COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Belgium

MERGER CONTROL

Contributor

McDermott Will & Emery Belgium LLP

Hendrik Viaene

Managing Partner (Brussels) | hviaene@mwe.com

This country-specific Q&A provides an overview of merger control laws and regulations applicable in Belgium.

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BELGIUM
MERGER CONTROL

1. Overview

The Belgian rules on merger control are included in Book IV "Protection of competition" of the Belgian Code of Economic Law and the Royal Decree of 30 August 2013 relative to notifications of company mergers. The Belgian rules are highly similar to the EU merger control rules, which are often applied by analogy (including notices and guidelines).

The Belgian Competition Authority, an independent administrative authority, is responsible for merger control enforcement. It is composed of:

(i) the President;

(ii) the Competition College, which is presided by the President;

(iii) the Managing Board,

(iv) the Investigation and Prosecution Service, led by the Competition Prosecutor General.

The Investigation and Prosecution Service is responsible for investigating mergers, whereas the Competition College decides whether to clear the transactions.

A merger filing is mandatory if the transaction meets the jurisdictional thresholds. It is standard practice to engage in pre-notification discussions with the Belgian Competition Authority.

The Belgian jurisdictional thresholds are relatively high. On average, the Belgian Competition Authority reviews around 30 concentrations a year. The Authority reviews most mergers under the simplified procedure.

If the jurisdictional thresholds are met, the merging parties are subject to a notification obligation and stand-still obligation (i.e., they must refrain from implementing the transaction prior to clearance).

A specific feature of the Belgian merger control regime concerns the exclusion of locoregional clinical hospital networks. In particular, the establishment of locoregional clinical hospital networks and any subsequent changes in its composition are excluded from the application of Belgian merger control rules. This exception has to be applied carefully as the BCA continues to review certain hospital transactions. In addition, the European merger control rules still apply.

On the basis of the one-stop-shop principle, concentrations with a Community dimension will be subject to review by the European Commission and not by the Belgian Competition Authority. However, the European Commission can refer transactions with a Community dimension to the Belgian Competition Authority for review. Furthermore, in line with the recent European Commission's Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021), the Belgian Competition Authority can also refer transactions to the European Commission, even if the Belgian or EU jurisdictional thresholds are not met.

2. Is notification compulsory or voluntary?

Concentrations that meet the jurisdictional thresholds are subject to compulsory notification. There is no voluntary merger filing regime.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

The Belgian merger control rules impose a stand-still obligation on the undertakings concerned. This implies that the undertakings concerned cannot implement the concentration prior to clearance by the Belgian Competition Authority.

However, the stand-still obligation does not prevent the implementation of public bids or series of transactions in financial instruments, subject to conditions. In this case, (i) the concentration must be notified to the Competition Prosecutor General without delay and (ii) the acquirer

cannot exercise the voting rights attached to the financial instruments or can only do so to maintain the full value of its investment and on the basis of a derogation granted by the President.

Furthermore, the President can grant derogations from the stand-still obligation at any time and at the request of a party. The President can grant a derogation subject to conditions and obligations.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The Belgian merger control rules apply to 'concentrations', i.e., transactions resulting in a lasting change in the quality of control over an undertaking. Three types of transactions can qualify as a 'concentration':

1. Mergers, i.e., the merger of two or more previously independent undertakings or parts of undertakings;

2. Acquisitions, i.e., the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings;

3. Full-function joint ventures, i.e., the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

The transaction must result in a lasting change of control. This entails a possibility to exercise decisive influence over an undertaking. Intra-group transactions do not qualify as a concentration, as these transactions do not result in a lasting change of control.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

An acquisition of a minority interest would be notifiable in case such acquisition would result in a lasting change in the quality of control resulting in joint or sole control. For example, if special rights are attached to the shareholding which enable the minority shareholder to determine the strategic commercial behavior of the acquired undertaking.

In 2013, the Belgian Competition Authority considered a minority interest of 27.6% to amount to control (*Picanol NV / Tessenderlo Chemie NV*). In this case, *Picanol* purchased 27.6% of the shares of *Tessenderlo Chemie*, whereas the remaining shares were dispersed among a large number of shareholders. As a result, the Authority found that Picanol acquired *de facto* control over *Tessenderlo Chemie*.

If the acquisition of a minority interest does not result in a lasting change of control, the acquisition would not be notifiable or reviewable.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

A concentration must be notified to the Belgian Competition Authority if the following turnover threshold is met:

- The combined turnover of the undertakings concerned in Belgium exceeds EUR 100 million, and
- At least two of the undertakings concerned each generate a turnover in Belgium of at least EUR 40 million.

