

THE MERGER
CONTROL
REVIEW

TWELFTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 28 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties’ turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on ‘killer acquisitions’ (i.e., acquisitions by a dominant company of a nascent competitor),

particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions (see discussion of *Google/Fitbit* in the Japan chapter), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has recently adopted the potentially most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. Two recent referrals should provide significant guidance regarding the impact of this new referral process.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from

notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US\$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to ‘stop the clock’ on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality. The United States is one significant outlier with no bar for

subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto control) rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority

holdings and concerns over ‘creeping acquisitions’, in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has ‘material influence’ (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an ‘acquisition’ subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the ‘International Merger Remedies’ chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that ‘structural’ remedies are preferable to ‘behavioural’ conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, Japan, the Netherlands, Norway, South Africa, Ukraine, Vietnam and the United States). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada’s decision in the *Loblaw/Shoppers* transaction, China’s MOFCOM remedy in *Glencore/Xstrata* and France’s decision in the *Numericable/SFR* transaction).

We are at a potentially transformational point in competition policy enforcement. This book should, however, provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz

New York

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Part II

JURISDICTIONS

BELGIUM

Carmen Verdonck and Nina Methens¹

I INTRODUCTION

The entry into force of Book IV of the Code of Economic Law² on 6 September 2013 introduced some fundamental changes to Belgian competition law.

One of the main innovations was the simplification of the structure of the Belgian Competition Authority (BCA). The BCA's former tripartite structure was changed into a single administrative authority that investigates and decides upon competition law infringements. Within this newly created administrative body, a distinction was made between the College of Competition Prosecutors (headed by the Prosecutor-General), which holds the BCA's investigative powers, and the Competition College, which holds the BCA's decision-making powers.³ The Competition College consists of two assessors (appointed in alphabetical order from the relevant (native Dutch or French-speaking) list of 20 nominated assessors) and the President of the BCA, who presides over the Competition College.⁴ In merger control cases, the Competition College will decide whether to authorise a concentration in regular proceedings, whereas the Prosecutor will, in the first instance, decide whether to authorise mergers filed under the simplified merger procedure.

A pre-merger notification and approval for all concentrations above the legally established thresholds is required. Concentrations must be notified to the BCA where the undertakings concerned, taken together, have a total turnover in Belgium of more than €100 million, and where at least two of the undertakings concerned each have a turnover of at least €40 million in Belgium.⁵

In addition to Book IV of the Code of Economic Law, there are a large number of royal decrees regulating various aspects of merger control in Belgium.⁶ The Belgian merger control

1 Carmen Verdonck is a partner and Nina Methens is an associate at ALTIUS.

2 Code of Economic Law of 28 February 2013, Belgian Official Gazette 29 March 2013.

3 Despite the Competition College formally holding the BCA's decision-making powers, Book IV of the Code of Economic Law also grants certain decision-making powers to the College of Competition Prosecutors (for example, within the framework of the simplified merger procedure).

4 Articles IV.16, Code of Economic Law.

5 Article IV.7, Section 1, Code of Economic Law. In May 2017, the BCA launched a consultation of stakeholders on the thresholds for notification and an assessment of whether they should be changed, but it was decided not to change the thresholds.

6 The most important royal decrees are the Royal Decree of 30 August 2013 on procedures with regard to the Protection of Economic Competition, Belgian Official Gazette 6 September 2013; and the Royal Decree of 30 August 2013 on the Notification of Concentrations of Undertakings in Accordance with Article IV.10 of the Code of Economic Law as inserted by the Acts of 3 April 2013, Belgian Official Gazette, 9 September 2013.

rules and case law are substantially influenced by European merger control rules and case law. The Belgian courts and the BCA have repeatedly stated that Belgian competition law should be interpreted in light of the European courts' jurisprudence and the decisions and guidelines of the European Commission, to which reference is often made.

Finally, on 25 April 2019, a legislative proposal was adopted to amend Belgian competition law. The two most notable changes concern the introduction of a stop-the-clock mechanism⁷ as well as a calculation of fines based on the worldwide annual turnover of the infringing party. The amendments came into effect on 3 June 2019.

II YEAR IN REVIEW

i General

In 2005, the notification thresholds were substantially increased, and in 2006, a simplified procedure was formally introduced into Belgian competition law. These changes resulted in a significant decrease in the number of notifications and a substantial increase in the number of mergers filed under the simplified procedure. In 2008 and 2009, the number of concentrations further declined as a consequence of the financial and economic crisis. From 2010, the number of notifications increased again. In 2020, 30 final decisions were issued. Out of these final decisions, 25 were issued under the simplified procedure and five under the non-simplified procedure. Two of the notified concentrations required a Phase II investigation in 2020. However, only one of those cases was effectively investigated in Phase II proceedings; the other case⁸ was withdrawn after the opening of Phase II. It is expected that the proportion of merger proceedings following the simplified procedure will continue to further increase because, on 8 January 2020, the BCA adopted new rules allowing the BCA prosecutors to use the simplified procedure for a number of additional categories of concentrations.

Concentrations	Number of notifications	Number of final decisions	Number of non-simplified procedures
2003	59	61	29
2004	54	54	13
2005	17	15	7
2006	17	15	7
2007	20	20	1
2008	13	15	4
2009	7	7	2
2010	19	16	3
2011	20	20	3
2012	17	17	4
2013	25	23	2
2014	16	18	2

7 This mechanism allows the Prosecutor to extend a given deadline to give parties more time to provide information or offer commitments. Such decision suspends the term within which the Prosecutor must render his or her decision proposal as well as the final term in which the College shall take its decision. Article IV.40 Section 1, Code of Economic Law.

