

BELGIUM

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INTRODUCTION

Small and Medium Enterprises (“SMEs”) occupy a place of utmost importance in the Belgian economy: 92.5 pc of the Belgian enterprises employ less than 10 workers, and 98.8 pc of them employ less than 50 workers.² Convinced that SMEs play a major role in the Belgian economy and that SMEs are key to national economic growth, the current Belgian government is willing to increase SMEs’ competitiveness and alleviate the administrative burden that weigh on them.³ In order to achieve these objectives, a clear and comprehensive framework on the application of antitrust law to SMEs should be drawn up and made easily available to the stakeholders, which are SMEs, but also practitioners and scholars.

Along this line, the present report aims at gathering data and legal analysis to contribute to the delineation of Belgian antitrust law for SMEs. Hence, in accordance with the general directives provided in the LIDC questionnaire, this report studies whether Belgian SMEs are subject to different rules from those applicable to other economic operators, and what rationales support possible differences of treatment. In so doing, we take into account the economic context under which SMEs struggle: the minimal anticompetitive impact of SMEs’ practices; the difficulties there are for SMEs to deal with the complex economic issues that may arise in antitrust litigations, etc. Prior to this, however, we first provide guidance on the legal definition given to the notion of SMEs in Belgian law.

A. SMEs in context

1. Legal definition

The legal definition of SMEs in Belgian antitrust law is a complex, unresolved issue. Several definitions are available for consideration. Amongst these,⁴ we introduce what we consider as the three main contenders.

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² Eurostat, *Key figures on European business with a special feature on SMEs*, Luxembourg, Publications Office of the European Union, 2011, p. 12, table 1.2 (2008).

³ Accord de Gouvernement, 1 December 2011, p. 120, available at: http://premier.be/files/20111206/Accord_de_Gouvernement_1er_decembre_2011.pdf.

⁴ We set aside several competition law related definitions that have been adopted by the various Belgian legislators to frame the grant of State aid measures for SMEs. See for instance: Decreet betreffende een

Article 2 of the Belgian Competition Act (hereafter referred to as “BCA”)⁵ explicitly refers to the notion of SMEs. Yet, no clear definition is given to this notion. Article 5 of a prior version⁶ of that same law expressly referred to the definition given in Article 12 § 2 of the Accounting law.⁷ The relevance of this definition⁸ is dubious though as (i) reference to the Accounting law has now totally disappeared from the BCA and (ii) Article 12 § 2 has been abrogated⁹.

The second best contender is Article 2(1) of the law for the Promotion of Independent Enterprise¹⁰ the purpose of which is to provide a workable definition of the notion of SMEs.¹¹ No reference is made to this status in antitrust law, though.

Finally, the definition provided in Article 15 of the Code of Companies¹² is also sometimes elicited in the legal literature.¹³ Considering that the Code contributes to define what is

waarborgregeling voor kleine, middelgrote en grote ondernemingen, 6 February 2004, *M.B.*, 20 February 2004, art. 2 ; Ordonnance organique relative aux aides pour la promotion de l'expansion économique, 13 December 2007, *M.B.*, 10 January 2007, art. 2; Décret relatif aux incitants régionaux en faveur des petites ou moyennes entreprises, 11 March 2004, *M.B.*, 8 April 2004, art. 3. Those norms enacted by the Flemish, Brussels and Walloon legislative authority respectively, directly refer to the SMEs definition provided within Annex I of EU Regulation No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), *OJ*, 9 August 2008, L 214/3.

⁵ Loi sur la protection de la concurrence économique, 15 September 2006, *M.B.*, 29 September 2006.

⁶ Loi sur la protection de la concurrence économique, 5 August 1991, *M.B.*, 11 October 1991.

⁷ Loi relative à la comptabilité et aux comptes annuels des entreprises, *M.B.*, 4 September 1975, Article 12 § 2: “Paragraph 1 applies to enterprises that do not exceed more than one of the following thresholds:

- 50 employees, on an annual average;
- annual turnover (excluding VAT) of 6.250.000 €;
- balance sheet total of 3.125.000 €;

except where the number of employees exceeds 100 on an annual average.”

⁸ The relevance of this definition was once supported by M. WAELBROECK and J. BROUCKAERT: “La loi sur la protection de la concurrence économique”, *J.T.*, 1992, p. 285.

⁹ Furthermore, several commentators voiced doubts from the very beginning that the definition provided in Article 5 BCA for notification thresholds might not be relevant for Article 2 BCA that relates to illegal agreements. See S. PLINGERS, De verhouding tussen Belgisch en Europees kartelrecht, *Jura Falconis*, 1997-1998, n°4, p. 585.

