Dominance
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Contributing editors
Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

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We are pleased to enclose a complimentary copy of Getting The Deal Through—Dominance, 2019

Cleary Gottlieb lawyers are the editors of this guide and authors of several country chapters.

We provide expert local insight in these and many other jurisdictions around the world and would be happy to answer any specific questions you have on dominance or antitrust matters more broadly.

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb Steen & Hamilton LLP, for their assistance with this volume.

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Getting The Deal Through

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Belgium

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GENERAL FRAMEWORK

Legal framework

1 | What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Book IV of the Code of Economic Law (CEL), introduced by the Competition Act of 2013, contains the legal framework for competition rules in Belgium. Article IV.2 of the CEL addresses the behaviour of dominant firms and prohibits 'the abuse by one or more undertakings of a dominant position in the Belgian market concerned or in a substantial part of that market'. Article IV.2 thus mirrors the substance of article 102 of the Treaty on the Functioning of the European Union (TFEU), less the condition of a potential effect on trade between EU member states. Pursuant to article 3 of Regulation No. 1/2003, article 102 of the TFEU may also apply in a Belgian context.

In addition to application in courts, the enforcement of article IV.2 of the CEL rests on the Belgian Competition Authority (BCA), which replaced the previous Competition Council in September 2013 (references to BCA decisions pre-dating September 2013 should be understood as referring to the Competition Council). The current BCA is composed of its President, the Competition College (decision-making body), the Auditorate (investigating body), and the Executive Committee (management of the BCA) (see also question 26).

Beyond Book IV of the CEL, abuses of dominance may be considered as unfair trade practices infringing Book VI of the CEL regarding market practices and consumer protection. Conversely, conduct not prohibited under Belgian or EU competition law can generally not be prohibited as an unfair trade practice to the extent the claim against the conduct is one of impediment to the functioning of the free market (save for cases of abuse of right), under the 'reflex' or 'mirror' effect of competition law on the law of unfair trade practices, confirmed by the Belgian Supreme Court in the *Multipharma/Widmer* case (7 January 2000).

Definition of dominance

2 | How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article I.6 of the CEL defines a dominant position as 'the position allowing an undertaking to prevent effective competition being maintained by affording it the power to behave to an appreciable extent independently of its competitors, customers, or suppliers'. This definition purposely aligns with the European Court of Justice's (ECJ's) definition of dominance, as the Belgian legislature intended to ensure consistency with EU precedents and thereby increased legal certainty. More generally, the BCA and national courts often rely on EU precedents, whether or not article IV.2 of the CEL and article 102 of the TFEU are applied concurrently.

Article IV.2 of the CEL does not cover unilateral conduct of non-dominant firms (see question 34).

Purpose of the legislation

3 | Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

As is the case at EU level, the purpose and underlying dominance standard of article IV.2 of the CEL are strictly economic. Article IV.2 of the CEL aims to protect competition and not other interests.

Sector-specific dominance rules

4 | Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

While Book IV of the CEL applies to all sectors, certain sector-specific rules may also apply concurrently. In the electronic communications sector, specific provisions aim to prevent telecom and broadcasting operators with 'significant market power' (SMP) from engaging in anticompetitive practices (under the federal E-Communications Act of 13 June 2005 and federate broadcasting decrees, which implement EU legislation). SMP is equivalent to 'dominance' under EU and Belgian competition law. The relevant regulatory authorities are the Belgian Institute for Postal Services and Telecommunications (BIPT) and regional regulators.

The existence of distinct sector rules does not preclude the application of competition rules on dominance, but may influence the assessment of the existence of an abuse. In the *Happy Time* case (*Tele2 NV/Belgacom NV*), telecoms company Tele2 complained that the incumbent telecoms operator, Belgacom, had abused its dominant position by engaging in a margin squeeze in relation to its fixed telephony activities. In a decision later annulled by the Brussels Court of Appeal, the president of the BCA rejected Tele2's request for interim measures: it had not established that Belgacom's offer constituted a prima facie abuse of its dominant position, in particular because the tariffs were cost-oriented, in accordance with telecoms legislation (decision of 1 September 2006). The BCA's final decision in December 2012 found that Belgacom's 'Happy Time' tariffs had not involved a margin squeeze abuse.

In *Mobistar SA/Belgacom SA* (22 July 2010), telecom operator Mobistar complained that Belgacom was charging excessive prices for access to its high-speed network. The BCA dismissed the complaint in part because Belgacom's tariff had been approved by the BIPT on an annual basis and respected the principle of 'cost orientation'.

Exemptions from the dominance rules

5 To whom do the dominance rules apply? Are any entities exempt?

Article IV.2 of the CEL applies to all 'undertakings'. They are defined as 'any natural or legal person engaged in economic activity on a lasting basis', and therefore the dominance rules also apply to public entities to the extent that they carry out an economic activity. Further, article IV.12 expressly states that the provisions of Book IV of the CEL, including article IV.2 of the CEL, apply to public undertakings and undertakings enjoying state-granted special or exclusive rights, 'to the extent that it does not prevent, in law or in fact, the specific mission granted by or pursuant to law'.

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

Yes. Article IV.2 of the CEL applies where an already dominant undertaking abuses its dominant position. Book IV of the CEL does not regulate conduct through which a non-dominant undertaking becomes (or attempts to become) dominant by means other than by merger.

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. Article IV.2 of the CEL covers collective dominance, as it prohibits the abuse of a dominant position by 'one or more undertakings'. The BCA has referred to the concept of collective dominance only in a couple of precedents, none of which have led to a finding of abuse of collective dominance. For example, in 2015, the BCA closed two investigations regarding abuse of collective dominance by cargo handling companies at Brussels airport because it was not able to establish such an abuse.

