



The In-House Lawyer: Comparative Guides

Belgium: Merger Control

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10/28/2016

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in [Belgium](#).

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control>

1. Overview

The Belgian merger control regime is governed by the Competition Act of 2013 (the Competition Act). All provisions concerning merger control entered into force on 6 September 2013. The Royal Decree of 30 August 2013 relating to the notification of mergers of undertakings is the main implementing decree, and it is supplemented by the rules adopted on 8 June 2007 concerning the simplified notification of mergers.

The relevant enforcement authority is the Belgian Competition Authority (Autorité Belge de la Concurrence / Belgische Mededingingsautoriteit), which is an independent administrative authority composed of the President, the Competition College, the College of Competition Prosecutors and a Management Committee. Notifications are submitted to the Competition Prosecutor General. Appeals against decisions approving or prohibiting a notified transaction can be lodged with the Brussels Court of Appeal.

Belgium enforces a system of mandatory notification for concentrations that meet the jurisdictional thresholds. The standard timetable for review is 40 working days in Phase One and 60 working days in Phase Two, subject to extensions. Certain transactions may be eligible for a simplified procedure which lasts 15 working days: in recent years, the majority of cases have been notified under the simplified procedure. Notifiable concentrations may not be implemented before approval, and fines can be imposed to sanction early implementation.

Merger filings in Belgium require extensive and detailed information and supporting materials. Businesses whose transaction triggers a Belgian notification should allow ample time to prepare the necessary documents. It should also be noted that the Belgian Competition Authority encourages parties to engage in informal "pre-notification" contacts before filing a notification and starting the clock on the formal review period. This, too, should be taken into account when planning the timeline of a deal.

2. Is mandatory notification compulsory or voluntary?

Filing is mandatory for all concentrations that meet the jurisdictional thresholds. The only exception is if the transaction also meets the jurisdictional thresholds for notifying the European Commission.

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

Closing is prohibited until the concentration receives the approval of the Belgian Competition Authority. The parties must suspend the implementation of their transaction until approval is received, i.e., there must be no transfer of shares or securities and no de facto change of control. There is no express provision that allows Belgium to be “carved out” so that closing can proceed in other jurisdictions.

There is one statutory exception to the prohibition on closing without approval. In the case of public offers, the parties may transfer the shares or securities in question provided that the concentration is notified without delay and the purchaser does not exercise the voting rights attached to the securities until the acquisition is approved. The buyer may request a waiver of the prohibition on exercising their voting rights if this is necessary to maintain the full value of the investment.

Such waivers have been successfully obtained on a number of occasions, typically when the change of control was considered urgent in order to preserve the value of the target. For example, in 2008 the Belgian Federal Holding and Investment Company acquired a stake in Fortis Bank and was granted permission to exercise limited control prior to formal approval, on account of the financial difficulties facing the bank. A waiver was also granted in the case of the initial public offering of Bpost in 2013.

4. What are the conditions of the test for control?

The merger regime applies to “concentrations”, which are defined as transactions that bring about a lasting change of control. “Control” is defined as the possibility of exercising decisive influence over an entity’s activity, including by way of negative control (such as the exercise of veto rights) or de facto control.

A concentration therefore exists where:

- One or more individuals or entities acquire control over the whole or part of another entity or its assets.
- Two previously independent entities merge.
- A “full-function” joint venture is established by two or more undertakings, or the nature of control over a full function joint venture is changed.

5. What are the conditions on minority interest in your jurisdiction?

The acquisition of a minority interest will require notification if it results in a change of control on a lasting basis and the jurisdictional thresholds are met. There is no minimum percentage shareholding below which it is safe to assume that control will not be acquired: the issue should be determined on a case-by-case basis.

As noted above, control can be acquired on a de facto basis. This can be particularly relevant in relation to minority interests. For example, In the case of Picanol NV/Tessenderlo Chemie NV, the Belgian Competition Authority ruled in 2013 that the buyer acquired de facto control over the target when it purchased a 27.6% interest because the remaining shares were dispersed among a large number of shareholders and the minority interest was, in practice, sufficient to exercise a decisive influence over the target. Decisive influence, for these purposes, relates to strategic business decisions such as approving the budget and appointing or dismissing members of the board.

The acquisition of a minority interest which does not result in a change of control will not be notifiable.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

A concentration must be notified if two thresholds are both satisfied: (a) the aggregate turnover in Belgium of all parties exceeds €100 million; and (b) at least two of the parties each have a turnover in Belgium above €40 million. The thresholds cannot be satisfied by one party alone, and only Belgian turnover (see below) is relevant.