¹⁰ Loi-programme pour la promotion de l'entreprise indépendante, 10 February 1998, *M.B.*, 21 février 1998, Article 2 : “For the purpose of the present law:

1° S.M.E.: shall mean enterprises which:

- do not employ more than 50 workers on an annual average;
- do not have more than 25% of their stocks or shares in the capital or related voting rights that are owned by one or more enterprises others than SMEs;
- and which have an annual turnover not exceeding ECU 7 million, and/or an annual balance sheet total not exceeding ECU 5 million.

The average number of employed workers on an annual basis is calculated in annual working units, i.e. the number of full-time workers employed during one year, with part-time workers and seasonal workers being counted in fractions of annual working units.

The reference year to take into account is, like for thresholds for annual turnover and balance sheet total, the latest complete approved accounting period.

An enterprise loses its status of S.M.E. when it does not meet the employment criterion, the annual turnover or the balance-sheet total during two successive accounting periods.

Unless the contrary is proved, evidence that the enterprise meets this definition is supposed to be brought by a sworn statement”

¹¹ Chambre des Représentants, Projet de loi pour la promotion de l'entreprise indépendante, Exposé des motifs, Ordinary session 1996-1997, 24 September 1997, - 1206 / 1 - 96 / 97, p. 2.

Belgian common business law, it is not unreasonable to support that Article 15 should be the reference definition for antitrust law as well. Two objections to the prevalence of this definition must be mentioned though: (i) the Code only applies to legal companies while the scope of antitrust law encompasses any entity providing goods and services on the market, private individuals included and (ii) the Code only defines what small enterprises are, but neglects medium ones.

The difficulties arising from the absence of any clear definition for SMEs in competition law are directly attributable to the Belgian legislator. The preparatory documents reveal that from the very first drafts of the BCA the Belgian Council of State had drawn the attention of the Parliament on this lack of definition.¹⁴ Unfortunately, the calls of the Council of State for more precisions remained without answer. The three above-mentioned definitions provide altogether only a blurred impression of what are SMEs in competition law: if these three provisions define SMEs according to the number of workers and the annual turnover/annual total of the balance sheet of the undertaking, the convergence is only limited¹⁵ as the financial thresholds differ from one statute to another. Moreover, where two provisions state that the SME status is barred for those entities that are part of a bigger group, the third one remains silent on the impact of the existence of a holding company. Only the 50 workers threshold is common to the three above-mentioned definitions.

In practice, Belgian Courts never ruled on the question of the relevant definition for SMEs in antitrust law. In the sole two rulings that dealt with the matter, the Courts expressly referred to the appearances of the case and admitted¹⁶ or rejected¹⁷ the SME status of the involved firms on this sole basis. The courts' disinterest for this issue can be criticized since firms' accounts

¹² Code des sociétés, 7 May 1999, *M.B.*, 6 August 1999, Art. 15. § 1^{er}:

“§1 Small companies are companies with a legal personality which, during the last and second-to-last approved accounting periods, do not exceed one of the following thresholds:

- 50 employees, on an annual average;
- annual turnover (excluding VAT) of 7.300.000 €;
- balance-sheet total of 3.650.000 €;

except where the number of employed workers, on an annual average, exceeds 100.

§ 2. The application of the criteria listed at § 1 to companies that start their activities is assessed in good faith at the beginning of the accounting period (...)

§ 5. Where a company is linked to one or more others, in the meaning of Article 11, turnover and balance sheet total criteria, as set at §1, are determined on a consolidated basis. Regarding the employed workers criterion, the number of employed workers on an annual average is the addition of the workers employed by each linked company”.

¹³ G. ZONNEKEYN and D. SMEETS, “De hervorming van de Belgische mededingingswet: een nieuwe start of een gemiste kans”, *RDC-TBH*, 2006/9, November 2009, p. 909, footnote 51.

¹⁴ Chambre des Représentants, *Projet de loi sur la protection de la concurrence économique*, *Avis du Conseil d'Etat*, Ordinary session 1989-1990, 10 September 1990, 1282/1 - 89/90, p. 63: “In our legislation « small and mediums enterprises » has, besides, diverse meanings and, since then, does not provide legal certainty”.

¹⁵ The EU Recommendation on the definition of SMEs clearly states that the thresholds it defines should be regarded as maximum values and that Member States may fix lower ceilings. See Commission Recommendation 2003/361 concerning the definition of micro, small and medium-sized enterprises, 6 May 2003, *OJ*, 20 May 2003, L 124 /36, Article 2.