The above threshold applies to all sectors. However, it should be noted that the establishment of locoregional clinical hospital networks and any subsequent changes in its composition are excluded from the application of Belgian merger control rules.

The turnover thresholds refer to the amounts derived from the sale of products by the undertakings concerned in the ordinary course of business, after deduction of sales rebates, value added tax and other taxes directly related to turnover.

Furthermore, turnover should be considered at group level and includes the turnover of subsidiaries, parent companies and their subsidiaries, as well as affiliated companies.

Turnover generated by the seller group is generally not included, except if the seller retains control over the target post-transaction.

No form of local presence is required in order for the Belgian Competition Authority to have competence over the transaction.

Every three years, the Belgian Competition Authority should carry out a review of the jurisdictional thresholds (see Question 36 – Are there any future developments or planned reforms of the merger control regime in your jurisdiction?).

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

For the purposes of the jurisdictional thresholds, the turnover generated during the last financial year should be taken into account. Turnover generated from intra-group transactions is excluded from the calculation.

Instead of turnover, the following metrics should be used for credit and other financial institutions, and insurance companies:

- Credit institutions and other financial institutions: the sum of (i) interest income and similar income, (ii) income from securities, (iii) commissions receivable, (iv) net profit on financial operations and (v) operating income.
- Insurance companies: value of gross premiums written.

The Belgian merger control rules do not specify how to allocate turnover geographically. However, the European Commission's Consolidated Jurisdictional Notice can be applied by analogy. As a general rule, turnover should be attributed to the place where the customer is located.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

In the absence of specific guidance on this point, the EU approach can be followed. The annual turnover of an undertaking should be converted at the average rate for the twelve months concerned, as published by the European Central Bank.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

According to the Belgian merger control rules, only joint ventures performing on a lasting basis all the functions of an autonomous economic entity qualify as a concentration and are notifiable if the turnover thresholds are met. In other words, only full-function joint ventures need to be notified. This is true for the creation of joint ventures and for acquisitions of joint control.

In line with the EU approach, this implies that the joint venture must:

- have sufficient resources to operate independently on the market;
- carry out activities beyond one specific function for the parents;
- play an active role on the market;
- be intended to operate on a lasting basis.

If the joint venture is not full-function, the Belgian Competition Authority can only analyze the joint venture under the rules for anti-competitive agreements.

There are no separate thresholds for joint ventures.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

The Belgian merger control rules provide that two or more transactions, which take place within a two-year period between the same persons or undertakings, shall be treated as one and the same concentration arising on the date of the last transaction. Therefore, the last transaction will be notifiable.

If a transaction occurs in several stages, and at each stage where a change in the quality of control occurs the merger filing thresholds are met, that particular stage of the transaction will have to be notified, provided there is a time lapse exceeding 2 years.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

The general jurisdictional threshold also applies to "foreign-to-foreign" transactions. In other words, even if the legal entities acquiring and being acquired are all located outside Belgium, the transaction can still be notifiable if the turnover threshold is exceeded.

Given that the jurisdictional threshold requires at least two of the undertakings concerned to achieve an individual turnover in Belgium of at least EUR 40 million, transactions involving companies with no nexus to Belgium, will in practice not trigger the threshold.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The Belgian Competition Authority technically applies the same test as the European Commission. The Authority examines whether the concentration 'significantly impedes effective competition' in the Belgian market or in a substantial part thereof, i.a. through the creation or strengthening of a dominant position. The Authority will prohibit concentrations that would result in a significant impediment of effective competition.

In this respect, the Belgian Competition Authority carries out an economic appraisal of the transaction and considers potential horizontal, vertical, unilateral and coordinated effects arising from the merger. In particular, the Authority takes into account:

- The need to maintain and develop effective competition on the market, having regard, in particular, to the structure of all the markets concerned and to the existing or potential competition from undertakings located inside or outside the territory of Belgium;
- The market position of the undertakings concerned, their economic and financial power, the options open to suppliers and customers, their access to sources of supply and markets, the existence of legal or factual barriers to market entry, the evolution of supply and demand for the products concerned, the interests of intermediate users and end users and the development of technical and economic progress, insofar for the benefit of consumers and not constituting an obstacle to competition.

If the combined market share of the undertakings concerned does not exceed 25% on the relevant market, the Competition College must approve the transaction, irrespective of whether it concerns horizontal or vertical relationships.

14. Are factors unrelated to competition relevant?

In general, the Belgian Competition Authority will only take into account factors that relate to competition.