8 Decision No. ABC-2020-C/C-02 of 15 January 2020 in Case No. CONC-C/C-19/0037, *Dossche Mills SA/Ceres SA*.

Concentrations	Number of notifications	Number of final decisions	Number of non-simplified procedures
2015	30	29	5
2016	26	26	5
2017	30	29	10
2018	36	36	9
2019	33	30	8
2020	27	30	5

Given that the decisions in simplified procedures are generally only a page long and only include the parties' names, the markets in which they operate and the Prosecutor's confirmation that the conditions for the simplified procedure were fulfilled, these decisions do not provide any guidance on procedural issues or substantive matters. Therefore, only the decisions taken in regular procedures or the Court of Appeal's judgments are discussed here.

ii Cases

Groupe Maurin/Groep Jam NV

On 5 February 2020, the BCA's Competition College approved the acquisition by which Groupe Maurin, through its wholly owned subsidiary Société SAAEM Belgium SA, acquired 100 per cent of the shares in Groep JAM NV.⁹ The two groups are active in Belgium in the retail of new and second-hand cars and trucks (mainly the Mercedes brand). In line with its decisions in the automotive sector over the past few years, the BCA's Prosecutor defined the following product markets:

- a* the local inter-brand market for the retail sale of new passenger cars;
- b* the local inter-brand market for the retail sale of new light commercial vehicles (LCVs);
- c* the local inter-brand market for the retail sale of new medium-heavy trucks;
- d* the local inter-brand market for the retail sale of new heavy trucks;
- e* the local and national inter-brand markets for the retail sale of used passenger cars and LCVs;
- f* the local brand-specific market for the maintenance and repair of Mercedes passenger cars;
- g* the local brand-specific market for the maintenance and repair of Mercedes LCVs;
- h* the local brand-specific market for the maintenance and repair of Mercedes medium and heavy trucks;
- i* the local inter-brand market for the body repair of Mercedes passenger cars and LCVs;
- j* the local inter-brand market for the body repair of medium and heavy trucks;
- k* the national brand-specific market for over-the-counter (OTC) sales of Mercedes spare parts for passenger cars and LCVs; and
- l* the national brand-specific market for OTC sales of Mercedes spare parts for medium and heavy trucks.

⁹ Decision No. ABC-2020-C/C-05 of 5 February 2020 in Case No. CONC-C/C-19/0042, *Groupe Maurin/Groep JAM*.

The Prosecutor defined the local markets as the catchment area around each garage in which that garage generates 80 per cent of its turnover and used a proxy at national or provincial level to better comprehend the local market shares. The Prosecutor defined two horizontally affected markets: (1) the local market for repair and maintenance services for Mercedes cars and LCVs in the catchment areas of the following garages: JM&K (Dilsen-Stokkem), Garage Modern (Bree), Hermans (Hasselt), C&Z Sint-Truiden, C&Z Tienen, C&Z Tongeren and ETC (Sint-Truiden); and (2) the local market for the repair and maintenance services for Mercedes medium and heavy trucks in the catchment areas of the following garages: ETC (Sint-Truiden), Hermans (Hasselt), Hermod (Lommel) and Garage Modern (Bree). However, the competitive assessment of the potential non-coordinated effects that the concentration may entail showed that the transaction would not cause a significant restriction of competition. In particular, the Prosecutor found that despite the parties' sometimes high market shares in the local markets, customers would still have credible alternatives to choose between different garages post-transaction, given the competitive pressure that both authorised Mercedes repairers and independent repairers would exert on Groupe Maurin, both on prices and on the quality of service provided by Groupe Maurin's garages, and both inside and outside the defined local markets. The Competition College approved this reasoning and declared the concentration admissible.

Kinopolis Group SA

On 11 February 2020, the Kinopolis saga finally came to an end.¹⁰ The Competition College approved Kinopolis' request to lift the restriction on organic growth imposed on it in 1997: from 12 August 2021, Kinopolis will be free to operate new cinemas without prior approval. The BCA's decision concerns the termination of the organic growth restriction on the Kinopolis Group in the Belgian market. Kinopolis was previously not allowed to set up new single- or multi-screen cinema complexes in Belgium without the BCA's prior approval. This restriction was imposed by the Competition Council in 1997 as part of its approval of the merger between the Bert and Claeys groups, which resulted in the creation of the Kinopolis Group. The restriction on organic growth had already been adjusted as a result of a ruling by the Brussels Court of Appeal in 2010 and was the subject of subsequent decisions by the BCA and rulings by the Market Court. By a judgment of 23 October 2019, the Market Court had finally ordered the BCA to establish a transitional period for the termination of the fourth organic growth condition, 'which is proportionate, appropriate and effective taking into account the considerations made by the Market Court and the BCA's own policy discretion, the exercise of which involves a balancing of economic and social data'. The BCA considered the imposition of a behavioural condition on a merging party to constitute a significant restriction of market freedom that should preferably not last long, particularly given the existence of laws to abuse by a dominant party. A competition authority cannot be expected to maintain or create local cinema monopolies by prohibiting one market player from growing organically. Market operators should be required to withstand competition as long as it is conducted fairly and without abuse of a dominant position. However, according to the Competition College, the purpose of a restriction for a transitional period may be to

10 Decision No. BMA-2020-C/C-08 of 11 February 2020 in Case No. MEDE-C/C-17/0014, Application by Kinopolis Group SA for the annulment of the conditions imposed by the Competition Council in Decision No. 97-C/C-25 of 17 November 1997, as amended by the judgment of the Brussels Court of Appeal of 11 March 2010 in Case No. 2008/MR/22-23-24 and as updated by Kinopolis on 28 January 2019.

support competitors of Kinopolis that (1) have taken the initiative to enter into competition or are better able to do so but (2) whose projects have not yet reached a stage where there is sufficient certainty that they will actually be implemented. By helping these still fledgling projects to reach that stage of greater certainty of implementation, without restricting the possible arrival of an organically growing player any more than necessary, the Competition College seeks to promote free competition, which presupposes freedom of choice, variety in supply and a sufficiently large number of efficient players on the market. Competitors have known since the publication of the Market Court's ruling on the BCA's website on 7 November 2019 that only one more transitional period would be applied before Kinopolis would be able to grow organically. Moreover, the BCA only wishes to protect projects that had already started and made minimal progress at the time of the Market Court's ruling. As an appropriate, effective and proportionate transitional period, the BCA has fixed a period of 18 months, which expires on 11 August 2021. Thereafter, Kinopolis will be free to start operating new single- or multi-screen cinema complexes in Belgium without the BCA's prior approval.