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. Article IV.2 of the CEL applies to both dominant purchasers and dominant suppliers in the same way.

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

As to market definition, the BCA and the courts will typically use the same criteria as at EU level and thus mainly refer to 'substitutability' to define the relevant product and geographic markets, assessed first on the demand side. Products and services are considered part of the same market if they are regarded as substitutable for users by reason of their characteristics, prices and intended use. The assessment of substitutability should also reflect sources of potential competition (new products, potential new competitor, etc), and relevant constraints that may affect the demand structure, such as the existence of a specific regulatory framework. The relevant geographic market comprises the area in which relevant undertakings are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous. The same market definition approach applies in merger control cases (also covered by Book IV of the CEL). Practically, BCA decisions and court judgments will be influenced by, in addition to their own assessment, EU and national precedents of market definitions, or converging arguments of parties. The European Commission's guidance on the definition of relevant markets is often used to give particular weight to certain arguments.

As to dominance, the BCA's assessment also tends to follow EU-level practice and thus will consider various factors, none of which are necessarily determinative on their own. Market shares are often given particular importance. Book IV of the CEL does not contain a statutory market-share threshold for dominance, but the BCA has considered that an undertaking holding a market share of over 50 per cent could be presumed dominant (for instance, *Lampiris/Electrabel*, 26 March 2015). Above 50 per cent, the BCA has found market shares of 80 to 100 per cent on relevant markets sufficient on their own to establish dominance (*Publimail, Link2Biz International and G3 Worldwide Belgium/bpost*, December 2012). Below 50 per cent, the BCA has held that a market share of above 40 per cent is a 'strong indication' of dominance, while a market share below 30 per cent is 'not indicative' of dominance, in the absence of additional factors (*Unie der Belgische Ambulancediensten/Belgische Rode Kruis*, 11 May 2001). The BCA will also look at the difference in market shares between competitors, and has for instance found that a 40 per cent difference in market share was indicative of dominance (in *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dome BV and MSD Overseas Manufacturing Company*, 5 October 2007, and *Distri-One SA/Coca-Cola Enterprises Belgium SPRL*, 30 November 2005).

The BCA will consider other factors beyond market shares, such as the evolution of market shares over time, the level of concentration in the relevant markets, barriers to entry or potential competition. In *Incine BVBA/Rendac NV* (9 March 2001), the BCA found Rendac to be dominant in the market for picking up and processing carcasses of household pets, with a 30–35 per cent market share. Rendac also benefited from having few competitors, its de facto monopoly on the (neighbouring) market for picking up and processing carcasses of farm animals, and its financial strength.

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

As noted, article IV.2 of the CEL mirrors article 102 of the TFEU and contains the same non-exhaustive list of the types of conduct that may constitute an abuse. EU-level inspiration extends to the practice of antitrust, as the BCA and Belgian courts will generally rely on precedents of the European Commission and EU courts, and on the Commission's Guidance Paper on article 82 of the TEC (102 TFEU).

As such, the BCA generally follows an effects-based approach to identifying abuse (but certain conduct could be considered as abusive per se, equally in line with EU practice). The BCA and Belgian courts will analyse a dominant player's conduct based on its actual or likely effect on competition, and will use various tests to assess the conduct's likely effects. However, courts may occasionally take a more form-based approach (including when applying said tests).

Exploitative and exclusionary practices

11 Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. Like article 102 of the TFEU, article IV.2 of the CEL covers both exploitative and exclusionary practices.

Link between dominance and abuse

12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

While a finding of abuse of dominance requires both dominance and abusive conduct, precedents confirm that the dominance and the abuse need not occur on the same market. In Rendac NV/Incine BVBA (12 November 2002), the Brussels Court of Appeal confirmed the BCA's decision (see question 9) and held that an undertaking dominant on one market may infringe article IV.2 of the CEL based on an abuse on a neighbouring market where it is not dominant. More recently, in the National Lottery case (22 September 2015), the BCA fined the National Lottery for abusing its dominant position in the market for public lotteries (a legal monopoly) when launching a new product on the neighbouring market for sports betting. The National Lottery had used customer details obtained through its activities on the former market, when launching its product on the latter market. It had also obtained commercially sensitive information about competitors, before and after the launch, from retailers (whose turnover largely stems from the sale of lottery products).

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

A dominant undertaking's conduct will not constitute an abuse if it is 'objectively justified'. The BCA has also recognised the 'state action defence' (ie, where the undertaking is engaged in anticompetitive conduct as a result of binding state measures (in Way Up/Belgacom, 22 April 1999, and in Executive Limousine Organisation/BIAC, 28 May 2001)).

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

Rebate schemes may constitute an abuse under Belgian competition law. Belgian precedents have concerned the exclusivity, loyalty (or fidelity) or discriminatory aspect of rebates more than the difference between retroactive versus incremental rebates. As under EU law, (genuine) quantity-based rebates typically do not raise concerns in Belgium.

One of the most well-known cases involving rebates is the *Presstalis* case (decision of 30 July 2012), confirmed by the Brussels Court of Appeal. French media distributor Presstalis granted French publishers an extra rebate for the exclusive right to distribute their publications in Belgium, Canada and Switzerland for a period of one year. The BCA found this rebate to be abusive because of its 'strong fidelity effect', which enabled Presstalis to foreclose competitors in the market for the export of French publications and in the market for the distribution of these publications in Belgium (through a privileged relationship with Belgian distributor AMP).

