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### Reform of the Belgian Competition Act

The Belgian Parliament recently enacted two acts which will replace the current Belgian Competition Act. It is expected that the two new acts will enter into force on 1 October 2006.

The current Belgian Competition Act dates back to 1991 and has been completely redrafted in 1999. The new reform implements a policy decision of the Federal Government to strengthen the Belgian competition authority, and to give it the means to vigorously enforce competition law within the Belgian context.

Most of the changes are institutional and procedural. The substantive changes essentially adapt Belgian competition law to the recent evolutions at the EU level.

The most important changes are discussed below.

#### *Institutional changes*

The most important changes relate to the Competition Council itself, and are the subject matter of a specific act.

The structure of the Belgian competition authorities has always been dualistic, with a clear distinction between the authority in charge of the investigating (the Competition Service, which since 1999 is instructed by the “Corps of Rapporteurs”) and the decision-making body (the Competition Council). This dualistic structure is a response to criticism often voiced against monolithically structured competition authorities, which combine the powers of investigation and decision-making. However, a dualistic structure is by definition more complex. Experience also shows that for a variety of reasons, the Belgian model did not operate optimally.

The new acts maintain the dualistic structure. However, an important change is that the current “Corps of Rapporteurs”, in the future designated as the “Public Advocate’s Office” or “Auditeurs’ Office” (“Auditoraat/Auditorat”), will become a division of the Competition Council. This transfer should raise the profile of the Auditeur’s Office and provide additional guarantees for an independent investigation.

The Competition Council *stricto sensu* will consist of 12 members, 6 of whom will act on a full-time basis. Currently, the Competition Council consists of 20 members, with only 4 full-time members. In principle, the Competition Council will handle cases in chambers consisting of 3 members. Another novelty is that it will no longer be required that a minimum number of Competition Council members, including the President and the Vice-President, be judges.

The Competition Council will be composed anew. All applicant-members will have to take an exam and demonstrate useful experience. All members will be appointed for a six-year period. The President and the Vice-President must be respectively Dutch and French native speakers (or vice-versa), and will alternate functions after 3 years.

The Auditeur’s Office will consist of 6 to 10 members and will have important powers in the new organisational structure. In addition to the current investigation tasks, the Auditeur’s Office will also be empowered to e.g. dismiss complaints and decide on the confidential nature of the data submitted by the parties. These decisions will be subject to appeal to the Competition Council.

The new acts do not eliminate all possible sources of conflict between the Competition Council and the Competition Service. For instance, the head of the Competition Service will chair the meetings which will define the priorities of the competition policy and the sequence of files to be handled. Since the Competition Service is part of the Ministry of Economic Affairs and acting under the authority of the Minister of Economic Affairs, this feature may introduce a political element in the

debate. In the same vein, the Competition Service will represent Belgium in the international and European competition networks. On the other hand, the Competition Council is defined as an administrative court, but is evidently more than a court and will also be a policy-defining body. Consequently, also in the future, the various bodies will have to operate in a sophisticated checks and balances system.

## *Substantive changes*

The substantive changes are essentially a consequence of recent EU competition law changes which are now also introduced into the Belgian legal sphere.

For instance, as far as restrictive agreements are concerned, there will no longer be a notification procedure. The exception of the Belgian equivalent of Article 81(3) of the EC Treaty will be available without a prior notification. The new act also states that all notifications which have not yet been handled by the Competition Council will lapse as from the entry into force of the new act.

In the area of merger control, the substantive test is adapted to the current test in the EC Merger Control Regulation. As a result, the substantial lessening of competition test will also apply in Belgium.

Furthermore, the leniency program and the simplified concentration control procedure will now have a basis in the Competition Act.

The thresholds triggering the notification of a concentration have been adapted earlier in 2005, and remain unchanged. Concentrations must be notified when the aggregate Belgian turnover of the parties exceeds 100 million EUR and the Belgian turnover of each of at least 2 of the parties concerned is at least 40 million EUR.

## *Procedural changes*

The new acts introduce an important number of procedural changes. The list below contains the most important changes.

- The time-limit to file merger control notifications has been abolished. In the case of the acquisition of sole control, only the undertaking acquiring control will be under an obligation to make a filing.
- In principle, concentrations falling under the notification obligation will be subject to suspension. A special regime will apply to stock exchange operations.
- The time-limits for the review of notified concentrations will change: the principle is that first-phase decisions will have to be rendered within a period of 40 working days. An additional time-limit of 60 working days applies in case of a second-phase procedure. Additional time-limits may apply, e.g. in case commitments are offered. The time-limits are longer than the current time-limits, and less predictable as a result of the various options to prolong or suspend the time-limits.
- The procedure to handle commitments in the context of merger control cases is at last spelled out in the Competition Act. Likewise with the EU level, the Competition Council will also be entitled to close restrictive practices cases on the basis of commitments, which it will make binding.
- The maximum amounts for fines for procedural infringements and periodic penalty payments will be expressed as a percentage of the turnover of the undertakings concerned.
- In cases still to be defined, the Competition Council will act as the appellate body against decisions of sector regulators, e.g. in the energy

or telecommunications sector. These decisions of the Competition Council will be subject to review by the Belgian Supreme Court ("Hof van Cassatie/Cour de Cassation").

- As a general rule, the decisions of the Competition Council and its President remain subject to appeal to the Court of Appeals of Brussels. The new act clarifies a number of issues with regard to the appeals procedure.
- The preliminary ruling procedure is maintained; however, preliminary rulings will be issued by the Belgian Supreme Court ("Hof van Cassatie/Cour de Cassation"). The Competition Council will equally have the option to request a preliminary ruling from the Supreme Court.

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