15. Are ancillary restraints covered by the authority's clearance decision?

The Belgian merger control rules do not explicitly provide that a clearance decision also covers ancillary restraints. However, in line with the EU approach, a clearance decision shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no statutory deadline for notification of the transaction. However, parties should notify the transaction before implementation.

17. What is the earliest time or stage in the transaction at which a notification can be made?

The Belgian merger control rules provide that the parties may notify a draft agreement. In that case, the parties must declare that they intend to conclude a final agreement that does not differ significantly from the notified draft in view of all aspects relevant to competition law. In practice, a notification can be made on the basis of a signed letter of intent or of a term sheet signed by the parties involved in the transaction.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

It is standard practice to engage in pre-notification discussions with the Belgian Competition Authority. The notifying parties can submit a draft notification. If the Authority considers the notification complete, it will give the green light for formal filing.

The Belgian Competition Authority encourages parties to contact them at least two weeks before notification. However, the duration of the pre-notification discussions is often longer. In general, the duration of the pre-notification discussions will depend on the sector and complexity of the case.

The longest pre-notification phase to date amounted to one-and-a-half years and concerned the acquisition of Group Coox by Group Delorge in the sector of automotive retail. Eventually, the Belgian Competition Authority cleared the transaction subject to conditions

after a Phase II review (2020) (see also Question 30 –What kind of remedies are acceptable to the authority?)

19. What is the basic timetable for the authority's review?

In practice, the parties will first engage in pre-notification discussions with the Belgian Competition Authority. During the pre-notification phase, the Authority will review the notification and will examine whether the notification is complete. If the Authority considers the notification complete, the parties may formally notify the concentration and the clock will start running from the day following the formal filing. The clock does not start running if the information provided at the time of notification is incomplete.

The basic timetable will differ depending on whether the concentration qualifies for the simplified procedure.

Simplified procedure (15 working days): The basic timetable for review of concentrations under the simplified procedure amounts to 15 working days from the day following receipt of a complete notification. If the Belgian Competition Authority does not take a decision within 15 working days, the concentration will be deemed approved.

Phase I review (40 working days): The basic timetable for a review of concentrations in Phase I amounts to 40 working days from the day following receipt of a complete notification. Within this period, the Competition College will approve the transaction or initiate a Phase II review. If the Competition College did not take a decision within this time frame, the concentration will be deemed approved.

Phase II review (60 working days): The basic timetable in Phase II amounts to 60 working days after the decision to initiate Phase II proceedings. If the Competition College did not take a decision within this time frame, the concentration will be deemed approved.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

The basic timetable will be extended in case the notifying parties offer remedies, revise the remedies or modify the concentration. In Phase I, the 40 working day deadline will be prolonged with 15 working days in all three cases. If the notifying parties offer remedies in Phase II, the 60 working day timeline will be extended with the same length of time used by the notifying parties to offer the remedies (in principle maximum 20 working days). If the parties concerned modify the concentration in Phase II, the 60 working day deadline will be increased with 15 working days.

Furthermore, the Competition College can decide to extend the basic Phase I or Phase II timeline at the request of the notifying parties, for no longer than the duration proposed by them. If the notifying parties request such extension in Phase I, the Competition College shall in any event grant an extension of 15 working days and organize a new hearing. In Phase II, the Competition College shall in any event grant the extension requested up to a maximum of 20 working days and organize a new hearing, if the notifying parties request so in order to offer new remedies.

On the other hand, the Belgian Competition Authority can freeze the basic timeline in case of requests for further information. The decision requiring information suspends the basic timeline until the information is provided.

The Belgium Competition Authority can also freeze the basic timeline in case the notifying parties submit a new piece, which is not yet included in the investigation file. The President shall set a time limit within which the Prosecutor may submit written comments. The President will also set a time limit for the notifying parties to respond to the Prosecutor's written comments. The basic timeline will be suspended from the date of the decision of the President fixing the above time limits until the end of the period in which the notifying parties can submit their response.

21. Are there any circumstances in which the review timetable can be shortened?

It is strongly encouraged to engage in pre-notification discussions with the Belgian Competition Authority to facilitate the merger review process. This will allow the Authority to verify whether the draft notification is complete, so the notifying parties can avoid suspensions of the timeline.

Depending on the case, it may be that a decision in a simplified procedure is rendered before the end of the 15 working days period, but there are no legal provisions requiring shorter decision deadlines.

22. Which party is responsible for submitting the filing?

In case of a merger or an acquisition of joint control, both the merging undertakings or the parties acquiring joint control must submit the filing.