In *Algist Bruggeman* (22 March 2017), the BCA found that a yeast supplier's retroactive rebates, based on a full year's orders, were abusive. Rebates were granted to certain distributors if they sourced (quasi) 100 per cent of their needs of fresh yeast from Algist Bruggeman, and had no objective justification. Algist Bruggeman was also found to have implemented abusive individualised exclusivity and loyalty rebates.

15 | Tying and bundling

Tying and bundling may amount to an abuse of dominance in Belgium, as under EU competition principles.

In a recent precedent, the BCA considered that Algist Bruggeman abused its dominance by tying the supply of liquid yeast to the acquisition of a dosing machine, for which Algist Bruggeman unilaterally set the price and a depreciation period linked to non-compete clauses (22 March 2017).

In an earlier precedent the Brussels Court of Appeal held that UPC had abused its dominance because of its bundling practices in the distribution of television programmes. UPC offered certain television programmes and benefited from a de facto monopoly in cable television distribution in part of the Brussels Region, and tied its distribution of Canal+'s competing programmes to the use of its decoder and to its management of Canal+ subscriptions (*Canal+ Belgique/Wolu TV and UPC Belgium*, 18 June 2004).

16 | Exclusive dealing

Exclusive dealing may constitute an abuse under Belgian competition law. The issue of exclusivity and loyalty rebates was illustrated in Presstalis (see question 14).

In recent years, the BCA's experience with exclusive practices has occurred through interim measures requests, in the context of which the BCA limits itself to a review of the prima facie (in)validity of the practices (not an in-depth review). In a decision upheld by the Brussels Court of Appeal (7 September 2016), the BCA considered Telenet's five-year contract for the exclusive broadcasting rights of the Superprestige Cyclocross competition constituted an abuse of dominance (5 November 2015). By acquiring these rights, Telenet had acquired a dominant position in the market for the licensing of broadcasting rights for cyclocross races in Flanders after having already acquired similar rights for the UCI World Cup cyclo-cross races for seasons 2016 to 2020. The BCA found that, due to the popularity of such races in Belgium, this could strengthen Telenet's dominance on the retail market for the provision of television services in Flanders, and constitute a breach of Telenet's special responsibility by virtue of its strong position in the market.

In another interim measure decision, also upheld by the Brussels Court of Appeal (28 April 2016), the BCA examined an exclusivity clause in the General Regulations of the Fédération Equestre Internationale (FEI), the federation that governs equestrian sports. The clause prohibited athletes and horses from participating in non-FEI accredited events in the six months preceding any FEI accredited event. Because only the latter type of events counted for ranking purpose and because of the timing of FEI competitions, athletes were effectively barred from participating in non-FEI competitions. The BCA found that the conditions of the exclusivity clause and the lack of transparency of the accreditation procedure were aimed to abusively reinforce the FEI's dominant position and amounted to an abuse.

In 2017, the BCA imposed other interim measures on the FEI and the organisers of one of its accredited competitions, the Global Champions Tour (GCT) (20 December 2017). A Belgian horse rider and her equestrian team complained about a memorandum of understanding (MoU) concluded by the defendants that significantly reduced the share of participants selected based on rankings relative to the share selected based on non-sport related criteria (such as membership of a paying team) in recognised competitions. The College considered that the FEI was dominant in the EU market for the organisation and promotion of showjumping competitions, as only FEI-accredited events are taken into account for ranking purposes. The College found that the reduction of the proportion of invitations for GCT events based on riders' official rankings from 60 to 30 per cent created a barrier to entry to

horse riders who are not members of fee-paying teams and who could have aspired to participate based on their sporting merits, as well as a difference in treatment between GCT events and other FEI-accredited competitions that was not justified by the specificities of the sector. Therefore, the College concluded that the defendants' practices might constitute an abuse of dominance. The BCA suspended the MoU insofar as it reduced the share of invitations based on the official ranking below 60 per cent. The BCA also imposed penalty payments on the FEI and the GCT organisers for non-compliance (13 April 2018). Later in the same year, the Brussels Court of Appeal, however, annulled the BCA decision to suspend the MoU, on grounds of inappropriate reasoning (27 June 2018). The Court ordered three members of the College involved in adopting the annulled decision (including the president of the BCA) to recuse themselves from the College that would be responsible for reviewing the case (7 August 2018). After dismissing a new request for interim measures, the BCA eventually accepted the commitments offered by the defendants and closed the case (20 December 2018, see question 27).

17 | Predatory pricing

Predatory pricing may amount to an abuse in Belgium, but while there have been complaints alleging predatory pricing, the BCA has not found a company guilty of this practice.

The case most often referred to is the *Electrabel* case (3 July 2008) (see also question 22). The BCA dismissed allegations of Electrabel's (the incumbent gas operator) predatory pricing between January and October 2007 because a sixth-month period was found too short to constitute a predatory strategy and no competitor had left the market during that period. Because it dismissed the allegations on that basis, the BCA did not carry out a cost-price analysis in this case. As a general matter under Belgian law, temporary below-cost prices when launching a product or liquidating stocks are not considered as abusive.

18 | Price or margin squeezes

Price and margin squeezes can amount to an abuse in Belgium. The BCA practice is generally in line with EU case law.

In the *Lampiris/Electrabel* case (26 March 2015, see also question 21), Lampiris complained to the BCA that Electrabel, the former incumbent electricity provider, abused its dominant position by engaging in margin squeeze and excessive and discriminatory pricing by incorporating the value of gas emission allowance certificates (which it had received for free from Belgian authorities) into its prices on the wholesale electricity market. Along with the other allegations, the BCA dismissed the margin squeeze claims. Based on the 'as efficient competitor test' using Electrabel's long-run average incremental costs, the BCA found that Electrabel's margins would have remained positive on the retail market if it paid the prices charged on the wholesale market. Further, Lampiris' prices had been equal or lower to Electrabel's prices and covered positive margins, and Lampiris had increased its market share.