¹⁶ Voorz. Kh. Brussel, 15 Februari 1995, *Jaarboek Handelspraktijken & Mededinging*, 1995, p. 744: “Whereas, pursuant to Art. 5 of the Competition Act of 5 August 1991, legal provisions on restrictive practices do not apply to small and medium enterprises unless the contrary is proved; that the defendant appears to be such company”

¹⁷ Hof van Beroep te Antwerpen, 27 October 2008, *Jaarboek Handelspraktijken & Mededinging*, 2008, p. 891: “Finally, the reference made by the respondent to Article 5 of the BCA is not relevant. Under this article SMEs are conditionally exempted from notification. First, it does not appear that in casu the conditions of Article 5 BCA are met”.

are easily available online with all the relevant information related to staff and financial results.¹⁸ At least, this approach corresponds to two of the above-mentioned provisions which state that the size of the firm may be judged on the basis of a good faith assessment of the firm or that proof of the SME status may be made by sworn statement.

Hence, to date, the definition remains an open issue. Should the debates focus on that specific question in a future case, we believe that the staff criterion should be central in the analysis of the courts. Once this criterion is fulfilled, Courts should show flexibility regarding the financial criterions. Because of the plurality of financial thresholds available and because of the changing nature of financial results, short term overcrossings of the financial thresholds should not be deprive the firm from possible benefits linked to the SME status. Conversely, we believe that the existence of a parent company exercising a decisive influence on the main decisions¹⁹ of the entity at stake should in any event disqualify the latter as a SME where the group is itself out of the SMEs scope. To decide otherwise would incentivize big firms to split their activities into several legal persons to conclude antitrust-sensitive operations.

2. Treatment of SMEs under competition law

2.1. Overview

The enforcement record of the Belgian Competition authority is notably weak²⁰. The lack of financial means and the shortage of human resources from which the NCA suffers²¹ are responsible for long waiting periods before decisions are delivered²² and for a very significant number of closing or limitation decisions. Amongst the rulings that have been issued in the last five years, not one decision identifies the presence of a SME on the basis of the three factors listed in the law (number of employees, financial results and integration in a group). The same is true with court rulings which, to our best knowledge, never followed the three-step test legally set by the law to identify SMEs. Only incidentally do these decisions refer to one of these three criterions: out of the 153 decisions issued by the NCA between 2006 and 2011, 9 % mention that they relate to self-employed people, 12% refer to the existence of bigger, holding companies and 1% relate to the annual turnover of the firm – a turnover that is usually kept confidential.²³

¹⁸ See the National Bank of Belgium's website: <http://www.nbb.be>.

¹⁹ In substance, the *Viho* ruling states that where an entity exercises a decisive influence on the main decisions of its subsidiary, the two entities should be regarded as one undertaking under antitrust law. See GC, 24 October 1996, *Viho Europe BV v Commission of the European Communities*, C-73/95 P, ECR, 1996, I-5457, para. 51.

²⁰ E. PROVOST, *Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?*, Report of the AEDC (Association pour l'étude du droit de la concurrence – Belgium), LIDC Bordeaux 2010, p. 1, available at: <http://www.concurrences.com/IMG/2010rapportAbelge.pdf>.

²¹ L. PARRET, "La perspective du Conseil de la concurrence", in N. PETIT (dir.), *Le Nouveau droit belge de la concurrence. Bilan et perspectives après quatre années d'application*, CUP vol. 124, Liège, Anthémis, 2010, p. 293.

²² SPF Economie, Direction Générale de la concurrence, *Rapport annuel (2007 à 2010)*, available at: http://economie.fgov.be/fr/entreprises/concurrence/Autorite_belge_concurrence_Introduction/Directon_generale_concurrence/.

²³ An Annex table was drafted for the realization of this paper with a detailed report of the cases issued by the NCA. We did not list judicial case law because of the significant grey number unpublished decisions represent. The Annex is available with the original version of the LIDC Report for Belgium.

Hence, in order to track those antitrust decisions that are indirectly or tacitly influenced by the small size of the undertakings implicated, we sorted the NCA decisions according to the likelihood they involve SMEs. The results are categorized under three groups according to our own assessment of the size of the firms. We used proxies to sort the decisions. For instance, we assume that the various trade associations that were the target of the NCA are SMEs, regarding that most of them have an activity limited to the defense of their members – what usually do not require more than a fistful of administrative and lobbyists – and have a turnover limited to the subscription fee paid by their members.²⁴ Likewise, it is reasonable to assume that firms active in the telecom markets are big sized undertakings, while local butcheries qualify as SMEs.²⁵ We find that out of the 153 decisions issued by the NCA between 2006 and 2011, 20% involved no SMEs, 51% possibly involved a SME, and 29% involved at least one SME. These data tend to indicate that a significant proportion of cases already deal with SMEs and confirm that SMEs are a relevant field of study for antitrust law.

The review of the cases involving SMEs shows that most of them deal with fee coordination scheme or opening days/hours regulation imposed by professional associations. Several discrimination and boycott cases are also identified.

2.2. Specific programmes addressed to SMEs ?

No specific programme and no specific policy have been adopted by the legislator or the NCA regarding SMEs. In contrast, the NCA recently realized a sectorial report on price levels in the supermarket sector.²⁶ This tends to indicate that big firms are a priority issue for the competition authority while SMEs are not a primary matter of interest.