The thresholds are based on the consolidated turnover of a party's entire group, i.e., the turnover of all undertakings that control the party concerned, all undertakings under common control with that party, and all undertakings that are controlled by that party. If the acquisition involves only parts of an undertaking, or its assets, only the turnover that is derived from the parts of the undertaking that are the subject of the transaction are taken into account. The turnover of the seller is not taken into account when applying the thresholds.

Turnover is defined as the revenue generated from the sale of goods and supply of services in Belgium as part of normal business activities, after deducting discounts and VAT or any other turnover-related taxes, in the last completed financial year. Intra-group (non-third party) sales are not included.

There are specific rules for calculating the turnover of credit and financial institutions, and insurers. The relevant turnover of a credit or financial institution is the total income of the Belgian branch (or branches), after VAT and other directly related taxes. The total income comprises interest and similar income; income from securities; commissions received; net profit on financial operations; and other operating income.

The turnover of insurance companies is based on the value of gross premiums paid by Belgian residents. This includes all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurer, including premiums assigned to re-insurance companies, after all taxes on the value of individual premiums or on the total value of premiums.

The Belgian Competition Authority is entitled to review the jurisdictional thresholds every three years. The current thresholds were last reviewed on 3 April 2013.

7. Is there a particular exchange rate required to be used for turnover thresholds and asset values?

The law does not prescribe a specific exchange rate that must be used to convert other currencies into Euros. In practice, parties should rely upon the European Central Bank's annual mean conversion rate for the relevant period.

8. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business)?**

The merger control regime applies to the creation (or change in control of) “full-function” joint ventures. There are no separate turnover thresholds for joint ventures.

A joint venture will be considered to be full-function if it performs, independently of its parents, the functions normally carried out by any undertaking active on the same market. Hence, to be full-function, a joint venture must: have management dedicated to its daily operations and access to sufficient assets, personnel and finance to conduct its business activity independently; be able to conduct its own commercial policy; perform activities other than specific functions for its parents; have no significant purchase or supply contracts with its parents which would limit its independent character; and be of a sufficiently long duration that this will cause a permanent change in the structure of the undertakings in question. A production joint venture that is created solely to supply its parents, for example, would not be regarded as full-function.

It should be noted that creating a joint venture that is not full-function – and hence is not subject to merger control – may be subject to review under the EU and Belgian rules on anticompetitive agreements.

9. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

There are no distinct jurisdictional thresholds for “foreign-to-foreign” mergers. If a concentration between two non-Belgian entities meets the Belgian thresholds, it must be notified. The penalties for failure to notify are the same as for any other concentration, i.e., fines may be imposed.

10. **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.

11. **Additional information: Jurisdictional Test**

Not applicable.

12. **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?**

The substantive test applied by the Belgian Competition Authority, when reviewing notifications, is whether the concentration will result in a significant obstacle to effective competition in the Belgian market, in particular by creating or strengthening a dominant position.

In applying this test, the Authority will have reference to the market share of the merged entity as well as other factors relevant to the structure of competition, such as: the existence of potential new entrants to the market; barriers to entry and exit; the availability of alternative products; the existence of vertical links to upstream or downstream markets; the creation or strengthening of a strong position in neighbouring markets; the possible impact on emerging or future markets; any risk of foreclosing the market through ties with customers and/or suppliers; conglomerate or portfolio effects, etc.

13. **Are non-competitive factors relevant?**

The Belgian Competition Authority will only take into account factors unrelated to competition in specific sectors.

14. **Are there different tests that apply to particular sectors?**

The Belgian Competition Authority will take into account the need to maintain media pluralism when assessing mergers in the media sector.

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

Ancillary restrictions on competition, such as non-compete clauses, are covered by the Belgian Competition Authority's clearance decision provided that they are directly related to the concentration and can be considered "necessary".

Generally, the Belgian Competition Authority takes the same approach as the European Commission to assessing whether these criteria are satisfied. In particular, any restraint on competition should be limited in scope (in terms of the product and geographic markets, duration, and entities affected) to the minimum that is required in order to successfully implement the transaction and ensure that the buyer receives the full value of their acquisition.

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

There is no statutory deadline for notifying a concentration, provided that it is both notified and approved before it is implemented.

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

Parties may notify a concentration after signing the relevant purchase agreement or after publication of the take-over bid or public offer of exchange. A notification may be filed on the basis of a draft agreement, provided that the parties state explicitly that they intend to conclude a final agreement that will not substantially differ from the draft on issues pertaining to competition law.

The Belgian Competition Authority encourages parties to engage in pre-notification contacts in order to discuss an intended concentration informally and in confidence before formal notification. Such contacts may take place on the basis of a draft agreement.