One of the main precedents is the *Base/Belgacom Mobile* case (26 May 2009). For the first time, the BCA found an abusive margin squeeze involving Belgacom, the incumbent telecoms operator in the sale of mobile services for business customers (in particular large private and public entities). After reviewing Belgacom's strategy in 2004 and 2005, the BCA found a negative margin between Belgacom's on-net prices for business customers (between two customers on its own network) and the mobile termination rates (MTR) charged by Belgacom to competitors (for terminating a call from their network to its network). The BCA found that these MTR charges were an essential input for competitors and that Belgacom could not have made a normal profit on its on-net communications if it had to pay the MTR rates charged to competitors, before concluding that a margin squeeze may, by its very nature, restrict competition.

19 | Refusals to deal and denied access to essential facilities

A refusal to deal may amount to an abuse of dominant position in Belgium, and both the BCA and the courts have addressed claims of refusal to deal.

The *Spira/De Beers* saga offers an interesting precedent of refusal to deal. Belgian diamonds dealer Spira had been a 'sightholder' (distributor) of rough diamonds from producer De Beers until 2003, when De Beers implemented a 'supplier of choice' system in 2003, under which Spira no longer qualified. Spira first raised the matter before the European Commission, which rejected its complaint (the General Court subsequently also dismissed its appeal). Spira then complained to the BCA and requested interim measures obliging De Beers to supply it with rough diamonds. The President of the BCA found that there was prima facie evidence that De Beers (with its 40 per cent market share in rough diamonds supplies) had abused its dominant position and ordered De Beers to continue supplying rough diamonds to Spira, subject to certain conditions. This temporary obligation was renewed several times. In the end, the BCA's prosecutors dropped the investigation on the merits in 2014, thereby ending the interim measure (this decision was subsequently confirmed by the BCA's College in 2015).

In *Mobistar SA/Belgacom SA* (22 July 2010, see also question 4), Mobistar wanted to offer 'naked' DSL services (ie, DSL services without the requirement of fixed-line telephony service). Mobistar claimed access to Belgacom's DSL wire network, and complained that Belgacom was charging excessive prices, and that the tariff should be non-discriminatory and sufficiently unbundled to ensure a reasonably profitable margin. The BCA dismissed Mobistar's request for access. It found that Mobistar's existing wholesale access was sufficient and that Belgacom's tariff was sufficiently unbundled, respected the principle of 'cost orientation', and had been approved by the BIPT (the Belgian telecoms regulator).

In *VRT/Norkring Belgium* (23 January 2019), the BCA imposed interim measures to ensure continuity of the FM broadcasts of the Flemish Radio and Television Broadcasting organisation (VRT), in the execution of its public service mission. VRT's FM broadcasts are transmitted through masts, some of which belong to NV Norkring Belgium. In a public tender procedure where Norkring itself made a bid, VRT awarded the broadcasting of FM programmes to Broadcast Partners, which was subsequently unable to enter into an agreement on reasonable terms with Norkring for the use of these masts. While VRT did not demonstrate that this was prima facie likely to constitute an abuse of dominance, the BCA held that the general economic interest of continuing the VRT's public service mission was sufficiently large to conclude for a likely prima facie abuse of dominance if such continuity was not guaranteed. The BCA required Norkring to provide the transmission masts under the same conditions that it offered in its tendering bid, and this until an agreement had been reached, or until the court ruled on the matter.

Sometimes, Belgian courts find refusals to deal on the basis of more flexible tests. In *Ducati/DD Bikes*, Ducati (lawfully) terminated its dealership agreement with a dealer-repairer (DD Bikes) and further refused to supply spare parts and equipment. Ruling on appeal, the Ghent Court of Appeal first established that Ducati (through its official dealers) was dominant in the market for maintenance and repair of Ducati motorbikes. It then seemingly applied its own test to determine whether there was an abuse, with no reference to EU or other precedents. The court concluded that Ducati's refusal to supply was abusive and subjected Ducati to supply obligations to ensure that DD Bikes could continue to

offer aftersales services for Ducati motorbikes (Ghent Court of Appeal, 1 October 2014). This case may reflect the Belgian courts' tendency to protect the interests of (long-term) dealership holders.

20 | Predatory product design or a failure to disclose new technology

To our knowledge, there is no relevant precedent, but in principle current law does not exclude a predatory product design or a failure to disclose new technology from constituting an abuse of dominance.

21 | Price discrimination

Price discrimination may amount to an abuse under Belgian law, and is generally considered to require that equivalent transactions are treated differently, resulting in a material competitive disadvantage (article IV.2(2)(3) CEL).

In *Lampiris/Electrabel*, Lampiris had raised various price-related abuse of dominance claims against Electrabel, the incumbent electricity producer and provider, including of price discrimination. The BCA considered that services offered by Electrabel on the electricity wholesale market and those on the retail market were different, so that the price differences were not discriminatory (26 March 2015, see also question 18).

In the *bpost* case, the BCA reviewed the 'per sender' rebate scheme set up by bpost, the incumbent postal operator. Under the scheme, direct senders could qualify for significant volume rebates, but intermediaries could not because their significant volumes were consolidated from mail processed for different senders. While not formally reaching a finding of discrimination, the BCA found a breach of equal treatment regarding the grant of rebates, which prevented the development of intermediaries, and fined bpost €37 million (10 December 2012). Bpost's tariff model had previously been subject to an investigation by the BIPT (the Belgian telecoms regulator), resulting in a €2.3 million fine for bpost (20 July 2011). The BIPT's fine was annulled by the Brussels Court of Appeal in March 2016. Interestingly, the BCA's fine was also annulled by the Brussels Court of Appeal in November 2016, which held that the BCA had breached the ne bis in idem principle in fining bpost, as the BIPT had already sanctioned bpost's conduct. In 2018, the Supreme Court ruled that the Brussels Court of Appeal improperly applied the ne bis in idem principle by disregarding whether the proceedings before these two distinct authorities could have complementary objectives (22 November 2018). The Supreme Court, therefore, overturned the judgment and referred the case back to the Brussels Court of Appeal.