B. PUBLIC ANTITRUST ENFORCEMENT AND SMES

1. Substantive and procedural rules applicable to SMEs

1.1. Introduction: Article 2§1 BCA

Article 2 BCA prohibits anticompetitive coordination to the extent that they “*significantly distort competition on the Belgian market or on a substantial part of it*”.²⁷ This requirement makes size matters in Belgian competition law.

²⁴ See for example Raad van Mededinging, Decision nr. 2008-I/O-04, 25 January 2008, MEDE-I/O-04/0045, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC)*, para. 66: “*In the present case, where it comes to behaviors that can be attributed to the association, the Council takes into account the statutory maximum, [...] % of the turnover of the association, which mainly results from of the membership fees of the bakers*”.

²⁵ A similar methodology was used for a similar review. See M. BAILLAT, “Appendice. L’examen des décisions du Conseil de la concurrence révèle-t-il une influence de la petite taille des entreprises sur la mise en œuvre des règles? Dépouillement des décisions rendues de 1987 à 2006”, in Y. CHAPUT (dir.) *Les PME et le droit de la concurrence. Analyse critique, comparative et perspective*, Paris, LexisNexis, 2009, p. 46.

²⁶ SPF Economie, DG Concurrence, *Niveaux de prix dans les supermarchés*, 13 February 2012, 128 p., available at: http://economie.fgov.be/fr/binaries/etude_niveaux_prix_supermarches_tcm326-163021.pdf.

²⁷ Loi sur la protection de la concurrence économique, 15 September 2006, *op. cit.*, Article 2 §1: “*Without the need for a prior decision to that effect, all agreements between undertakings, all decisions by associations of*

It is well-known and well-accepted EU policy that agreements that have “*only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question*”²⁸ fall short of the prohibition of anticompetitive coordination of Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”). This so-called *de minimis* doctrine, once focused on the market share and market position of the firms under investigations, was progressively extended to include agreements involving enterprises of a limited size.²⁹

Belgian law followed a similar path, with rulings taking the size of the firms into account – and not their market shares – to decide whether or not the agreement at stake should be held illegal. For instance, in a case related to the legality of an exclusive distribution scheme, the Court of Commerce of Brussels held that an important turnover may under all circumstances bar the benefice of the *de minimis* rule.³⁰ According to the Court, the agreement could not fall under the *de minimis* principle because the common turnover of the two contracting parties was superior to ECU 200 million³¹ whatever their market shares.

In the same vein, the NCA stated that the importance of the turnover was a relevant criterion to assess whether an agreement could cause a significant distortion of competition. Echoing the *Société technique minière* decision,³² the NCA held that the economic and legal context of the agreement had to be considered to determine whether competition is significantly hampered by the agreement under review. In order to do so, several factors have to be taken into account and, among those, the turnover of the firms.³³

Conversely, in the *Professional Association of Pharmacists* cases involving small, independent undertakings part to an anticompetitive coordination on a limited portion of the Belgian territory, the NCA ruled that the conditions of Article 2§1 BCA were not met. In the case at hand, several pharmacists had introduced complaints against the national and local

undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or distort significantly competition in the Belgian market concerned or in a substantial part of that market are prohibited (...)”.

²⁸ CJ, C-5/69, *Franz Völk v SPRL Ets J Vervaecke*, 9 July 1969, ECR, 1969, p. 295, para. 7.

²⁹ In the *Ventouris v Commission* case, the General Court held that agreements “*to which all the parties are SMEs*” fall out of the scope of the prohibition of Article 101 TFEU. GC, T-59/99, *Ventouris Group Enterprises SA v. Commission*, 11 décembre 2003, ECR, 2003, II-5257. The 1986 version of the *De minimis* Notice equally assimilated insignificant market shares with SMEs. See Commission Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty Establishing the European Economic Community, OJ, 1986, C-231/2, para. 1: “*The Commission considers that it is important to facilitate cooperation between firms as long as it is economically desirable and does not raise objections with regard to competition policy, what is specifically of application for small and medium undertakings*”.

³⁰ Comm. Bruxelles, 28 January 1994, *J.L.M.B.*, 1994, p. 1262: “*Moreover, whatever the market shares held by APT-B and A.M.C., the agreement at stake could not be considered as of minor importance and fall out of the scope of Article [101] since the total turnover of the participating undertakings exceeds ECU 2 hundred million*”.

³¹ European Currency Unit, or 200.000 Euros.

³² CJ, *Société Technique Minière v Maschinenbau Ulm GmbH*, 30 June 1966, Case 56/65, ECR, 1966, p. 235.