Kuwait Petroleum (Belgium) SA/Uhoda SA

On 13 February 2020, the Competition College approved the acquisition of the companies U Car Services Sprl and VP Oil SA, through Financière Saint Paul, Uhoda SA and M Stephan Uhoda by Kuwait Petroleum Belgium SA (Q8).¹¹ The target companies operate a network of 74 fuel stations in Belgium, under various brands such as Esso, Shell, Texaco, Total and Q8. The Prosecutor defined the following product markets: (1) the market for the wholesale¹² or 'off-grid'¹³ sale of fuel, and (2) the market for the retail sale of fuel through fuel stations. Regarding the geographic market definition, the Prosecutor assessed the parties' market shares both at national and local level. When delineating the local markets, the Prosecutor departed from its standard methodology¹⁴ and considered that the local markets could be comprehended using a concentric circle with a driving time of 10 minutes (and an alternative of 15 minutes) around each fuel station. This followed from the observation that many players monitor the prices of competing fuel stations within five to 10 minutes of their own fuel station. Although the parties' combined market shares in 65 local markets would exceed 25 per cent post-transaction, the Prosecutor decided to analyse only the local markets in which the parties' combined market shares would exceed 40 per cent, namely 18 catchment areas in the Liège region. For the other affected local markets, the Prosecutor argued that the offer of competing fuel stations would remain abundant, and that the concentration would therefore not significantly impede competition in these markets. In the 18 affected local markets, the Prosecutor carried out a detailed assessment of the impact of the concentration and came to the conclusion that the transaction would not cause a significant

11 Decision No. ABC-2020-C/C-09 of 12 February 2020 in Case No. CONC-C/C-19/0044, *Kuwait Petroleum (Belgium) NV/Uhoda*.

12 Wholesale sales include sales to three categories of customers: (1) independent retailers (operators of unbranded petrol stations, such as hypermarkets); (2) other independent resellers; and (3) companies and other consumer establishments (e.g., hospitals, car rental companies, factories).

13 The 'off-grid' market is the market in which fuel is supplied to retailers (such as supermarkets and hypermarkets) that are not integrated upstream and to large end-users (transport companies).

14 Instead of defining the local market as 'the catchment area around each shop, based on the area where that shop generates 80% of its sales', the Prosecutor based its assessment on the decision-making practice of the UK Competition and Markets Authority.

restriction of competition in these markets either. During its assessment, the Prosecutor took a slightly wider local market into account: where issues remained after the in-depth analysis of the affected catchment areas, the Prosecutor extended the area by an additional five minutes of driving time, and verified the impact in terms of the actors present. He concluded that in some areas, the addition of just one minute of extra driving time substantially increased the number of competing players present. Moreover, in those local markets where the parties' combined market shares would exceed 40 per cent post-transaction, the Prosecutor took into account that there would still be a presence of aggressive rivals competing on price. Despite the characteristics of the market for the retail sale of fuel through stations (standardisation of the product, transparency in the prices charged), which could favour coordinated effects, the Competition College argued that these effects would remain localised and that it would therefore be unlikely that coordinated price effects would significantly impede effective competition in the Belgian market or in a substantial part of it. Based on the foregoing, the Competition College declared the concentration admissible.

Holding Groep Delorge BV/Groep Coox

On 9 November 2020, the BCA's Competition College authorised, with remedies, the acquisition by Holding Groep Delorge BV (Groep Automotive & Mobility Invest NV (A&M Invest)) of Coox Gregor Management BV & Coox Jocher Management BV (Coox).¹⁵ This is the only case in 2020 in which the BCA identified a competition issue that needed to be addressed through remedies, following a Phase II investigation. A&M Invest is the holding company of Holding Groep Delorge BV (Delorge), which is the business unit of the Volkswagen group. The parties to this concentration are, for the most part, active as authorised dealers in the retail of cars and light commercial vehicles (LCVs) as well as in the general maintenance service and repair of cars and LCVs of the Audi, Seat, Skoda and Volkswagen brands. The proposed concentration is framed in the context of a reduction by D'Ieteren¹⁶ of the number of authorised dealers for the Volkswagen, Audi, Skoda and Seat brands from 171 to 27 dealers. Therefore, D'Ieteren intervened as an interested third party in this transaction. Delorge would become the exclusive D'Ieteren concessionaire for the province of Limburg and, in that context, would take over the Coox garages. The investigation concerned the impact of the concentration on local markets for the maintenance and repair of these brands. In its Phase I decision of 15 June 2020,¹⁷ the BCA concluded that the concentration would significantly impede effective competition on the relevant local brand-specific markets for maintenance and repair of passenger cars and LCVs in the catchment areas of the following garages: Delorge Hasselt, Delorge Automotive (Hasselt), Delorge Lommel, Delorge Overpelt, Delorge Bilzen, Garage Willems (Maaseikerbaan, Genk), Garage Willems (André Dumontlaan, Genk), Coox Motors (Rekem Lanaken), Coox Motors (Dilsem-Stokkem) and Garage Jaspers (Bree). The

15 Decision No. BMA-2020-C/C-35 of 9 November 2020 in Case No. MEDE-C/C-19/0049, *Holding Groep Delorge BV (Groep Automotive & Mobility Invest NV)/Coox Gregor Management BV & Coox Jocher Management BV (Groep Coox)*.

16 D'Ieteren is the national importer of Volkswagen brands in Belgium and operates a selective distribution network of which Delorge and Coox are part. D'Ieteren reduced the number of Volkswagen, Audi, Skoda and Seat authorised dealers, which impacted Delorge and Coox's position in Limburg.

17 Decision No. BMA-2020-C/C-20 of 15 June 2020 in Case No. MEDE-C/C-19/0049, *Holding Groep Delorge BV (Groep Automotive & Mobility Invest NV)/Coox Gregor Management BV & Coox Jocher Management BV (Groep Coox)*.

