessor whom he delegates rules on the confidentiality of extracts and this decision is not open to separate appeal.

§ 6. After the hearing the Competition College decides by reasoned decision within a term of one calendar month referred to in paragraph 3, if there is reason to adopt interim measures. In the absence of such a decision within this term , the request to adopt interim measurers deems to be rejected .

The decision of the Competition College cannot be based on documents of which the undertakings, against whom it had been requested to

adopt interim measures, had no knowledge of."

3.2.

On the question, *"does the review equally regard the ascertainment of the infringement and the remedies/sanctions imposed",* the answer is positive.

Art. IV.79 § 2 CEL states that the MC decides, ***as in summary proceedings on both points of law and fact, on the case such as submitted by the parties***.

By specifying that the Court shall decide on both points, facts and law, it is clear that the Court can verify and decide - completely independent of the decision - whether or not an infringement has been committed.

This principle is lead down in the power of the MC to decide "***with full jurisdiction including the power to substitute the contested decision by his own decision***".

In the cases, where the MC has full jurisdiction with the power to substitute his decision, it's clear that the MC can modify the remedies as well as the eventual sanctions.

The MC may, when the occasion arises, order that the paid amount of the fines is reimbursed to the party concerned.

It's only in cases regarding the admissibility of concentrations or the by the Competition College imposed conditions or obligations, and in cases in which the Court, contrary to the contested decision, finds an infringement of articles 101 or 102 TFEU, that the Court will only rule on the contested decision, with the power of annulment.

In the case of annulment of a decision, the BCA has to make a completely new decision and to that end, the BCA has to reconsider all the facts. Due to a verdict of the MC of August 7, 2018 the BCA shall have to take the 'new' decision "in another composition of members". This decision of the MC aims to ensure as much as possible the impartiality and independence. In fact the Court wants to avoid that the BCA seeks to rectify the same decision by adjusting the disputed motives by 'new' motives to confirm the previous decision. Of course, after an annulment, the BCA can take a new identical final decision but in any case the MC wants that this new decision is considered and decided by other members of the BCA.

In the cases where the MC has restrained power to annulment, the MC cannot reconsider the facts in that eventuality but the MC should investigate whether the qualification that the BCA gives to the facts are legally justified

(which means that the facts taken into consideration by the BCA can lead to the decision; this can be compared to the task of the Court of Cassation to ensure the correct application of the law by the courts and tribunals, and thereby in the long run to maintain legal certainty).

In these cases the MC shall not decide whether the decision of the BCA is in fact good or bad, but only whether the decision is legal or not. By doing that exercise the MC will verify if the facts, as they are defined by the BCA, may leas on legal grounds to the decision that was taken. If the answer is negative then the MC will proceed to annulment with the result that the BCA will have to reconsider again the facts and the BCA shall have to give a legal interpretation and application of the facts.

When the facts cannot legally justify the decision the MC can annul the decision for the motive that the qualification of the facts doesn't justify the decision.

3.3.

The question, "*can the MC adopt a different measure/sanction from the one imposed by the ABC or review the measure of a fine*" gets also a positive answer for the same reasons.

The key issue is the ***full jurisdiction including the power to substitute the contested and annulled decision by his own decision***.

As mentioned before (point 2.4) there might be a semblance of contradiction between the full jurisdiction for a court of the judiciary in matters concerning decisions of the Executive power. Does it mean that the judiciary stays above the Executive power in the pyramid of constitutional basics ? I will not give a response to this constitutional question but I can only say that, due to different verdicts of the Belgian Supreme Court, the judiciary has the power and jurisdiction to condemn the Belgian State to pay damages for fault liability of the legislative authority, for fault liability of the Executive and for fault liability of the judiciary itself.

3.4.

Is the Court bound by the EU principles of proportionality when doing so and, e.g., reviewing the scope of an injunctive measure or a fine? Once more, the answer is positive.

The CEL don't give a direct answer on that question. It's in fact the general principle of the hierarchy of the Belgian supranational and national law that gives the answer.