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

The Belgian Competition Authority's review consists of two stages. In Phase One, the Authority has 40 working days to adopt a decision to either: (i) approve the concentration; or (ii) open an extended Phase Two investigation, if the transaction gives rise to serious concerns. If no decision is issued within 40 working days, the concentration is deemed to be cleared (hence, tacit approval through lapse of time is possible). The timetable in Phase One can be extended if commitments are given (see below). It can also be shortened in cases where the simplified procedure is applicable.

The Authority has a further 60 working days to conduct its more detailed investigation once it decides to open Phase Two. Again, this period can be extended (see below) but it may not be shortened.

It should be noted that Saturdays are treated as working days for the purpose of the above timetable.

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

The Belgian Competition Authority's review will be extended by 15 working days if the parties offer commitments in Phase One, and by 20 working days if they offer commitments in Phase Two.

The timetable for review may also be suspended if the Authority requests further information from the parties following notification, until such time as the information is provided.

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

Concentrations may be eligible for expedited approval if they do not pose any competition concerns and they satisfy the conditions for the simplified procedure. This shortens the review timetable to 15 working days.

This simplified procedure is available for any of the following:

- Acquisitions of joint control over a joint venture which is not active on the Belgian market or has a limited presence. This condition is fulfilled when the turnover in Belgium of the joint venture and/or the activities that will be combined to form the joint venture is below €40 million, and the value of the joint venture's total assets in Belgium is below €40 million.
- Mergers or acquisitions where the parties are not active in the same product or geographic market or in markets which are upstream or downstream of each other.
- Mergers or acquisitions where the parties' combined market share, in markets where they overlap either horizontally or vertically, is below 25%.
- A change from joint to sole control.

21. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

In the case of an acquisition of sole control, only the acquiring party is legally obliged to notify the concentration. Fines for failure to notify can only be levied on the buyer. It should be noted, however, that under Belgian civil law a concentration that is implemented without prior approval is deemed void, which will also affect the seller.

In the case of a merger, the acquisition of joint control, or the creation of a joint venture, both parties are legally responsible for notifying the concentration.

22. What information is required in the filing form?

A merger notification in Belgium must follow the format of Form CONC C/C, which requires a substantial amount of information to be provided. This includes detailed descriptions of the parties, the transaction, and the relevant market(s), and extensive sales data. The form must be completed in an official language of Belgium (i.e., French or Dutch). The notifying party or parties may request a waiver of certain information, which will be granted if the information in question is not material to the Belgian Competition Authority's assessment.

A "short form" filing can be used to notify concentrations that are eligible for the simplified procedure. The short form requires less substantial information to be provided in some areas, such as in relation to relevant markets.

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

A notification in Belgium requires the filing of extensive supporting documents. The documents that must be submitted include:

- The final or most recent draft documents constituting the concentration (e.g., a Share Purchase Agreement).
- In the case of a public tender, a copy of the offer. If the offer is not available at the time of notification, it must be provided to the Authority when it is submitted to the shareholders.
- Copies of the most recent articles of association, annual report and annual accounts of each party to the concentration.
- A document from the works council of each party to the concentration showing that they have been duly informed of the transaction.
- A document identifying the unions that represent the majority of the parties' employees.
- Copies of all analyses, reports, studies, research or similar documents prepared by or for any member of the board of directors, or a supervisory board, or any other person exercising similar functions, or the general shareholder meeting, for the purpose of assessing the concentration.

All supporting documents must be submitted in their original language and must be accompanied by a translation in the language of the case (i.e., French or Dutch), unless the original is in English. The parties may submit either original documents or copies of the originals; if the latter, the copies must be certified.

The notification form may be signed by representatives of the notifying parties (e.g., their attorneys), in which case the representatives must submit a written mandate establishing their power of representation.

24. Is there a filing fee? If so, please specify the amount in local currency.

No filing fee is payable for notifications in Belgium.

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

Following receipt of a notification, a notice is published in French and Dutch in the Belgian State Gazette and on the website of the Belgian Competition Authority. The notice includes the names of the parties and indicates whether they have requested the simplified procedure.

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

The Belgian Competition Authority has the power to contact third parties as it deems necessary for the purposes of its investigation. This can include customers, suppliers, and competitors of the parties concerned, as well as relevant trade unions or trade associations.

In addition, third parties that demonstrate a “sufficient interest” may intervene in a merger investigation of their own motion. The Belgian Supreme Court has confirmed that interested third parties may be granted access to a non-confidential version of the Authority’s file in order to intervene effectively; interested third parties may also receive a non-confidential version of the Authority’s draft decision before it is formally adopted.

It is important to note the particular rights of trade unions in relation to merger reviews in Belgium. Unions that represent workers in affected markets have a right to receive and submit their views on non-confidential draft decisions of the Belgian Competition Authority before they are adopted, in both Phase One and Phase Two, except under the simplified procedure.