Competition College cited several ‘serious doubts’ that would indicate the necessity of a Phase II investigation of the case. The main concern was that post-transaction there would be only one group of authorised Volkswagen/Audi dealers in the province of Limburg, next to a highly fragmented supply of independent garages. This would restrict consumer choice and fallback options. Nevertheless, the Competition College had already raised the question of the counterfactual at that point in time: taking into account that before the concentration, Delorge and Coox were part of D’Ieteren’s selective distribution network, to what extent is there real competition between authorised distributors, even without the transaction, in light of the fact that they all meet the same quality requirements as imposed by the importer and usually apply the recommended prices set by the importer for their services? On this point and following the Prosecutor’s Phase II investigation, the Competition College found that (1) there was virtually no price competition between the authorised D’Ieteren distributors that apply the standard recommended prices for maintenance and repairs, and (2) the way in which a garage must be equipped, and services must be provided, is determined in detail in the agreements with D’Ieteren. In view of these points, the College noted that, before the concentration, competition only existed within parameters such as location, quality and capacity, and future price developments. In other words, authorised distributors only compete on quality criteria that depend on the policy of the groups affected by the merger, and that are not determined by the importer or dependent on the personnel of the various garages in those groups. While the Prosecutor believed only structural commitments could properly address the competitive issues linked to these three points (location, quality and capacity, and future price developments), the Competition College found that none of these three points were decisive in finding that the concentration would have an anticompetitive effect on the Belgian market or a substantial part of it, and thus accepted a number of behavioural commitments. These commitments require Delorge to maintain a status quo for a period of three years on a number of competition parameters, principally opening hours, holidays and replacement vehicles. This case broke the Belgian record for length of pre-notification, taking one and a half years, after which the file was processed in Phase II. The total duration from the start of the pre-notification to the final decision was no less than two years and four months. Finally, this is the first case in which a data room procedure was set up during Phase II to organise the parties’ access to confidential information pertaining to third parties such as competitors.

IPM/EDA-LAH

On 22 December 2020, the BCA’s Competition College approved the acquisition of the press activities of Editions de l’Avenir SA (EDA) and of the company L’Avenir Hebdo SA (LAH) by IPM Group SA (IPM).¹⁸ IPM is a diversified group, active in media, internet (in particular, real estate websites), travel and sports betting. With this concentration, IPM aims to achieve minimum business volumes and profitability thresholds to cope with the transformative pressures facing the newspaper industry in the digital age. In the media field, IPM is the publisher of the daily newspapers *La Libre* and *DH/Les Sports* and the weekly magazines *Paris Match Belgique* and *Courrier International*. The merger concerns the daily newspaper *L’Avenir*, the weekly *Le Journal des Enfants* and the weekly magazines *Moustique* and *Télé Pocket*, as well as the related advertising activities and websites. The relevant markets

18 Decision No. ABC-2020/C/C-41 of 22 December 2020 in Case No. CONC-C/C-20/0031, *IPM/EDA-LAH*.

concerned by this concentration are the press markets, namely the readers markets, the advertising sales markets and the printing markets. The Prosecutor identified the following affected markets: (1) the national market for the French-language daily paid press, including the online version, but excluding business dailies (financial and economic); (2) the national market for non-specialised French-language weekly paid press, including the online version; (3) the national market for national themed advertising in French-language dailies; and (4) the regional market for regional themed advertising in the French-language dailies in Brussels and Luxembourg. The Prosecutor found that the concentration would lead to a duopoly in the newspaper markets in the French-speaking region – between Rossel, on the one hand, and IPM, on the other. Both would have similar market shares, both would have more similar news titles than before the transaction, and the markets are relatively transparent. It is interesting to note that in this case, before the Prosecutor even submitted its proposal decision to the Competition College, the parties unilaterally and spontaneously offered to maintain, post-transaction, a number of independent services and editorials linked to the daily newspaper *l'Avenir* for a period of at least five years.¹⁹ Taking this informal commitment into account, the Prosecutor concluded that the concentration would not entail non-coordinated effects. However, this is the only case during 2020 in which the Prosecutor made a detailed analysis of the potential coordinated effects. Considering that the press markets are two-sided markets,²⁰ the Prosecutor nevertheless found that there were a number of elements that made coordinated effects less likely. In the readers market, the Prosecutor identified increasing differentiation of the product range, market instability due to declining print readership and technological developments. In the advertising market, also, the Prosecutor argued that it is unlikely that players will agree on advertising rates due to the large differences between advertised and actual prices. Based on these considerations, the Competition College followed the Prosecutor's findings and declared the concentration admissible.

III THE MERGER CONTROL REGIME

As mentioned in Section I, concentrations must be notified in Belgium if the undertakings concerned, taken together, have a total turnover of more than €100 million in Belgium,²¹ and if at least two of the undertakings concerned each have a turnover of at least €40 million in Belgium, unless the concentration has a 'Community dimension'²² and thus must be notified to the European Commission. The relevant turnover is the consolidated sales turnover in Belgium during the preceding financial year. On the seller's side, only the Belgian turnover

19 In particular, the parties committed to *l'Avenir* continuing to be produced by a dedicated editorial team, including the following roles and services: an editor-in-chief and deputy editors; local newsrooms, each headed by a manager, covering all aspects of society in their region (politics, culture, news); a general and political information service with a manager; a culture department; and a web publishing service.

20 Two-sided markets are composed of two different groups of consumers who will exchange and transact through a platform, a firm that simultaneously offers different services to these two types of customers. In the press market, advertisers' demand for advertising space depends on the number of newspaper readers and their characteristics; however, reader demand can be positively or negatively influenced by the number of advertisements.

21 Article IV.7, Section 1, Code of Economic Law.

22 Article IV.11, Code of Economic Law.

generated by the target company (or companies) (or sold business) should be taken into account.²³ The parties must obtain approval for the proposed concentration before it can be implemented.²⁴

In 2006, the ‘significant impediment to effective competition’ test was introduced in Belgian competition law as the substantive test for clearance, aligning it with the EU Merger Regulation. A particular feature of the Belgian merger control system is that if the post-merger joint market share of the parties in any relevant horizontal or vertical market does not exceed 25 per cent, then the transaction must be approved by the Competition College.²⁵

The first step in the notification procedure usually consists of pre-notification contacts with the BCA, in particular with the Prosecutor. The Code of Economic Law does not oblige the parties to make pre-notification contacts, but it is highly recommended²⁶ and has become standard practice. It is also not uncommon for the BCA to request the parties’ consent to start its investigation and send out requests for information to third parties during the pre-notification stage. In principle, a formal notification may only be submitted after the informal approval of the Prosecutor-General has been obtained in the context of such pre-notification contacts. These contacts can take place via telephone or email, or in face-to-face meetings. The discussions usually take place based on a draft notification. These contacts have several purposes, including the following.