³³ Raad voor de mededinging, *N.V. L.-D.*, 25 March 1997, *Rechtskundig Weekblad*, 1997-1998, n°2, 13 September 1997, p. 53: “*Moreover, in accordance with the minimum rule one should not lose sight that the agreement must still be considered in its economic and legal context; it may indeed be part of a network of agreements, so that in the present case the competition may be appreciably reduced. To assess whether competition is substantially impacted, different criteria can be taken into account, including the turnover criterion, the market shares and the very nature of the anticompetitive agreement itself.*”

professional associations for imposing regulated opening hours to their members. The NCA held illegal the decision of the national association, but rejected the complaints targeted at the local associations. Because the decisions of the local associations produced effects on the territory of a small number of municipalities only,³⁴ the NCA judged that no significant restriction of competition on a substantial part of the Belgian market could be established – or in other words: *de minimis non curat praetor*. Quite remarkably, the NCA also stated that the relevant markets were local and matched the territory of the local associations.³⁵ The fact that a whole market was crippled by an anticompetitive practice was not held illegal because of the small sized features of the case.³⁶

The size of the enterprises may thus have an impact on the likelihood of an agreement to fall under Article 2§1 BCA:³⁷ big sized firms have a higher probability to be punished for the agreements they conclude while SMEs may avoid a similar fate despite the fact that their respective market positions would have indicated the contrary. If the regime applied to big firms may be explained by the fact that those are often in a strong enough financial position to quickly increase their market shares,³⁸ the very favorable regime applied of SMEs is less acceptable. If one may understand that SMEs may fall out of the scope of Article 101(1) TFEU for jurisdictional purposes,³⁹ such outcome at the national level equals to a denial of justice for consumers that are confronted to an agreement that cripple the geographical market⁴⁰ they live in.⁴¹

³⁴ Conseil de la concurrence, Decision n° 2007-I/O-27, 26 October 2007, CONC-I/O-98/0004, *E.S./Ordre des pharmaciens*; CONC-I/O-98/0024, *L.P.D./Ordre des pharmaciens*; CONC-I/O-98/0032, *Groupe Multipharma/Ordre des pharmaciens*, para. 75 and ff.

³⁵ Conseil de la concurrence, Decision n° 2007-P/K-35, 20 December 2007, CONC-P/K-05/0026, *F.N.H. / Ordre des pharmaciens - GLEP 30*, para. 21.

³⁶ According to us, the limited territory on which the anticompetitive restraint took place cannot in itself explain the rejection of the complaint; the limited size of the undertakings also played a decisive role. In the *Canal+* case, a refusal to supply related to a territory of a similar size than the one of the *Professional Association of Pharmacists* case was said to take place on a substantial part of the Belgian market. True enough, the players here involved were the local incumbent for TV services and Canal+, the main EU pay TV supplier, while pharmacists are more often than not small, independent retailers. Compare Conseil de la concurrence, Decisions n° 2007-I/O-27, n° 2007-P/K-35, *op. cit.* and Bruxelles, 18 juin 2004, *Canal+ Belgique c. WoluTV et United Pan European Communications Belgium, A&M*, 2004/4, p. 357.

³⁷ It is worth noting that the prohibition of abuses of dominance is also limited to those behaviors that take place “on the Belgian market or on a substantial part of it” (Art. 3 BCA).

³⁸ “Even if they have a small market share, undertakings can still appreciably affect competition if, in the light of a number of other elements such as their turnover, production, financial power, technical capacity, etc. they cannot be considered as unimportant undertakings on the relevant market. This may be the case where an undertaking with a small market share belongs to a large group of undertakings that is able to increase its market share in the relatively short term through financial and economic power.” P. MAES, “*De minimis non curat praetor en de toepassing van de Wet Bescherming Economische Mededinging. Belgische variaties op een Europees thema?*”, note after Raad voor de mededinging, *N.V. L.-D.*, *op. cit.*, p. 56.

³⁹ From the beginning, the Commission Notice on agreements of minor importance made clear that agreements that are not prohibited under EU law because they do not affect interstate trade may nonetheless be caught under national law. Commission Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85 paragraph 3 of the Treaty Establishing the European Economic Community, *OJ*, 12 September 1986, C 231/2: “The Commission considers it is important to facilitate cooperation between undertakings to the extent it is economically desirable and that it does not raise objections regarding competition policy, what is particularly true for cooperation between small and medium undertakings.” (no official translation available); J. BOCKEN and K. DE CORTE, “La communication du 22 décembre 2011 concernant les accords d'importance mineure qui ne restreignent pas sensiblement le jeu de la concurrence au sens de l'article 81, paragraphe 1, du traité CE”, *RDC*, 2002, p. 239.