All the Belgian Courts and tribunals, including the MC have to adopt the supranational laws *sensu lato*.

Yet in 1971, the Supreme Court stated (in the also called "Franco-Suisse Le Ski verdict" [i]) that a treaty with direct applicability (self-executing Treaty) in the internal Belgian legal order takes precedence over the laws of the Belgian Parliament and also on the Constitution, even when these laws are more recent than the date that the Treaty has been approved.

When there should be any conflict between the national law and the supranational law, it's the supranational law that has to be applied.

The Belgian Supreme Court (Court of Cassation) will check concordance with the standards in the legal hierarchy.

PRELIMINARY RULING :

Let's not forget the Chapter 2 of Book IV CEL

Text goes as follows:

> *"Preliminary rulings sought from the Court of Cassation and interventions as amicus curiae*
>
> *Art. IV.75.*
>
> *The Court of Cassation shall give preliminary rulings on questions relating to the interpretation of the provisions of book.*
>
> *Art. IV.76.*
>
> *§ 1. When the resolution of a dispute depends on the interpretation of this book, the court to which the dispute is referred, may defer its decision and ask the Court of Cassation for a preliminary ruling.*
>
> [……]
>
> *The court's decision on whether or not to seek a preliminary ruling is not appealable.*
>
> *§ 2.* [….]
>
> *§ 3. The latter may each ask to be heard and consult the file of the proceedings at the registry, without removing it, or request that a copy be sent to them.*
>
> *The Court may rephrase the preliminary question.*
>
> *The Court shall give a reasoned decision.*
>
> *The Court shall rule on these requests with priority on all other cases.*
>
> *§ 4. The jurisdiction which requested a preliminary ruling, as well as any other jurisdiction called upon to rule on the same case, shall be required, in order to resolve the dispute, for which the preliminary ruling was sought, to comply with the ruling given by the Court of Cassation.*

Art. IV.77.

The Belgian Competition Authority may on its own initiative or at request of the court hearing the case, submit written observations within the time limits determined by the court, concerning the application of the articles IV.1 and IV.2 or of the articles 101 and 102 of the Treaty of the Functioning of the European Union.

She can also submit oral observations with the permission of the court hearing the case.

Only in order to prepare their observations, the Belgian Competition Authority may request the court hearing the case to send or to forward all documents necessary to evaluate the case.

When the Belgian Competition Authority submits observations the other parties must get the opportunity to respond to these observations.

Art. IV.78.

Any judgement or ruling given by the courts relating to cases concerning the legitimate nature of a competition practice within the meaning of this book, shall be notified to the Belgian Competition Authority and, if the judgement or ruling concerns the application of European competition act, to the European Commission within eight days at the request of the registrar of the competent jurisdiction.

[….] ”

According to Article 267 of the TFEU [i] :

“*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the

European Union shall act with the minimum of delay."

We can conclude that although the MC shall apply spontaneously the European rules - including the principles laid down by the jurisprudence of the Court of Justice - the MC can always, in case of any doubt as to the correct interpretation, ask ***a preliminary ruling of the Court of Justice***.

To give an example, the Brussels Court of Appeal (in a matter where the Court has still jurisdiction although the MC should have jurisdiction) has pronounced verdicts on October 25, 2017 annulling several decisions of a Regulator on the ground that the Regulator had failed, when taking the decisions, to adequately take into account the recommendations of the European Commission.