- a* The parties and the Prosecutor can discuss a number of essential points (such as whether the concentration must be notified, whether the simplified procedure could be used and what information must be provided).
- b* A reduction in the risk of the Prosecutor finding the notification to be incomplete (which has a significant impact on the notification’s timing).
- c* The Prosecutor can, at the parties’ request, exempt the notifying parties from providing certain information,²⁷ which can make the notification less onerous.
- d* They allow the parties to understand the Prosecutor’s point of view on, for example, the market definition, and to more accurately estimate whether Phase I clearance is likely to be granted.

For the notification itself, the parties must use the CONC C/C form.²⁸ By completing this form, the parties provide a wide range of information on, among other things, the concentration, the parties, their economic activities, the relevant markets and the effects of the concentration on the relevant markets. The information provided must be correct and

23 Article IV.8, Code of Economic Law.

24 Article IV.10, Section 4, Code of Economic Law.

25 Article IV.66, Section 2(2), Code of Economic Law.

26 The Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 recommend contacting the College of Competition Prosecutors at least two weeks before notification (see Section III.i). These Rules also remain applicable after the entry into force of Book IV of the Code of Economic Law and have been complemented by additional rules adding further categories of concentrations that can be dealt with under the simplified procedure from 8 January 2020.

27 Article 5, Section 4, Royal Decree on the notification of concentrations.

28 Annexed to the Royal Decree on the notification of concentrations. For the simplified procedure, form CONC C/C-V/S is used, which is annexed to the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.

complete,²⁹ otherwise the notification cannot have any effect.³⁰ In general, the notification obligation falls on the party acquiring control through the concentration.³¹ In the case of a merger between two formerly independent companies, the obligation falls on both parties.³² The concentration must be notified after the agreement's conclusion and before its implementation. Nevertheless, the parties can notify a draft agreement if they declare that it will not significantly differ from the proposed agreement on all relevant points from a competition law perspective.³³

The notification must be made in Dutch or in French.³⁴ The documents attached to the notification must be filed in their original language. If that language is not Dutch, French or English, a translation into the notification language must be added.³⁵ The notification, including its annexes, must be sent to the BCA for the attention of the Prosecutor-General in three copies, either by registered post or by courier with acknowledgment of receipt, using the address indicated on the BCA website. At the same time, an electronic copy of the notification and its annexes must be sent by email to the Secretariat of the BCA for the attention of the Prosecutor-General, using the email address indicated on the BCA website.³⁶

As is the case in European merger control, the parties must suspend the implementation of the merger until it has been cleared.³⁷ Failure to respect this standstill obligation can result in fines of up to 10 per cent of the notifying parties' annual turnover.³⁸ While the Code of Economic Law of 2013 took into account only the Belgian turnover for the calculation of the fine, the new law provides that the maximum fines will now be capped at 10 per cent of the worldwide turnover of the infringing undertaking.³⁹

In exceptional circumstances, the President can permit the parties to implement the merger before it has been approved, but this exemption must, in principle, always be requested before the merger's implementation.⁴⁰ If incorrect or incomplete information is

29 Article 4, Section 1, Royal Decree on the notification of concentrations.

30 Article 5, Section 2, Royal Decree on the notification of concentrations.

31 Article IV.10, Section 2, Code of Economic Law.

32 *ibid.*

33 Article IV.10, Section 1, Code of Economic Law. In Case No. 98-C/C-11 of the Competition Council of 28 July 1998, *Promedia CV/Belgacom Directory Services NV*, Belgian Official Gazette, 18 September 1998, p. 30,441, the Council ruled that an agreement that had not yet been approved by the works council was not sufficiently binding to be notified.

34 Article IV.92, Section 3(5), Code of Economic Law.

35 Article 3, Section 4, Royal Decree on the notification of concentrations.

36 Article 3, Section 2, Royal Decree on the notification of concentrations.

37 Article IV.10, Section 4, Code of Economic Law.

38 Article IV.79, Section 1 and Article IV.80, Code of Economic Law.

39 This new maximum applies only for infringements committed after the entry into force of the new Act on 3 June 2019. Infringements that have taken place and ended before the entry into force of the new law will be fined under the previous rules.

40 Article IV.10, Section 6, Code of Economic Law; for recent applications, see also Decision No. BMA-2019-C/C-28 of 2 May 2019 in Case MEDE-C/C-19/0021, *AVS Group GmbH/De Fero groep* and Decision No. BMA-2015-C/C-79 of 23 December 2015 in Case No. MEDE-C/C-15/0035, acquisition of Imtech Belgium Holding NV and Imtech Belgium NV by Cordeel Group NV.

provided in a notification or a request for information, the information is not provided on time, or the notifying parties hinder or prevent the investigation, the notifying parties can be sanctioned with fines of up to 1 per cent of their respective annual turnovers.⁴¹

The Belgian Competition Act makes a distinction between the simplified merger procedure and the regular merger procedure.

i Simplified procedure

On 1 October 2006, the simplified merger procedure was introduced in Belgian competition law. Before that date, the simplified procedure was based on ‘soft law’. It was only on 8 June 2007 that the General Assembly of the Council approved this procedure’s detailed rules and thus replaced the previous soft law rules.⁴² The Rules were complemented by additional rules on 8 January 2020 to extend the scope of the simplified procedure.

The simplified procedure is highly practical, and in recent years the vast majority (up to 80 per cent) of notifications were made using this procedure. In 2020, the number of concentrations notified under the simplified procedure broke an unprecedented record, as 25 out of the 30 decisions were issued following the simplified procedure.

