

CLIENT ALERT

The Belgian Competition Authority recently renewed its antitrust guidelines relating to the calculation of antitrust fines

May 29, 2020

AUTHORS

Susanne Zuehlke | Maxime de l'Estang | Sylvain Petit

The Belgian Competition Authority (“BCA”) adopted on 6 May 2020 (published on 25 May 2020) new guidelines relating to the calculation of fines for anticompetitive agreements or abusive conduct under article IV.79, § 1, first subparagraph of the Belgian Economic Law Code (“CDE”) for violations of articles IV.1, § 1 and/or IV.2 of the CDE, or of their European equivalent, namely articles 101 and/or 102 of the Treaty on the Functioning of the European Union (“TFEU”) (the “2020 Belgian Guidelines”).¹ The 2020 Belgian Guidelines replace preceding guidelines adopted by the BCA in 2014 (the “2014 Belgian Guidelines”), without much change.² (These new guidelines essentially aim at tidying up the text following the law of 2 May 2019, which introduced some new provisions in the competition law chapter of the CDE, the ones of relevance here entering into force on 1 June 2020.)

In both the 2020 and 2014 Belgian Guidelines, the BCA largely refers to the European rules applicable to the calculation method of antitrust fines (the “EU Guidelines”)³ with some national specificities, as highlighted hereinafter.

¹ Guidelines from the Belgian Competition Authority of 6 May 2020 on the method of setting fines for undertakings and associations of undertakings pursuant to Article IV.79(1), first subparagraph of the Code of Economic Law .

² Guidelines from the Belgian Competition Authority of 26 August 2014 on the method of setting fines for undertakings and associations of undertakings pursuant to Article IV.70(1), first subparagraph of the Code of Economic Law .

³ Commission Guidelines of 1 September 2006 on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

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Objectives of the 2020 Belgian Guidelines

The 2020 Belgian Guidelines, similar to the 2014 Belgian Guidelines, intend to bring more transparency and legal certainty for undertakings and associations of undertakings under investigation (or which may be involved in, or concerned by, potential anticompetitive practices) as regards the level of fine that they may face pursuant to Article IV.60 and IV.79(1) of the CDE.

Calculation of the basic amount of the fine

Pursuant to the EU Guidelines, the Commission uses a two-step methodology when setting the fine to be imposed for antitrust violations: (i) first, a so-called “basic amount” is determined for each undertaking concerned (set by reference to the value of sales); (ii) second, this basic amount may be adjusted upwards or downwards depending on the circumstances.

For purposes of the 2020 Belgian Guidelines, the value of sales to be taken into account is the value of the undertaking's sales of goods or services in Belgium to which the infringement directly or indirectly relates⁴ (as opposed to the relevant geographic area within the European Economic Area (“EEA”), pursuant to the EU Guidelines⁵), during the last full business year of its participation in the infringement.

In the event where an undertaking concerned did not achieve a turnover in Belgium that is directly or indirectly related to the infringement (i.e. application of a market-sharing agreement that kept the undertaking out of the Belgian market), but where that undertaking did consolidate its turnover in Belgium (in the sense of article IV.84 of the CDE), a different method of calculation may be applied, namely: the basic amount of the fine is then calculated on the basis of the turnover related to the products and services directly or indirectly related to the infringement on the geographic markets outside Belgium where the undertaking was offering the infringement goods or services.⁶

In any event, pursuant to the 2020 Belgian Guidelines, which make reference to the new art. IV.84 of the CDE as introduced by the law of 2 May 2019,⁷ the fine cannot exceed 10% of the undertaking's total worldwide turnover for the last fiscal year. (Before, the 10% threshold was to be computed on the basis of the domestic and export markets related

⁴ 2020 Belgian Guidelines, para. 5.

⁵ EU Guidelines, para. 13.

⁶ 2020 Belgian Guidelines, para. 6(a).

⁷ 2020 Belgian Guidelines, para. 7.

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to Belgium only.⁸) The 2020 Belgian Guidelines are thus now in line with the higher threshold applied by the European Commission.

Computation of reductions for leniency and settlement

Following the 2020 Belgian Guidelines, where an undertaking benefits from both a partial exemption due to the leniency programme and from a reduction due to the settlement procedure, then the leniency reduction is deducted first from the amount of the fine, and the settlement reduction second (on the basis of the already-reduced amount).⁹ This differs from the computation methodology followed by the European Commission, which adds the two reductions together (on the basis of the same amount), leading to a higher reduction overall.¹⁰ In that sense, the 2020 Belgian Guidelines are stricter than the EU Guidelines, which allow for a potentially higher amount of reduction.

Aggravating circumstances: repeat offence

The 2020 Belgian Guidelines indicate that an identical or similar infringement, which may lead to a higher fine amount, may also qualify as such when the European Commission, or a national competition authority in a neighboring country of Belgium or of the United Kingdom (namely, the Competition and Markets Authority) has made a previous finding that the same undertaking infringed articles 101 and/or 102 of the TFEU.¹¹ Following the EU Guidelines, to which the 2020 Belgian Guidelines refer, the basic amount may be increased by up to 100% for each such repeat infringement.¹²

In our view, the limitation of this provision to competition authorities in neighboring countries around Belgium is rather unusual¹³ but, in practice, it reduces the risk for companies being fined by the BCA to see their fine increased on the basis of a repeat offence.

Finally, and usefully, the 2020 Belgian Guidelines specify that there is no repeat offence within a group of companies if an identical or similar infringement has been committed by a subsidiary of that group that was acquired after the involvement of that subsidiary in such infringement ceased.¹⁴

⁸ 2014 Belgian Guidelines, para. 7.

⁹ 2020 Belgian Guidelines, para. 10.

¹⁰ Commission Guidelines of 2 July 2008 on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, para. 33.

¹¹ 2020 Belgian Guidelines, para. 11.

¹² EU Guidelines, para. 28.

¹³ See e.g., decision of the French Competition Authority (“FCA”) 07-D-23 of 15 October 2007 (para. 117-118) where the FCA decided that a repeat offence can be established based on a 101 and/or 102 TFEU infringement decision of any national competition authority (or of the European Commission).

¹⁴ 2020 Belgian Guidelines, para. 12.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Susanne Zuehlke

+32 2 290 18 32

szuehlke@willkie.com

Maxime de l'Estang

+32 2 290 18 20

mdelestang@willkie.com

Sylvain Petit

+32 2 290 18 20

spetit@willkie.com

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