⁴⁰ The dismissing of a claim on the basis that the anticompetitive behavior does not affect a substantial part of the Belgian market is less controversial when the geographical portion of the market that is crippled by that conduct

1.2. Infringement scenarios

We have not identified any specific infringement scenario that would apply differently to SMEs than to bigger firms. Non-compete clauses may be seen as an exception to this statement, though, as prohibition decisions applicable to non-compete clauses are influenced by the size of the undertakings. For instance, in the construction sector, small undertakings with a small staff can answer to a limited number of contracts only that, in most cases, will be executed in the close vicinity of the location of the firm.⁴² Hence, under such circumstances, the boundaries of a non-compete clause related to the market for roof repairs must be limited to a 30 kilometers circle.⁴³

1.3. Safe harbours for SMEs

Without speaking of a true safe harbour regime, Article 2§3 BCA provides a specific exemption for SMEs.⁴⁴ According to the preparatory documents the aim of this regime is twofold: (i) help SMEs to strengthen their competitive position and (ii) favor the dispersion of economic operators.⁴⁵

Quite disturbingly, this regime is rarely evoked by litigants and is often seen as an oddity by the doctrine⁴⁶ as well as the NCA.⁴⁷ A relatively recent piece even stated that the exemption regime for SMEs had never been applied so far.⁴⁸

represents only a tiny share of the whole, relevant, geographical market. In such a case, consumers still have the opportunity to move towards other suppliers. See for instance: Prés. Comm. Bruxelles, 30 May 1994, *Annuaire Pratiques du commerce & Concurrence*, 1994, p. 186, where the anticompetitive conduct took place on the territory of a few municipalities only while the total relevant market was said to be national.

⁴¹ To this denial of justice, one might also add the existence of an obvious discrimination between consumers.

⁴² Gent, 25 May 2005, *DAOR*, 2005, liv. 76, p. 33.

⁴³ Voorz. Kh. Hasselt, 16 February 2004, *RABG*, 2004, liv. 11, p. 685.

⁴⁴ Loi sur la protection de la concurrence économique, 15 September 2006, *op. cit.*, Article 2 § 3 : “ *The provisions of § 1 may however be declared inapplicable in the case of :*

1° any agreement or category of agreements between undertakings,

2° any decision or category of decisions of associations of undertakings, and

3° any concerted practice or category of concerted practices which contribute to improving production or distribution or to promoting technical or economic progress or which enable small and medium-sized undertakings to assert their competitive position in the market concerned or internationally, while enabling users to benefit from a fair share of the resulting benefits, without however:

a) *imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*

b) *giving the undertaking the possibility to eliminate competition for a substantial part of the affected products.”*

⁴⁵ “*However, it appeared opportune to add an exemption motive for allowing the confirmation of competition agreements such as those that are concluded between small and medium enterprises – in order to allow them to strengthen their competitive position on the Belgian concerned market – and to favor a dispersion of economic operators. This is all the more justified in a national context where the role of small and medium enterprises is relatively more important than in intracommunity trade.*” Chambre des Représentants, *Projet de loi sur la protection de la concurrence économique, Exposé des motifs*, Ordinary Session 1989-1990, 10 September 1990, 1282/1 - 89/90, p. 18.

⁴⁶ G. ZONNEKEYN, “*De hervorming van de Belgische mededingingswet: een stille (r)evolutie?*”, *C.J.*, n° 4/2005, p72, footnote 15.

Contrary to the previous statement, a few decisions deal with the SMEs exemption regime. These few decisions fail to provide all the necessary directions for use, though, considering the various questions the application of this provision raises.

First, Article 2§3 BCA does not allow litigants to clearly determine what conditions must be met to claim the benefit of the SMEs exemption. Most unfortunately, the wording of Article 2§3 BCA intertwines the SMEs regime with the four conditions of the general exemption – that same four conditions listed under Article 101(3) TFEU. Hence, some commentators held that *five* conditions have to be cumulatively met for an illegal agreement to fall under the SMEs exemption provision or, in other words, that Article 2§3 BCA was stricter than Article 101(3) TFEU.⁴⁹ However, most voices consider that an “*effet utile*” must be provided to the SMEs exemption so that not all four conditions of the general exemption regime should be fulfilled in addition to the SME requirement.⁵⁰ Those support the view that the SME status should exempt firms from demonstrating that the agreement improves welfare⁵¹ with the three others general conditions left unchanged.⁵²

One may however wonder whether SMEs should prove that consumers receive a fair share of the benefits generated by the anticompetitive agreement – second condition of the general exemption regime – if the agreement is not welfare enhancing. To apply, the SMEs exemption requires that the anticompetitive agreement “*allows small and medium enterprises to strengthen their competitive position on the relevant market or on the international market*”. True enough, an agreement that contributes to the growth of the market shares of an SME should logically imply an increase of its benefits which could be passed on to consumers. However, the wording of Article 2§3 BCA does not require an “*increase*” of the market shares of the SME. The “*strengthening of the SMEs’ competitive position*” may as well imply a mere consolidation of the SMEs’ situation with the creation of new barriers to entry. No direct, economic benefit being generated from such a kind of agreement, no passing-on to consumers could be required. From a policy standpoint, the dismissal of the two first conditions would present the advantage to significantly alleviate the burden of proof that lies on SMEs, providing a true advantage to these when embarked in the vicissitudes of a trial.