The simplified procedure has two essential characteristics: first, the Prosecutor examines the merger and decides whether to authorise it (and not the Competition College); second, the simplified procedure is very short, as the Prosecutor has to make a final decision within 15 working days of having received the notification (unless a request for information is sent to the parties, in which case the deadline can be extended until the information has been received according to the stop-the-clock mechanism introduced in 2019).⁴³ The amount of information that must be filed is also substantially less than in the regular procedure.

The parties can choose the simplified procedure for the following categories of concentrations:⁴⁴

- a* two or more undertakings acquire joint control over a joint venture on condition that the joint venture is not active or is only active to a small degree on the Belgian market, when the joint venture’s turnover or the turnover of the brought-in activities in Belgium, or the turnover of both, is less than €40 million; and the total value of the transfer in assets to the joint venture in Belgium is less than €40 million;
- b* none of the parties to the concentration are active on the same product and geographical markets, or on a product market situated upstream or downstream of a product market on which one or more parties to the concentration is active;

41 Article IV.82, Section 1, Code of Economic Law. See also Decision No. BMA-2015-C/C-31 of 30 September 2015 in Case No. MEDE-C/C-15/0017, acquisition of Humo NV, Story, TeVe-blad and Vitaya by De Persgroep Publishing NV, in which the Competition College ruled that the Guidelines on the calculation of fines may be used as guidance for the calculation of such fines. The same fines applied until the modification of Book IV of the Code of Economic Law in April 2019 for the failure to notify a merger, but this part of the legal provision was omitted by mistake in the new Book IV. It is expected that this mistake will be corrected by a legislative measure.

42 Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations on 8 June 2007.

43 Article IV.70, Section 6 and Article IV.40, Section 1, Code of Economic Law.

44 Point II.3.2 of the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007 states that, in special circumstances, the simplified procedure cannot be applied. This can be the case where it is impossible to determine the exact market shares of the parties (e.g., on new or less-developed markets) or where markets with high entry barriers or a

- c two or more of the parties to the concentration are active on the same product market and geographical market (horizontal relationship), on condition that their joint market share is less than 25 per cent; or one or more parties to the concentration are active on a product market upstream or downstream of a product market on which another party to the concentration exercises activities (vertical relationship), on condition that their individual or joint market shares amount to less than 25 per cent; and
- d a party acquires sole control over an undertaking over which it already exercises joint control.⁴⁵

On 8 January 2020, the following three categories of mergers, for which the simplified procedure can be used, were added:

- a the combined market share of the parties to the proposed merger is below 50 per cent and the increase in the Herfindahl–Hirschman Index is less than 150;
- b the combined market share of the parties to the proposed merger is below 50 per cent and the increment in the parties' market share resulting from the proposed merger is less than 2 per cent; and
- c in view of all the circumstances, the merger does not raise any significant competition concern and (1) where the parties are active in the same markets, the parties' combined market share does not exceed 40 per cent in any market; or (2) where the parties are active in vertically affected markets, the parties' market share in either the relevant downstream or upstream market is less than 40 per cent.

As mentioned above, the Prosecutor has only 15 working days from the notification⁴⁶ to decide whether the conditions for the simplified merger procedure apply and whether the concentration raises any objections⁴⁷ or doubts as to its permissibility.⁴⁸ If the Prosecutor fails to come to a decision before the deadline, the merger is deemed to have been approved.⁴⁹ If the Prosecutor concludes that either the conditions for applying the simplified procedure are not fulfilled or the concentration raises objections, the use of the simplified procedure will be rejected and a full notification under the regular procedure must be made.⁵⁰ Moreover, the timetable for the regular proceedings will only start running after the new filing is made,

high degree of concentration are concerned. In Decision No. BMA-2015-C/C-79 of 23 December 2015 in Case No. MEDE-C/C-15/0035, the acquisition of Imtech Belgium Holding NV and Imtech Belgium NV by Cordeel Group NV Cordeel, gun-jumping was also considered to be a special circumstance to set aside the simplified procedure.

45 Point II.1 of the Rules adopted by the General Assembly of the Competition Council regarding the simplified notification of concentrations of 8 June 2007.

46 Article IV.70, Section 6, Code of Economic Law.

47 Article IV.70, Section 3, Code of Economic Law. This criterion was widely interpreted in case law. In the *Belgian Airports/Brussels South Charleroi Airport* case, the Prosecutor refused the application of the simplified procedure merely because a third party voiced an objection against the concentration (Case No. 2009-C/C-27 of 4 November 2009, Belgian Official Gazette 22 January 2010).

48 Article IV.70, Section 5, Code of Economic Law. Strangely, this Paragraph ('doubts as to the permissibility') does not use the same criterion as Paragraph 3 ('no objection').

49 Article IV.70, Section 6, Code of Economic Law.

50 For example, Decision No. ABC-2014-C/C-03 of 26 March 2014 in Case No. CONC-C/C-13/0030, *Tecteo/EDA-Avenir Advertising*, which was notified under the simplified procedure but had to be re-notified under the regular procedure as some of the market definitions were contested and the transaction raised multiple competition concerns according to the auditor.

as the simplified notification will be deemed to have been incomplete from the start. If the Prosecutor accepts that the conditions for the simplified procedure apply and does not find any objections, the merger must be approved. In this respect, it is also useful to refer to a peculiarity of Belgian merger control that obliges the BCA to approve any merger where the parties' Belgian market share does not exceed 25 per cent, which will often be the case in simplified merger filings. The Prosecutor informs the parties of the decision by post, which is deemed by law to have the value of a decision of the Competition College for the application of Book IV of the Code of Economic Law.⁵¹

Even though the simplified procedure is formally included in Book IV of the Code of Economic Law, it still entails some uncertainty for the parties. First, there is uncertainty as to timing. As set out above, a ruling that the simplified procedure cannot be used means that the parties have to start regular proceedings from scratch. Even if the Prosecutor during the pre-notification contacts indicates that the concentration qualifies for the simplified procedure, nothing is certain, especially given the wide interpretation of the 'no objection' criteria, which can allow third parties to force the notifying parties into a regular notification by filing objections. This uncertainty is increased by the absence of any right to appeal against a Prosecutor's decision to revert to the regular procedure.

ii Regular procedure

The regular procedure is divided into two phases (Phase I and Phase II), which each consist of an instruction and a decision stage. Once a complete notification has been filed, the Prosecutor will open a Phase I procedure. At this point, a summary of the notification is published in the Belgian Official Gazette and on the BCA's website. The Prosecutor gathers information and submits a reasoned decision proposal to the Competition College, which takes the final decision to either approve the merger (possibly subject to certain conditions) or to open a Phase II procedure.