The Court considered:

> "*The main argument for the cable operators was : art, 7.7 Framework Directive (2002/21/EC as amended 2009/140/EC): "The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities, BEREC and the Commission and may, except in cases covered by paragraphs 4 and 5(a), adopt the resulting draft measure and, where it does so, shall communicate it to the Commission".*
>
> *The same principles are lead down in art. 19.2 paragraph 2: "Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission, giving the reasons for its position."*
>
> *In its decision the CRC had either to follow the comments of the European Commission, either had to motivate any deviation thereof in detail. The comments of the European Commission can be compared to a non-binding opinion which the regulator may differ but within that case the duty – to give an adequate motivation – is more severe.*
>
> *The Commission had a lot of remarks in a letter of November 7, 2013. In the decision, the CRC didn't add additional justifications. It's exactly this failure to reply to the questions of the Commission via justifying reasons and motifs, that violates the duty and the obligation to give a formal and material motivation for every decision.*
>
> *It's not up to the Court to control if the final decision is economically correct or not, the control by the Court is what we call a marginal control which means that the Court has to verify if all the legal forms and conditions have been respected.*
>
> *Every administrative act must be based on reasons that are correct in fact and in law. Without taking a factual decision instead of the CRC the Court considered that by non-answering to the non-binding opinion of*

the European Commission, the decision is not properly motivated. The Commission commented that (i) the grounds invoked by the CRC to use the costs of a particular operator were insufficient and that (ii) the CRC cannot handle so without doing any research or analysis."

3.5.

According to the general principles of the Belgian Code of civil procedure one need *to prove that one has the required capacity and interest to set up the proceedings* (Code civil procedure, articles 17 and 18).

The Code of civil procedure does not define the concept of capacity. One can argue that one must be holder of the material claims whose securement is claimed. There must be a substantial link between the party and the disputed substantive law.

The interest is each material or moral advantage that who set a claim or a defence who, at the time of the introduction before the Court, would expect and which can modify and improve his current legal situation.

According to the Supreme Court, the party to proceedings who is holding the ownership of a subjective right, even if it is in dispute, has the requested interest and capacity to make the claim; the investigation of the existence or the scope of the claimed subjective right doesn't concern the admissibility but the merits of the claim [i].

Normally, a regular appeal (as second degree instance) can only be introduced by a party that was in that capacity a party in the procedure before the first judge and that has the required interest to submit the (same) case (for the second time) to the appeal jurisdiction.

According to the CEL there is a slightly different definition. The appeals before the MC may be lodged ***by the interested parties*** (defined as therefore) "***as well as by any other person demonstrating a valid interest in accordance with article IV. 45,§ 5, or article IV.60, § 2, and having asked the Competition College to be heard***."

The text of these articles is as follows:

"*Art. IV.45 § 5 : "§ 5. The Competition College hearing the case shall hear each case in court. It shall hear the competition prosecutor, as well as the undertakings and natural persons whose activity has been investigated, as well as the complainant, at the latter's request.*

When the Competition College considers it necessary, it shall hear any natural or legal person.

The request of any natural or legal person, who can demonstrate a sufficient interest, to be heard, shall be accepted. In the economic sectors

placed under the control or supervision of a public body or another specific public institution, the said bodies or institutions shall be considered to have a sufficient interest. In all cases, the minister and the chief economist and the general counsel shall be considered to have a sufficient interest.

The validity of the proceedings shall not be affected by the non-appearance of the parties summonsed or their representatives."

Art. IV.60 § 2 : "§ 2. The Competition College hearing the case shall hear the undertakings that are parties to the concentration. These undertakings shall submit their written observations, if any, no later than the day before the hearing, with a copy to the competition prosecutor.

They may not add additional documents which were not submitted during the previous investigation, except if it is a proof of a fact or an answer to grievances of which they have not yet been informed.

When it considers it necessary, the Competition College hearing the case shall hear any natural or legal person that it summons.

It shall also hear third parties that can demonstrate a sufficient interest. In the economic sectors placed under the control or supervision of a public body or another specific public institution, these bodies or institutions shall be deemed to have a sufficient interest. In all cases the chief economist and the general counsel shall be deemed to have a sufficient interest.

The members of the supervisory or executive bodies of the undertakings participating in the concentration, as well as the representatives of the most representative employee organisation of those undertakings, or those that they designate, shall be deemed to have a sufficient interest.

The validity of the procedure shall not be affected by the non-appearance of the parties summonsed or their representatives."