In case of an acquisition of sole control, the acquirer will be responsible for submitting the filing.

23. What information is required in the filing form?

In general, the notifying parties must provide information about the undertakings concerned, the concentration, the parties' ownership and control structure, the relevant product and geographic markets, the parties' estimated market shares, the general situation on the affected markets (supply, demand, market entry, research & development, collaboration agreements, industry organizations) and efficiency gains. Parties can request waivers to submit certain information.

In practice, most transactions qualify for the simplified procedure. A simplified merger review requires less information to be provided compared to standard filings, and will mainly focus on ensuring that the conditions for application of the simplified procedure are fulfilled. The simplified procedure applies to the following situations:

- Acquisition of joint control of a joint venture, which is or will not be active in Belgium, or only to a limited extent. This will be the case if the turnover and assets of the joint venture in Belgium are each less than EUR 40 million;
- Mergers or acquisitions of sole or joint control with no horizontal or vertical overlap;
- Mergers or acquisitions of sole or joint control, where (i) in case of a horizontal overlap, the parties' combined market share is less than 25%, or (ii) in case of a vertical overlap, the parties' individual or combined market share is less than 25%;
- Acquisition of sole control by a party already exercising joint control;
- Mergers or acquisitions of sole or joint control, where in case of a horizontal overlap, the parties' combined market share is below 50% and the HHI-delta is below 150.
- Mergers or acquisitions of sole or joint control, where in case of a horizontal overlap, the parties' combined market share is below 50% and the transaction results in less than a 2% increment in market share.
- If the Belgian Competition Authority considers that in the following two situations, in view of all relevant circumstances, there is no doubt on the admissibility of the concentration and it does not raise objections: (i) in case of a horizontal overlap: the parties' combined market share is above 25% but below 40%, (ii) in case of a vertical overlap: the parties' individual or combined market share is above 25% but below 40%.

24. Which supporting documents, if any, must be filed with the authority?

The notifying parties must file the following supporting documents with the Belgian Competition Authority:

- Power of attorney (no notarization or apostille required);
- Transaction documents;
- Articles of association of all parties to the concentration;
- Annual report of all parties to the concentration;
- Annual accounts of all parties to the concentration;
- A document drawn up by the works council of the notifying parties, which proves that the works council has been informed about the transaction;
- A document from the undertakings concerned listing the representatives of the most representative employee organization;
- Analyses, reports, studies, surveys or other similar documents prepared by or for members of the administrative or supervisory body or persons exercising a similar function, the shareholder's meeting, for the purpose of evaluating or analyzing the concentration;
- A signed declaration from the notifying parties that all information provided is correct and complete, and that they will respect the stand-still obligation.

The documents must indicate the date of the document, as well as the name and role of each person that drafted the document.

The notifying parties need to submit the notification in Dutch or French, and the supporting documents in their original language. In case the original language is not Dutch, French, German or English, they need to be translated to the language of the notification.

25. Is there a filing fee?

Yes. In principle, notifications are subject to a filing fee of EUR 52.350. In case the concentration qualifies for the simplified procedure, the filing fee amounts to only EUR 17.450. As of 2023, the amount of the filing fee shall be automatically indexed according to the consumer price index.

26. Is there a public announcement that a notification has been filed?

Yes, shortly after the formal filing the Belgian Competition Authority publishes a notice and summary of the notification on its website. A notice of the notification is also published in the Belgian Official Gazette.

27. Does the authority seek or invite the views of third parties?

Yes, the Belgian Competition Authority invites interested third parties (e.g. customers, competitors, trade associations, consumer organizations) to submit their views on the proposed concentration. For this purpose, the Authority publishes a notice of the notification on its website and in the Belgian Official Gazette. The notice indicates a deadline by which third parties need to provide their comments.

28. What information may be published by the authority or made available to third parties?

The Belgian Competition Authority publishes a short notice of the notification on its website and in the Belgian Official Gazette. The Authority also publishes a non-confidential summary of the transaction on its website, as provided by the notifying parties. The Authority does not publish the notification itself, any of the supporting documents, or any other submissions made by the notifying parties.

The Belgian Competition Authority also publishes a non-confidential version of its decision on its website. It will provide a copy of the draft decision to the notifying parties first, and ask them to mark any confidential information.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Yes, the Belgian Competition Authority cooperates with the national competition authorities of other EU member states and the European Commission within the framework of the European Competition Network (ECN).

30. What kind of remedies are acceptable to the authority?

The Belgian Competition Authority accepts both structural and behavioural remedies. Compared to the European Commission, the Belgian Competition Authority is generally more inclined to accept behavioural remedies.