Book IV of the Code of Economic Law contains fixed time frames for both the decision and the investigation. Once the concentration has been notified, the Prosecutor must submit a reasoned decision proposal to the Competition College within 25 working days of the day after the notification.⁵² A copy of this report will also be sent to the parties and a non-confidential version to the representatives of the employee organisations of the undertakings involved.⁵³ If the file is incomplete, the time period only starts when the complete information is received. If commitments are presented, the time limit is extended by 10 working days.

No less than 10 working days after the communication of the Prosecutor's reasoned decision proposal, the Competition College organises a hearing during which the parties and any interested third parties are heard.⁵⁴ From the moment the Prosecutor's decision proposal is submitted, the parties must be given full access to the file, except for confidential submissions from third parties. Third parties, on the other hand, only have a right of access to the file in limited circumstances. The Competition College must decide whether to approve the

51 Article IV.70, Sections 3 and 4, Code of Economic Law.

52 Article IV.64, Section 1 and 2, Code of Economic Law. However, the deadline can also be extended in the regular procedure, following the use of the stop-the-clock mechanism introduced in 2019; Article IV.40, Section 1, Code of Economic Law.

53 Article IV.64, Section 3, Code of Economic Law.

54 Article IV.65, Sections 3 and 4, Code of Economic Law.

merger within 40 working days of the day after the notification.⁵⁵ This deadline is extended by 15 working days in cases where commitments are proposed. Furthermore, the parties can request an extension of the deadline after the investigation has ended.⁵⁶ This extension may be particularly relevant if the parties need more time to convince the Competition College of their case, offer commitments, etc., to avoid the opening of a Phase II investigation.

If the Competition College has serious doubts about approving the merger, it can order an additional investigation under the Phase II procedure. The parties have 20 working days after such a decision to propose commitments.⁵⁷ The new Act provides that the Prosecutor can extend that deadline by another 20 days. Furthermore, the Prosecutor must submit its revised decision proposal within 30 working days of the decision.⁵⁸ The parties may submit their written observations within 10 working days of the submission of the revised decision proposal. If the parties submit written observations, the Prosecutor may submit an additional decision proposal within five working days.⁵⁹ A hearing must be held no less than 10 working days after the submission.⁶⁰ The Competition College must decide whether to approve the merger within 60 working days of initiating the Phase II procedure.⁶¹ This deadline can be extended at the parties' request.

If the Competition College fails to make a Phase I or Phase II decision by the deadlines set out above, the merger is deemed to have been approved.

The Competition Act does not grant interested third parties the right to access the file, but only to be heard by the Competition College.⁶² However, the Supreme Court⁶³ has somewhat limited this principle by ruling that, in exceptional circumstances, an interested third party can obtain access to the file to the extent that this access is limited to a non-confidential version and that such access is strictly necessary to allow the third party to set out its views on the merger. In practice, it seems that the Competition College is more inclined to refuse access than to grant it. However, in the *Mediabuis* decision, the Brussels Court of Appeal confirmed that the BCA is obliged to give access to the concentration file that was submitted to the Competition College during the appeal proceedings.⁶⁴

Once a decision has been taken, notifications must be sent to the parties, the relevant Minister, anyone who might have an interest and anyone who has requested to be kept informed. The decisions are also published in the Belgian official gazette and on the BCA's

55 Article IV.66, Section 3, Code of Economic Law. The deadline can also be extended in the regular procedure following the use of the stop-the-clock mechanism introduced in 2019; Article IV.40, Section 1, Code of Economic Law.

56 Article IV.66, Section 3(1) and (2), Code of Economic Law.

57 Article IV.67, Section 1, Code of Economic Law.

58 Article IV.67, Section 2, Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any.

59 Article IV.68, Sections 1 and 2, Code of Economic Law.

60 Article IV.68, Section 4 and Article IV.65, Code of Economic Law.

61 Article IV.69, Section 2, Code of Economic Law. This deadline shall be extended by a period equal to the period used by the parties to present commitments, if any. The deadline can also be extended if the stop-the-clock mechanism is used; Article IV.40, Section 1, Code of Economic Law.

62 Article IV.68, Section 1 and Article IV.65, Code of Economic Law.

63 Court of Cassation, 22 January 2008, *Tectéol/Brutélé*.

64 Decision of the Brussels Court of Appeal of 19 November 2014 in Case No. 2013/MR/30, *De Persgroep NV/Belgio Competition Authority and Corelio NV and Concentra NV*.

website.⁶⁵ Before publication, the President of the Competition College will decide which, if any, passages in the decision are confidential,⁶⁶ and will invite the parties to submit their views on this confidentiality.

Appeals against decisions made by the Competition College can be made to the Brussels Court of Appeal and, subsequently, the Supreme Court. The appeal could be against the Competition College's decision to approve or refuse a merger or against default approvals when the Competition College failed to make a decision by a specified deadline.⁶⁷ The appeal could be lodged by the parties, by interested third parties that have requested to be heard by the Competition College and by the Minister of Economic Affairs. The appeal must be lodged within 30 days of the notification of the decision.⁶⁸

Before the Court of Appeal, the parties present their arguments in writing and at a hearing. The Minister of Economic Affairs can also submit written arguments to the Court of Appeal. Since the entry into force of Book IV of the Code of Economic Law, the BCA, represented by the President, can also intervene as a party in the proceedings and submit written arguments. At any time, the Court of Appeal can call the parties to the case before the Competition College when there is a risk that the appeal may affect their rights or obligations.⁶⁹ In cases concerning the admissibility of concentrations, the Court of Appeal does not have full jurisdiction, but will only rule with the power of annulment.⁷⁰

An appeal to the Court of Appeal does not suspend the Competition College's decision,⁷¹ and it continues to have full effect until the Court of Appeal issues its judgment. However, at the request of one of the parties, the Court of Appeal can order the suspension of the Competition College's decision. In practice, the suspension of a College decision is usually of limited interest to the parties, as they are bound by the suspension obligation of the merger until it is approved. However, in the *Cable Wallon* case, it turned out to be useful when the Court of Appeal overruled a tacit admissibility decision and reopened the investigation.⁷² On the other hand, a suspension might be useful to third parties that have appealed against a decision to ensure that the merger is not implemented.