So, any natural or legal person, who can demonstrate a sufficient interest, to be heard, shall be accepted. In the economic sectors, placed under the control or supervision of a public body or another specific public institution, the said bodies or institutions shall be considered to have a sufficient interest.

In all cases, the Minister, the chief economist and the general counsel shall be considered to have a sufficient interest.

The appeal may also be lodged by the Minister, who shall not however have to justify an interest or having had to be represented before the Competition College.

When a consumer-association can prove in cases concerning infringements of EU law in financial markets or other regulated markets (telecom, electricity, gas. etc.) that it has *a sufficient interest, to be heard*, it might have legally enough interest to introduce an appeal. The condition of "capacity" is not requested for the appeals before the MC.

In combination with the Code of civil procedure, one could consider that a consumer-association – especially concerning infringements of EU law in financial markets or other regulated markets - has the legally requested interest to protect a material or moral advantage according to his purpose of existing, with the consequence that such organisation could successfully introduce an appeal before the MC. Until now there is no precedent.

3.6.

Another interesting theme is to know to what extent an appeal before the MC is open to the litigant, taking into account article 47 CFREU.

According to that article :

> "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*"

Of course, the MC can obviously not intervene with regard to the right to be advised, represented or defended, neither to the organisation of legal aid, but as showed before, the MC guarantees the right for any natural or legal person to an effective remedy taking care to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

As far as I know there are no specific verdicts of the MC concerning the question of application of article 47 CFREU.

Let's not forget that the MC is operational only since January 2017. There are a lot of verdicts concerning Regulators (telecom and energy) but there are only a few decisions concerning competition law.

According to my (strict) personal opinion, article 47 CFREU guarantees that everyone "*has the right to an effective remedy*" which means that one has *the right to ask* the Court to apply this effective remedy but that does not mean

that the Court should have to apply this effective remedy *ex officio*.

According to the Belgian rules of civil procedure, questions of protection of subjective rights are not applied *ex officio* by the MC. These rights belong to the sphere of the subjective rights of moral or physical persons.

It's up to the concerned person to ask before the court, that his (by law) protected rights, should effectively (by verdict) be respected and protected.

I tend to give the same answer on the application of article 49 CFREU where the article states "*the severity of penalties must not be disproportionate to the criminal offence*". It's not the task of the MC to take any initiative by herself (*ex officio*). An initiative of the MC is moreover legally (under the national law) not admitted.

The MC has the jurisdiction (= "*can*") - on the basis of the principle of proportionality – to ***adapt the penalty/fine*** in accordance with the above mentioned article 49 -, but again, only, when the applicant claims explicitly such a reduction.

We have a verdict of March 1, 2017, where the MC considered that the administrative sanction (administrative fine) adopted by the FSMA against as well companies as individuals (organs of the companies) was appropriate, taking account of all the various circumstances, included the good faith on the part of the organs of the companies.

> The Financial Services and Markets Authority (FSMA) can impose administrative measures (e.g. warning, order, penalty) or an administrative sanction (monetary fine) on providers who fail to comply with the Regulation. In this regard, the FSMA points to a recent sanction for a provider of derivatives. For example there are sanction in case of any misuse of inside information.

In other words, the principle of proportionality will be applied by the MC as far as the applicant request it explicitly and when the applicant convincingly argues why there must be passed to the moderation of the fine.

In contrast to consumer law, an appeal before the MC can hardly be seen as a matter in which an economically weak party needs "help" to get justice in such a way that an *ex officio* protection of the rights of the applicant would be requested. The applicants before the MC are generally strong - even very strong - trade companies who are in a position to stand up for their rights (without any *ex officio* helping hand of the judiciary).

End of September 2018, the MC had a case where the claimant introduced an appeal before the MC demanding the annulment of a decision of a regulator, at the same time the claimant introduced a claim before the

tribunal of the European Union demanding the annulment of a decision of the European Commission during the preliminary procedure. The defendants argued that first of all we should wait for the decision of the tribunal of the EU because, when the preliminary procedure as followed by the European Commission has not been followed correctly, the decision of the regulator – based on the EC decision – shall be illegal and has to be annulled by the MC.