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

The parties’ notification itself, their supporting documents, and any submissions made during the proceedings, are not made public. Note, however, that interested third parties may be granted access to a non-confidential version of the Authority’s file in some cases, and trade unions may review non-confidential versions of the Authority’s draft decisions. In such cases, the parties are given the opportunity to identify information that they consider to be confidential before it is disclosed.

As noted above, a notice is published in the Belgian State Gazette and on the website of the Belgian Competition Authority after notification. This identifies the parties and the transaction, but does not contain any confidential information. A summary of the Authority’s decision is also published at the end of the process, prior to which the parties may request the removal of confidential information.

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

The Belgian Competition Authority cooperates with antitrust authorities in other jurisdictions as part of the European Competition Network, the European Competition Authorities Network, and the International Competition Network. The Authority may exchange confidential information regarding mergers with the European Commission and the competition authorities of other EU Member States, and use information received from them in its review of notified concentrations.

29. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

The Belgian Competition Authority will accept either behavioural or structural commitments – or a combination of both – in order to remedy competition concerns raised by a concentration. The Authority has no clear preference for either type of remedy and will accept the most suitable form of commitments in each case.

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

The parties may offer remedies during either Phase One or Phase Two. The Authority will not propose remedies to the parties of its own initiative, but may suggest amendments to remedies once they have been submitted.

In Phase One, the parties must submit remedies (if they wish to do so) within five working days of receiving the Authority's draft decision indicating that the concentration gives rise to significant concerns, which is issued within the first 25 working days. In Phase Two, the parties must submit remedies within the first 20 working days of the decision to open Phase Two.

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

The Belgian Competition Authority has the power to impose a range of penalties for breaches of the merger control rules.

If parties fail to notify a notifiable concentration, a fine of up to 1% of the previous year's Belgian turnover may be imposed on the party or parties responsible for submitting the notification. If the parties notify a concentration but then implement it before they receive the Authority's approval, a fine of up to 10% of the previous year's Belgian turnover, and a daily penalty of up to 5% of the previous year's average daily Belgian turnover, may be imposed. In addition, if the Authority concludes subsequently that the concentration creates a significant impediment to effective competition, it can order the transaction to be reversed or dissolved.

Parties can also be fined for failing to comply with conditions imposed by the Authority in order to approve a transaction, again up to 10% of the previous year's Belgian turnover and a daily penalty of up to 5% of the previous year's average daily Belgian turnover.

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

The Belgian Competition Authority may impose a fine of up to 1% of the previous year's Belgian turnover on any persons who:

- Provide incorrect or misleading information in a notification or in response to a request for information.
- Provide incomplete information.
- Fail to provide information within a prescribed time limit.
- Hinder the investigation of a concentration.

33. **Can the authority's decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

Appeals of the Belgian Competition Authority's decisions are heard by the Brussels Court of Appeal. Except in the case of appeals relating to the use of data obtained in the course of a search (where the Court of Appeal may replace the Authority's decision with its own), the Court of Appeal only has jurisdiction to annul or uphold the Authority's decisions.

Decisions which may be appealed include:

- A decision which states that a concentration falls outside the scope of the merger control law.
- A decision approving a concentration (conditionally or unconditionally), or prohibiting a concentration, in Phase One or Phase Two.
- A decision approving a concentration under the simplified procedure.
- A tacit approval decision, based on the expiry of the Authority's review deadline in Phase One or Phase Two.
- A decision concerning the use of data obtained in a search conducted during the course of a merger investigation.

The process of an appeal does not suspend the decision of the Authority. However, the Court of Appeal may suspend the execution of the decision until its judgment if:

1. a person with an interest in the matter has explicitly requested it;
2. serious reasons capable of justifying the annulment of the contested decision are invoked; and
3. the immediate execution of the decision may have serious consequences for the person concerned.

A decision of the Authority can be appealed by the parties concerned, as well as by third parties that have a sufficient interest in the matter and have previously asked the Authority to be heard during the investigatory stage. The Minister of State may also appeal a decision (without having to prove an interest and without having been represented during the procedure).

Appeals must be brought within 30 calendar days of the notification of a decision. Generally, appeals are heard within one year.

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

The Authority adopted 20 merger decisions in 2015, 16 of which were adopted under the simplified procedure. Only one notified concentration required remedies, namely De Persgroep Publishing NV/Humo NV, Story, Teve-blad, Vitaya. In the same case, the Authority imposed a fine of €50,000 for failure to comply with an information request.

To date in 2016, the Authority has adopted conditional approval decisions in two cases: Delhaize NV/Koninklijke Ahold NV, which required the divestment of 23 retail stores; and Kinopolis Group NV/Utopolis (Utopia NV), which required the divestment of two cinemas and additional behavioural commitments.

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

There are no current plans to reform the merger control regime in Belgium.