In *TECO/ABB* (3 September 2018) the BCA imposed interim measures on ABB Industrial Solutions BVBA (ABB), a producer of 'smart' electricity meter boxes. Interestingly, ABB obtained the exclusive right to produce the lids for these boxes by acquiring GE Industrial Solutions (GE), which had obtained this monopoly in a public tender from the Flemish energy grid net operator Eandis (now Fluvius). The College found it not manifestly unreasonable to assume prima facie that ABB abused its dominant position by charging other companies in the market, dependent on it for such lids, a substantially higher price than the price charged to Eandis as offered in the tender bid by GE. ABB did this in combination with the subsequent lowering of its prices for electricity meter boxes, allowing it to squeeze the margin, and creating uncertainties in supplies to other companies by failing to apply a strict supply policy. Therefore, the BCA required ABB to maintain a non-discriminatory pricing policy and processing of orders, by applying price reductions for products it sells in competition with the lids, and for electricity boxes or their components (regardless of the configuration of orders), as well as refraining from price increases that were not objectively justifiable.

Belgian courts have also dealt with discrimination cases, however without always establishing an actual competitive disadvantage from the discriminatory conduct. In *SABAM*, the Brussels Court of Appeal found that, while the prices differed, the services provided by SABAM, the Belgian collecting society, to major customers were equivalent to those provided to the other customers (SABAM is the Belgian authors rights' collecting society). It concluded that the different prices were discriminatory, without investigating the existence of an actual competitive disadvantage on the downstream market (3 November 2005). In *AMP* (see also question 22), the Brussels Court of Appeal again had to examine the pricing regime applied to large versus smaller retailers by a supplier (AMP, the exclusive distributor of the main newspapers in Belgium). Relying on an expert economic report to find the price discrimination, the court considered that AMP's increase in the fixed minimum monthly distribution fees was discriminatory because only smaller retailers paid the fixed fee, whereas large retailers paid a variable percentage, so that smaller retailers paid a higher relative price.

22 | Exploitative prices or terms of supply

Exploitative prices or terms of supply may amount to an abuse of dominance in Belgium. In particular, excessive pricing cases are fairly frequently brought to the BCA or the courts, but actual findings are much less frequent.

An interesting case involving Electrabel, the incumbent electricity provider, was decided by the BCA in 2014 (this case is distinct from the *Lampiris/Electrabel* and *NMBS/Electrabel*, mentioned in other questions, and in which the excessive pricing claims were dismissed by the BCA and the Brussels Court of Appeal, respectively). Electrabel faced abuse of dominance allegations in relation to its tertiary production reserve policy (ie, the management of reserve capacities on the Belpex electricity exchange, for the electricity wholesale market). After finding that Electrabel was dominant both in the market for the production and wholesale trade of electricity and in the market for the supply of the tertiary reserve in Belgium, the BCA found the margin scale for the sale of reserve capacity to be excessive. Electrabel's 'pricing scale' governing the release of reserve capacity involved margins of 50 to 200 per cent above the average wholesale price per MWh achieved on the Belpex trading platform in 2008, which was seen as 'excessively disproportionate' when considering the marginal cost of production (18 July 2014).

A few years earlier, the BCA had investigated another excessive pricing case against Electrabel, regarding an increase of its natural gas prices. In that case, the BCA had conditioned carrying out a full cost-price analysis on a comparison of Electrabel's prices with certain benchmarks. After comparing the prices with other providers' prices, pre-liberalisation regulated prices, and average prices in neighbouring EU member states, the BCA concluded that there were insufficient indications of excessive prices to warrant a cost-price analysis (*Electrabel NV*, 3 July 2008).

In the *AMP* case (see question 21), the Brussels Court of Appeal found that the increase in the fixed minimum monthly fees was excessive, having already found that it was discriminatory. Relying on the same expert economic report used for the assessment of discrimination, the court found that a lower fee increase would have sufficed because the increase lacked a costs-based justification (29 May 2012).

In the more recent case *Festival organizers/SABAM*, the Brussels Commercial Court ordered SABAM, the Belgian collecting society, to cease and desist its pricing practices (12 April 2018). The Court concluded that SABAM had a de facto monopoly in the collection and distribution of authors' musical copyrights. Relying on European Courts precedent on excessive pricing (C-402/85 *Basset*, 1987; *STIM* C-52/07 11, 2008), the Court held that SABAM failed to justify its pricing practices as having

a reasonable relation to the economic value of the product supplied. SABAM significantly increased tariffs for concerts and music festivals without objective economic justifications (ie, since 2017 it raised tariffs with 17 per cent, respectively 37 per cent depending on the size of festivals for services that remained the same in terms of nature and cost), determined prices on the basis of a festival's total turnover (including turnover unrelated to music and thus for services not provided), and used pricing methods unrelated to actual use of music (while alternative methods of calculation that quantify use do not require additional costs).

23 | Abuse of administrative or government process

To our knowledge, there is no relevant precedent, but in principle current law does not exclude an abuse of administrative or government process from constituting an abuse of dominance.