On October 3, 2018, the MC pronounced an intermediate decision inviting the parties to take position on the question whether by waiting for a few years to have the European decision, art. 47 CFREU in combination with the national law, saying that the MC should take decisions as in summary procedures (which means in a time-lapse of almost 4 months), is infringed or not. According to the MC the answer might be positive. In other words: when the law provides that the MC should take decisions "*as in summary proceedings*" (*id est* within three months from the date of introduction of the case before the Court)" and the Court has to wait until the European judiciary pronounced a verdict concerning the regularity of the administrative procedure preceding the contested decision, it might be so that by the working of the European rule that the Court has to wait, the right of the plaintiff to have a Court's decision within three months (= article 47 CFREU) might be infringed. If so, the MC might pronounce a second intermediate verdict (in December, after hearing the two parties) to avoid that plaintiff and defendant would lead damage following the long wait.

3.8.

The MC is independent. The judges are members of the judiciary. They are recruited through a presentation by the High Council of Justice. To become a judge one has to pass the special exam for judges and after that he has to be presented by 2/3 of the members of the Commission of nomination in the High Council of Justice. The specialists in the MC shall be presented by the High Council of Justice after proving that they have a particular experience during 15 years in economic, financial or market law. The legislator wishes thus to attract specialists who either come out of practice, either from the academic world.

Until now there are no specialist recruited, the proceedings for the first nomination of specialist is going on [i].

3.9.

It's the intention of the Government to set up a *Brussels International Business Court* to establish judgements in English. This Court will be composed partly by "ordinary judges", partly by specialists recruited from

the academic world or the specialised Bar-associations.

According to the project of the Bill that is lead down for approval in the Parliament in autumn, this Court will deliver judgments in one single instance about claims in the field of economic, commercial and market law.

It will be no arbitration tribunal, but an effective court which is part of the judicial system and which guarantees the independence and impartiality of the judges.

The professional judges will be recruited from the judges at the courts and tribunals.

4. Conclusions ?

I personally think that, although the MC has a particular place in the Belgian judiciary pyramid, this Court respects all the principles of the European supranational and international legislations (EU treaties, Regulations, Directives, …. and ECHR).

As said before (point 1) the advantage of the MC - although in most cases, the procedure and the powers are little different from the common law rules of the civil procedure – is that it's a part of the judiciary presenting the guarantees of independence required by the Belgian constitution (Art. 151).

The special power of *full jurisdiction* is applied with great circumspection. The MC is apprehensive of the narrow border between the Executive and the Judiciary and tries not to exceed this limit. By way of example: in 2017 the Court annulled a decision made by a regulator in 2013. Because the annulment *ex tunc* risked to have an inappropriate economic impact, the Court, making use of the *full jurisdiction*, provided that the decision was indeed annulled but that the consequences, by way of derogation from the common law, would not work *ex tunc* but on the contrary *ex nunc*. In other words, so far, the full jurisdiction has not been used to replace an economic decision of an administrative authority which is competent to do so according to the law, but on the contrary the MC used the full jurisdiction as a weapon to restore righteousness when this righteousness seems to be not respected due to the way the rules have been practised by the administrative authority.

Looking to the future, I would hope that, instead of remaining a section of the court of appeal, the MC could become (eventually with the BIBC) a separate court with distinct procedural rules so that the MC can achieve its goals on economic, financial and market area, that it can be able to act quickly and effectively in order to ensure compliance with the basic principles of law and, in particular, on respect for the basic principles of the EU law.

It would be extremely interesting that the EU should try :

(1) to make an intern network of all the Courts dealing with these competences in the different Member States and
(2) to ensure that there could be effective interaction and that an effective exchange of judgments between national courts of the Member States would be made possible (for example by creating a database in which all national judges who decide in last instance, post the copy of the decision with a brief summary in English and mentioning the digital data of the judge or court in such a way that another judge in another Member State can contact his colleague to get more information).

* * * * * *