A recent decision in which behavioural remedies were accepted, concerns the acquisition of Group Coox by Group Delorge (2020) in the sector of automotive retail. Following Phase II proceedings, the Belgian Competition Authority accepted the following remedies: for a period of three years, Delorge would (i) maintain the current opening hours of the Coox concessions, (ii) not impose any closures of the Coox concessions during holiday periods, (iii) have the same proportional number of replacement vehicles available at the Coox concessions as at the Delorge locations and (iv) introduce the Fleetback system (a system that allows for live video chat communication with customers during car maintenance or repair) in the Coox concessions.

The Belgian Competition Authority also clears concentrations subject to structural remedies. A recent example concerns the acquisition by Volvo Group Belgium NV of authorized retailer Kant NV (2018). The approval was subject to the closure of one of Volvo's points of sale and the authorization of another retailer.

31. What procedure applies in the event that remedies are required in order to secure clearance?

The notifying parties can offer remedies both in Phase I and Phase II.

In Phase I, the notifying parties can offer remedies within a period of five working days from the day they are informed of the Prosecutor's objections. If the parties offer remedies, the basic timetable of 40 working days will be extended with 15 working days. Therefore, the Phase I review period amounts to maximum 55 working days.

In Phase II, the notifying parties can submit remedies no later than 20 working days after the decision by the Competition College to initiate Phase II proceedings. The Prosecutor can extend this period of 20 working days. If the notifying parties submit remedies, the basic timeline of 60 working days will be prolonged with the same length of time used by the parties to offer the remedies (in principle maximum 20 working days). In that case, the Phase II review period will amount to 80 working days.

It is worth noting that the President of the Competition College, which decides on whether a notified transaction will be approved, can grant the parties an additional delay within which they can offer new remedies. Also,

parties to the concentration can modify the notified concentration up until the point where the Competition College takes the case into deliberation, i.e., after having held a hearing.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

The Belgian Competition Authority can impose a fine up to 10% of the total worldwide turnover if the parties implement the concentration prior to clearance, i.e., 'gun jumping'. The party responsible for notification will be liable for such penalty. Furthermore, the Belgian Competition Authority can impose penalty payments up to 5% of the average daily turnover for each day of non-compliance.

By way of example, in 2015, the Belgian Competition Authority fined the Cordeel Group EUR 5.000 for gun jumping.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

In case the notifying party intentionally or negligently provides incomplete or misleading information, the Belgian Competition Authority can impose a fine up to 1% of the total worldwide turnover.

34. Can the authority's decision be appealed to a court?

Merger decisions (including implicit decisions to authorize concentrations by expiry of the review periods) taken by the Belgian Competition Authority can only be appealed to the Market Court. The Market Court is a separate section within the Brussels Court of Appeal.

The following persons can lodge an appeal to the Market Court within a period of 30 days from notification of the decision:

- Any party to the contested decision;
- Any person claiming an interest and who has requested the Competition College or the Prosecutor General to be heard;
- The Minister.

In cases concerning the permissibility of concentrations or conditions and obligations imposed by the Competition College, the Market Court can only annul or uphold such decisions. If the Market Court (partly) annuls a merger decision, it refers the case back to the Belgian Competition Authority which will need to review the concentration anew.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

The Belgian Competition Authority has a preference for treating as many concentrations as possible under the simplified procedure. In January 2020, the Authority adopted new rules to extend the scope of the simplified procedure (see also Question 23 – What information is required in the filing form?). In 2021, for example, all notified transactions were reviewed under the simplified procedure, except for one.

It should also be noted that the Belgian Competition Authority supports the European Commission's revised approach with regard to the case referral mechanism (see the Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases – 2021).

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

Every three years, the Belgian Competition Authority should carry out a review of the jurisdictional thresholds, taking into account the economic impact and administrative burden for undertakings. However, the Belgian Competition Authority has not published any news about a review of the jurisdictional thresholds since its last review in 2017.

During the last review in 2017, the Belgian Competition Authority considered that the jurisdictional thresholds are relatively high and should not be raised. Nevertheless, the Authority also concluded that the thresholds should not be lowered. If the Authority would consider to lower the thresholds, it would opt for lower thresholds in specific sectors with a local catchment area, as is the case in France. It could also be envisaged to ask companies to inform the Authority of mergers that are below the thresholds but are important for the Belgian market (thresholds to be defined).

There are no other publicly known future developments or planned reforms of the Belgian merger control regime.

Contributors

Hendrik Viaene
Managing Partner (Brussels)

hviaene@mwe.com