24 | Mergers and acquisitions as exclusionary practices

The question of whether mergers and acquisitions that do not meet notification thresholds can be subject to review under article IV.2 of the CEL (and, in fact, article IV.1 of the CEL) is a longstanding one, which seems to receive a positive, if qualified, response.

In 2006, the Brussels Court of Appeal held that a transaction that does not meet the Belgian notification thresholds may be reviewed under articles 101 and 102 of the TFEU or articles IV.1 and IV.2 of the CEL (*Gabriella Rocco & Centro di Medicina Omeopatica Napoletano v Dano-Invest and others*, 15 December 2006).

In 2016, the BCA had the opportunity to address the question, after receiving a request for interim measures to suspend the non-notifiable acquisition of Brouwerij Besteels by AB InBev (*Alken-Maes/AB InBev*, 21 November 2016). Alken-Maes contended that the acquisition constituted an abuse of AB InBev's dominance. The BCA referred to the ECJ's Continental Can judgment and acknowledged that concentrations can lead to an abuse of dominance, but also noted the potential harm of interim measures against transactions. In a decision upheld by the Brussels Court of Appeal (28 June 2017), the BCA then held that an acquisition escaping merger control can be assessed from an abuse of dominance perspective if there are prima facie restrictions on competition, distinct from the effect of the concentration itself, which can be qualified prima facie as an abuse of dominance. This was not the case in the transaction at hand.

25 | Other abuses

As with article 102 of the TFEU, the list of abuses in article IV.2 of the CEL is not exhaustive. While generally relying on EU precedents and guidance, the BCA and the Belgian courts assess conduct on a case-by-case basis so that they may find other types of abuses.

In the 2017 *Algist Bruggeman* case (see question 14), the circulation of a biased internal report on a competitor was found to constitute abusive denigrating practices. The BCA considered that the objective of the report was to create uncertainty about the microbiological aspects and quality of the competing yeast, and to discourage distributors or bakeries from suppling or using the product.

In the *National Lottery* case (see question 12), the BCA found that the National Lottery had abused its dominant position by leveraging customers' contact details obtained through its legal monopoly in the market for public lotteries. The National Lottery used these contact details when launching a new product on the neighbouring market for sports betting (by sending a one-off email to the customers).

In the 2014 *Electrabel* excessive pricing case (see question 22), the claims included an abuse resulting from Electrabel's excessive electricity reserves, ie, from witholding electricity. The BCA dismissed this claim and found that the additional reserve capacity maintained was explained by the risk that Electrabel be required to pay penalties in the event of negative imbalance positions in the market (18 July 2014).

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The BCA is the authority responsible for enforcement of dominance rules, and replaced the previous Competition Council in 2013 (see question 1). As noted, the BCA is composed of its President, the Competition College, the Auditorate, and the Executive Committee (management of the BCA). The Auditorate and its prosecutors, headed by the Auditor General, is in charge of investigations (for all cases, including merger control). While the Auditorate can decide to close a case, the College is generally responsible for decision-making.

The Auditorate, headed by the Auditor General, is in charge of investigations, which it opens either following a complaint, ex officio, or at the request or injunction of the competent minister. The Auditorate's investigation powers under Book IV of the CEL are aligned with those at EU level under Regulation No. 1/2003. The prosecutors of the Auditorate can request all necessary information from undertakings (and associations). They may conduct on-site inspections (dawn raids) between 8am and 6pm, and search business premises, transport vehicles, and other locations where they reasonably expect to find relevant documents or other records, including the homes of directors, managers and other employees of the undertakings (and associations) concerned. They may also search the business premises (and homes) of those in charge of the commercial, fiscal, financial or administrative management of the undertakings and associations of undertakings concerned (including external providers). On-site inspections are however subject to the Auditorate obtaining a search warrant issued by an 'investigating judge'. The Auditorate may seize and seal materials for the investigation, but for no more than 72 hours for non-business premises.

Besides the BCA, Belgian courts are also responsible for the enforcement of Belgian and European competition law. Belgian civil procedure does not foresee discovery as conceived in the United States, but courts may order parties to submit specified evidence (in a much narrower fashion). Courts may also appoint experts to assist them in their assessment, for instance to understand cost structures or evaluate damages. Where a dispute hinges on the legality of a specific conduct under the CEL, courts must request a preliminary ruling from the Supreme Court (and stay their proceedings).

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Where the BCA finds an infringement, including an abuse of dominance, it may order the termination of the conduct. The BCA has, however, never imposed structural remedies for abuses of dominance (and it is not clear that Book IV of the CEL enables it to do so).

The BCA may also impose fines on undertakings and associations. While the entry into force of Book IV of the CEL brought the possibility of fines against individuals, this only applies for individuals involved in cartel behaviour and not abuses of dominance. When imposing fines, the BCA cannot exceed the 10 per cent cap of turnover realised in Belgium (including exports) in the last full year preceding the adoption of the decision. Fines are calculated pursuant to the BCA's 2014 Fining Guidelines, which refer to and generally follow the European

Commission's methodology (save limited deviations). The BCA may also impose daily penalty payments of up to 5 per cent of the average daily turnover in the preceding financial year for non-compliance with a decision. Further, the BCA may impose fines of up to 1 per cent of the annual turnover where an undertaking (or association) wilfully or negligently obstructs the investigation, or provides incorrect, misleading, delayed or incomplete information. The highest fine ever imposed in a dominance case was a fine of €66.3 million, in the *Base/Belgacom Mobile* case (26 May 2009, see questions 14 and 18).

The BCA may also close investigations through settlement or commitments.