Another debate related to the application of Article 2§3 BCA refers to the number of SMEs the agreement should involve. Should all the contracting parties be SMEs or is only one

⁴⁷ Conseil de la Concurrence, *Avis du Conseil de la concurrence relatif à l’avant-projet de loi sur la protection de la concurrence économique (art. 78 de la Constitution)*, 29 June 2005, p. 2, available at: http://economie.fgov.be/fr/binaries/Advice_art78_fr_tcm326-43331.pdf.

⁴⁸ J. STUYCK “Restrictieve Mededingingspraktijken”, in J. STUYCK, W. DEVROE and P. WYTINCK (dir), *De nieuwe Belgische Mededingingswet 2006*, Mechelen, Kluwer 2007, p. 32.

⁴⁹ D. SZAFRAN, “La loi sur la protection de la concurrence économique réforme de 1999”, *J.T.*, 2002, n°23, p. 475.

⁵⁰ Chambre des Représentants, *Projet de loi sur la protection de la concurrence économique, Avis du Conseil d’Etat, op. cit.*, p. 63.

⁵¹ The “*welfare improvement condition*” refers to the need for the agreement to contribute “*to improve[e] production or distribution or promoting technical or economic progress*”. See D. GERARDIN, A. LAYNE-FARRAR and N. PETIT, *EU Competition Law and Economics*, Oxford, Oxford University Press, 2012, p. 165.

⁵² S. PLINGERS, *op. cit.*, pp. 585 and ff.; Answer of the Minister for Economy to the question of I. VAN BELLE, “Concurrence économique. - PME. - Exemption de l’interdiction de cartel”, *Q.R.*, 14 April 1997, B77, p. 10455: “*In any event, agreements cannot enclose restrictions that are not indispensable to reach the objectives and cannot allow these undertakings to eradicate competition for a substantial part of the concerned products. Moreover, these agreements must reserve a fair share of profits to users*”.

enough for the SMEs exemption to apply? According to several commentators, because Article 5 of the first version of the BCA imposed the presence of two SMEs for an agreement to be exonerated from the obligation of notification while Article 2§3 BCA did not mention such requirement, a different regime should be applied to the SMEs exemption. This past discrepancy would then justify that one SME suffices to validate the entire agreement.⁵³

In practice, Article 2§3 BCA was relied on in a case dealing with the organization of a distribution scheme. Most unfortunately, no directive regarding the implementation of the SMEs exemption may be deduced from this ruling. The judge contented himself with an invocation of Article 2§3 BCA in a host of considerations that led to the validation of the distribution agreement.⁵⁴

More interestingly, a recent decision of the Court of Appeal of Antwerp imposed limitations to the SMEs exemption regime⁵⁵. According to the Court, the SMEs exemption does not release SMEs from their duty to comply with competition law obligations “*in particular regarding hardcore restrictions of competition*”. In the case at hand, the Court refused to exempt a resale price maintenance clause (“RPM”) on the basis of the SMEs exemption. We understand this ruling as an application of the principles set for the application of Article 101 TFEU. According to these: “*In principle, all restrictive agreements which cumulatively met the four conditions of Article [101(3)] are covered by the exemption rule. However severe restrictions of competition are unlikely to fulfill the conditions of Article [101(3)]*”⁵⁶. The conditions of application of Article 2§3 BCA slightly differ from the ones of Article 101(3) TFEU, though. The policy line established for the application of Article 101(3) TFEU is generally justified by the fact that hardcore restrictions “*neither create objective economic benefits, nor do they benefit consumers (...) and generally also fail the indispensability test under the third criterion*”.⁵⁷ However, regarding hardcore restrictions to which SMEs are part, the nonfulfillment of the first (two) general condition(s) cannot explain an *a priori* exclusion from exemption; only the last two conditions may justify the inapplicability of the SMEs exemption to those restrictions that are not indispensable or that are so severe that they eliminate competition for a substantial part of the product in question. Hence, price fixing cartels or regulated opening hours that totally eliminate rivalry on one aspect of competition should not be exempted. The same conclusion should be reached for boycott practices that prevent the apparition of competitors relying on new technologies.⁵⁸ On the other hand, RPM clauses do not inevitably eliminate all competition and should be thoroughly assessed.

⁵³ S. PLINGERS, *op. cit.*, pp. 585 and ff.; P. EECKMAN, “Kartelpraktijken”, in P. DE VROEDE (ed.), *Bescherming van de economische mededinging. Wet van 5 augustus 1991*, Brugge, Die Keure, 1993, pp. 52-53.