IV OTHER STRATEGIC CONSIDERATIONS

As is the case in all merger control proceedings, time is of the essence. Under the Belgian merger control system, a third party could try to prolong merger procedures to the disadvantage of its competitors. A third party could, for instance, prevent the merging parties from enjoying the benefits of the simplified (and much faster) procedure by raising objections to the merger.

Regarding timing, the deadline imposed on the prosecutors to issue decisions in simplified merger filings was shortened to 15 working days in 2013. This term of 15 working days is very short for the investigatory team. Therefore, it is important to start pre-notification talks,

65 Article IV.75, Sections 1 and 2, Code of Economic Law.

66 Article 74, Section 1, Code of Economic Law.

67 Article IV.90, Section 1, Code of Economic Law.

68 Article IV.90, Sections 4 and 5, Code of Economic Law.

69 Article IV.90, Section 7, Code of Economic Law.

70 Article IV.90, Section 2, Code of Economic Law. This was confirmed in the decision of the Brussels Court of Appeal of 19 November 2014 in Case No. 2013/MR/30, *De Persgroep NV/Belgian Competition Authority and Corelio NV and Concentra NV*.

71 Article IV.90, Section 3, Code of Economic Law.

72 Brussels, 25 January 2008, *Tecteo/Brut  l  *, Case 2008/MR/1.

which can take months, well before the actual merger filing. On the other hand, as more and more issues are investigated and solved during the pre-notification period, decisions are often taken before the end of the legal deadline for the decision. For non-simplified concentrations, however, in 2020 and as opposed to previous years, the Competition College almost always used the full legal deadline to issue its decision. In the case of a simplified procedure, it is also advisable to start pre-notification contacts to obtain as much certainty as possible about the Prosecutor's preliminary view on whether the conditions for a simplified procedure have been fulfilled and on the extent of the information that should be provided to convince the BCA that the simplified procedure's conditions indeed apply.

V OUTLOOK AND CONCLUSIONS

Since 2015, the number of notifications filed and the number of notification decisions issued have significantly increased compared to previous years. In 2019, the number of concentrations filed under the regular merger control procedure remained as high as in 2017 and 2018. However, in 2020, the number of concentrations filed under the regular merger control procedure substantially dropped in comparison with the total number of notifications filed. This may be due to the extension of the scope of the simplified procedure, which took effect on 8 January 2020.

Several recent decisions have given rise to fines for procedural infringements (for negligent obstruction, gun-jumping and non-compliance with commitments). The BCA expects the parties to a concentration to act diligently and has stated that it will fine undertakings that omit to notify, do not promptly reply to requests for information in merger proceedings or do not, intentionally or otherwise, comply with commitments imposed.

The decisions that have been issued under the regular merger control procedure since the entry into force of Book IV of the Code of Economic Law demonstrate that it is not uncommon for admissibility decisions to be linked to complying with certain commitments. In this context, as is the case under European competition law, both behavioural and structural remedies can be accepted. Whereas the BCA seemed to be more inclined to impose behavioural remedies, in some recent decisions structural remedies have also been imposed (e.g., in the *Delhaize/Abold*, *Kinopolis/Utopolis* and *McKesson/Belmedis* cases).

The Code of Economic Law provides that the BCA shall carry out an assessment of the two merger filing thresholds every three years, taking into account, inter alia, the economic impact and the administrative burden for undertakings. In 2018, the BCA stated that, in view of the relatively high notification thresholds in Belgium, it saw no reason to raise these thresholds, and after a stakeholder consultation, decided not to modify the thresholds for the time being. However, as noted in Section I, a new act was adopted on 25 April 2019 amending Belgian competition law on various other matters. In particular, the act introduced the worldwide turnover for the calculation of fines, and a stop-the-clock mechanism suspending the term within which the Prosecutor must make a decision proposal, the term within which the College shall take its decision in regular proceedings and the term within which the Prosecutor has to make its decision in simplified procedures, with the time required for the parties to provide additional information requested or to offer commitments. The timing of merger procedures will therefore become more uncertain. It remains to be seen how often

the BCA will make use of its new powers to use this stop-the-clock mechanism.⁷³ On the other hand, the burden on undertakings notifying a concentration and the time required to obtain a decision may decrease if the intended concentration falls within the scope of the additional categories of concentrations that qualify for a simplified procedure, introduced on 8 January 2020. This is already apparent in 2021. Moreover, although the BCA had invited companies to delay any non-urgent concentration projects in the context of the covid-19 crisis, it should be noted that the number of merger decisions in 2020 remains the same as in 2019.

Finally, it is noteworthy that the Belgian legislator adopted the new Belgian Act of 29 March 2021, which exempts, in general, concentrations that create loco-regional hospital networks⁷⁴ from the BCA notification obligation. The Act provides that without prejudice to the competence of the European Union on merger control, both the establishment of a loco-regional hospital network and any subsequent changes in its composition are not subject to the BCA's *ex ante* merger control under Book IV, Title 1, Chapter 2 of the Code of Economic Law.

73 In the *Group Delorge/Coox* case discussed in Section II, the BCA's Prosecutor initiated this stop-the-clock mechanism due to incomplete information provided by the notifying party.

74 As from 1 January 2020, all hospitals must establish and be part of a loco-regional hospital network in Belgium. A loco-regional hospital network is 'a long-term, legally formalised cooperation with legal personality . . . between at least two non-psychiatric hospitals that are separately recognised at the time of the creation of the local hospital network . . . which are located within a geographically contiguous area and which offer complementary and rational locoregional care assignments'.

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