Commitment decisions do not involve a formal finding of infringement. Plaintiffs therefore cannot solely rely on such decisions as establishing fault under article 1382 of the Civil Code as the basis for a follow-on damages claim before the national courts. Unlike the European Commission, the BCA does not generally make use of commitment procedures to close dominance cases. However, there are some notable exceptions. Commitments were used in November 2016 in the Immoweb case, pursuant to which Immoweb offered to unilaterally terminate the Most Favoured Nation (MFN) clauses included in its contracts with software developers and to refrain from including such clauses in future contracts, for a period of five years (7 November 2016). Furthermore, the Auditorate recently closed an investigation of the FEI initiated in 2015 (see questions 16 and 25), pursuant to commitments (20 December 2018). The Auditorate's preliminary assessment considered potential abuses in (i) the opacity of the accreditation rules related to new team show jumping series; (ii) the penalties for participating in events not approved by the FEI; and (iii) the ability given to the FEI to raise objections to potential new entrants on the market in case of conflict of dates (ie, when two or more events are organised in parallel). In response to the Auditorate's concerns, the FEI offered to establish a transparent procedure for the approval of new series, and to amend its rules concerning the participation to non-FEI accredited events and the conflict of dates.

In its first and only settlement in a dominance case to date, the BCA settled in the National Lottery case (see questions 12 and 25).

The BCA President may also impose interim measures during the investigation, as illustrated on various occasions in questions above. It has done so relatively readily, compared to the European Commission and national competition authorities of neighbouring member states. Interim measures may be requested by a complainant, the Auditorate, the Minister of Economic Affairs, or the minister responsible for the sector in which the alleged abusive practice is taking place. Interim measures may be granted where there is a prima facie infringement and an urgent need to avoid a situation likely to cause serious and imminent harm that would be difficult to remedy, or a situation that is likely to harm the general economic interest. Contrary to the situation before Book IV of the CEL, strict deadlines apply to decide on requests for interim measures so that the decision must come within 12 weeks maximum of the request (a failure to do so amounts to a rejection).

Interim measures may take the form of cease-and-desist orders, but also of specific positive obligations. In *Spira/De Beers* (see question 19), the BCA found prima facie evidence of an abuse by De Beers with serious harm on Spira, after Spira no longer qualified as a distributor under De Beers' newly implemented 'supplier of choice' system. The President of the BCA ordered De Beers to continue supplying rough diamonds to Spira, a measure that was extended on multiple occasions (original decision 25 November 2010). In *Feltz/BMW*, the BCA obliged BMW to take certain measures to allow Feltz, a former official dealer, to remain active in the market as an independent repairer. These included sending a letter to Feltz's customers informing that they were free to choose their repairer and would not lose their warranty if they chose Feltz, and a letter to all official Belgian dealers and repairers confirming that they could sell spare parts to independent repairers (11 July 2014).

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The BCA can directly enforce Belgian and EU competition law and impose sanctions, without having to petition a court.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

The BCA generally received several complaints a year relating to abuses of dominance, though many do not lead to a decision on the merits. As mentioned above, the BCA adopts interim measures in dominance cases more readily compared to the European Commission and national competition authorities of neighbouring member states (see question 27).

A recent interesting case is the *Immoweb* case (see question 27), in which the BCA's Auditorate closed its investigation into MFN clauses included in contracts between Immoweb, Belgium's main real estate web portal, and software developers for real estate agencies (7 November 2016). In January 2015, the Auditorate had initiated an ex officio investigation into Immoweb's practice of including MFN clauses in its contracts with developers, so that they had to offer Immoweb the more beneficial conditions afforded to competing web portals (if so). After the Auditorate preliminary found that the MFN clauses increased the cost of entry of competing real estate web portals, Immoweb proposed to unilaterally terminate the MFN clauses and refraining from including such clauses in future contracts with developers, for a period of five years. Because it was satisfied with the commitments, the Auditorate did not pursue the investigation and no finding of abuse of made. The BCA's case followed investigations of other national competition authorities into MFN clauses in other sectors, and in particular in the travel sector (*Booking.com* investigations).

Contractual consequences

30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Infringing clauses will typically be considered void (Book IV of the CEL does not contain a specific provision on point).

Private enforcement

31 | To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is possible in Belgium and parties may – and do – raise abuse of dominance claims before civil and commercial courts, for instance to terminate contracts (clauses) or to seek damages. While not required to bring an action, a BCA decision finding an abuse may be very useful in support of private litigation (see also question 32).

Further, parties may, under a specific and effective procedure, obtain cease-and-desist orders from the President of the Commercial Court with jurisdiction over the dispute (positive obligations are also possible). The Commercial Court President's orders are immediately enforceable even where appealed. Parties may also obtain interim measures from the President of the BCA (see question 27).

Class actions as understood in the United States are not available in Belgium. However, a law of 28 March 2014 introduced a form of collective redress for groups of consumers, which also applies to cases seeking redress from violations of competition rules.

Damages

32 Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices may bring claims for damages to Belgian courts, under general tort law. Companies have to prove a fault imputable to the defendant (ie, the abuse), an injury suffered by the plaintiff, and a causal link between them.

Belgium has implemented the EU Damages Directive in Book XVII, Title 3 of the CEL, which also covers abuses of dominance. It includes an irrefutable presumption that a finding of abuse in a final decision by the BCA or the Market Court constitutes evidence of fault. Infringement decisions by competition authorities from other EU member states are only prima facie evidence of wrongdoing.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

Decisions of the BCA may be appealed to the Market Court, which has full jurisdiction to review the facts and the law. The Market Court, a special division within the Brussels Court of Appeal, was set up in 2017 to review cases of an economic nature and relating to regulated markets, such as appeals against BCA decisions, but also against decisions of the BIPT (postal and telecoms regulator), FSMA (financial regulator), and CREG (gas and electricity regulator). Settlement decisions of the BCA cannot be appealed by the settling parties.

In the past, the Court of Appeal of Brussels has shown willingness to rule against the BCA, in particular with respect to companies' rights in the context of on-site inspections.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

Article IV.2 of the CEL only applies to dominant firms. For instance, under the 'reflex' or 'mirror' effect, conduct not prohibited under Belgian or EU competition law can generally not be prohibited as an unfair trade practice to the extent the claim against the conduct is one of impediment to the functioning of the free market (see question 1). A conduct not prohibited under Belgian or EU competition law on dominance may only constitute an unfair trade practice where it can be considered as an abuse of right (Belgian Supreme Court in *Multipharma/Widmer*, 7 January 2000).

Belgium has refrained from 'adopting and applying on [its] territory stricter national laws that prohibit or sanction unilateral conduct engaged in by undertakings' (as allowed by Regulation 1/2003). A draft bill regarding abuses of economic dependency by firms with 'significant market positions' is expected to be adopted in March 2019. The new rules would allow enforcement against non-dominant undertakings, similar to existing regulation in France. In view of the BCA's limited resources, it can be expected that effective enforcement of these rules will take time.

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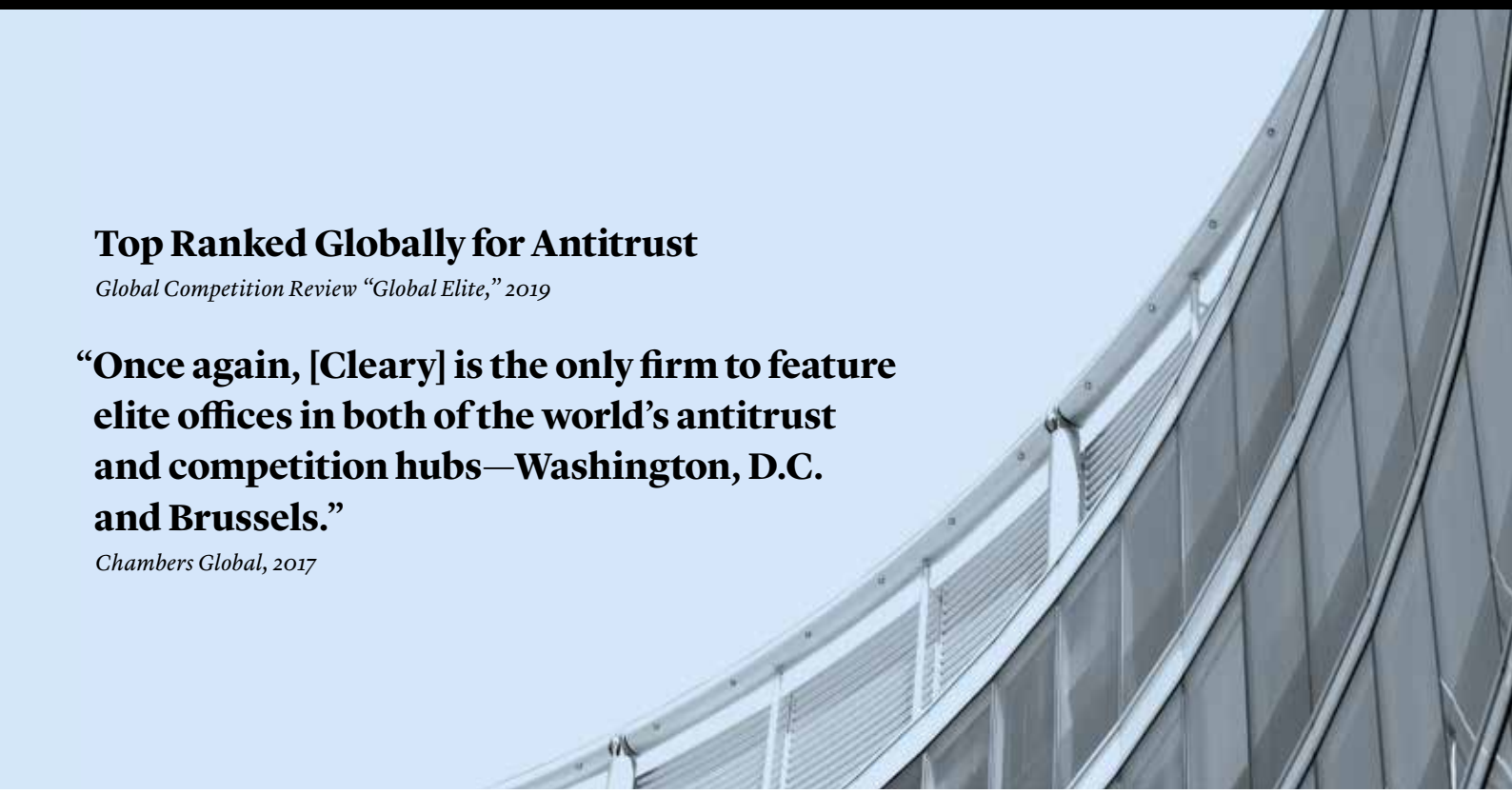
UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

The BCA's annual priority policy report flags certain economic sectors as focus areas. In 2018, these were telecoms, distribution, services to consumers and public procurement, pharmaceuticals and logistics (ports, and road, rail and water networks). Some of these sectors are likely to remain focus areas in 2019.

On the legislative front, the Belgian parliament is expected to adopt a draft law in 2019 on 'significant market power' that would allow enforcement against non-dominant undertakings, similar to existing regulation in France. The BCA President has stated that the enforcement of new provisions on 'significant market power' would require additional staff if adopted.



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