⁵⁴ Voorz. Kh. Brussel 15 February 1995, *op cit.*, p. 744.

⁵⁵ Hof van Beroep te Antwerpen, 27 October 2008, *op cit.*, p. 891: “*Furthermore, Article 5 BCA holds that small and medium-sized enterprises are not free from the obligation to comply with the legislation on competition, this is especially true concerning the prohibition of "hardcore" cartels agreements*”.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*.

⁵⁸ See for instance: Liège, 5 February 2009, *Annuaire Pratiques du commerce & Concurrence*, 2009, p. 955, note A. VANDERELST, where according to the number of workers and the annual turnover/annual total of the balance sheet that have been published, apparently all companies involved on the oxygenotherapy market have SMEs profiles. According to EU Commission Decision No COMP/M.6504, *LINDE / AIR PRODUCTS HOMECARE* of 18 April 2012, most of these companies seem to be linked to firms active in other States, though.

The opportunities opened by the SMEs exemption should not be exaggerated though. In many cases, national courts will have no other choices than to limit themselves to the general exemption of Article 101(3) TFEU as the Primacy principle of EU law and Regulation 1/2003 require full compliance with Article 101 TFEU when national courts deal with agreements that affect interstate trade.⁵⁹ Under such circumstances, national courts would have no other choices than to set aside the SMEs exemption.

1.4. Remedies

No case issued by the NCA⁶⁰ deals with the issue of access to remedies for SMEs.⁶¹ In our opinion, facilitated access to remedies for SMEs should be taken into consideration in two kinds of situations: (i) on markets where an unlimited number of competitors may enter and (ii) on markets where tacit collusion concerns may appear.

The first hypothesis may be illustrated by the *Microsoft I* case, where Microsoft was obliged to make interoperability information available for competitors active on the market for work group server operating systems.⁶² Information being a non-exclusive good, the Commission's decision could theoretically benefit to an unlimited number of licensees. In practice though, the communication of the interoperability required Microsoft to adapt its interoperability package to the particular needs of different licensees⁶³. We believe that in such kind of situation where any kind of firm could equally pretend to enter the market, SMEs should serve as the “*least common multiple*” for the definition of the remedy so that the remedy is tailored in an easy to use for all fashion.

Second, where a market is between the hands of an oligopoly of big-sized firms, a reserved access to the remedy could be offered to SMEs. In such kind of market configuration, SMEs should be used as mavericks, to thwart the tacitly collusive equilibrium. For instance, where docking slots have to be freed in order to open sailing lines to competition,⁶⁴ a quota of these slots should be allocated in priority to SMEs in order to bring in contact different sized firms so that their different profiles make coordination between them more difficult.

2. Procedural and fundamental rights of SMEs

⁵⁹ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, 4 January 2003, L 1/1, Article 3(1).

⁶⁰ Judicial decisions are of no use here as they only grant or reject the claims of the applicants but do not adapt remedies according to the vicissitudes of the market.

⁶¹ Access to the remedy was discussed in access to telephony network cases, what is of little insight for SMEs cases. See for instance: Conseil de la concurrence, Decision n° 2010-L/G-27, 22 July 2010, L/G-07/0015, *Mobistar / Belgacom*.

⁶² EU Commission Press Release, “Antitrust: Commission ensures compliance with 2004 Decision against Microsoft”, 22 October 2007, IP/07/1567.

⁶³ Hence, concerning the licensing of interoperability information to an open-source developer (Samba), weeks of negotiations were needed only to determine the exact protocol information that would be included in the license. A. TRIDGELL, *The PFIF Agreement*, 20 December 2007, available at: http://www.samba.org/samba/PFIF/PFIF_agreement.html.

⁶⁴ See for instance : Commission Decision of 21 December 1993, *Holyhead*, 94/19, *OJ*, 18 January 1994, L 15/8; Commission decision, 21 December 1993, *Rødby*, 94/119, *OJ*, 26 February 1994, L 55/52.

Belgian antitrust procedure does not differ according to the size of the undertaking. The procedure set in the BCA is neutral with regard to the size of the undertaking involved. Admittedly, differences of treatment may be deduced from the case law of the European Court of Human Rights when it comes to the rights of legal companies in comparison to the rights of private individuals⁶⁵. However, we emphasize that (i) this case law is not specific to antitrust and (ii) does not distinguish on the basis of the *size* of the operator but on the basis of its kind, (natural or legal person).

The sole procedural peculiarity that may be mentioned in relation to SMEs is that investigations may be launched not only at the initiative of the Minister for Economy, but also at the initiative of the Minister for SMEs,⁶⁶ who may not always be the same occupant. Now that the two portfolios are split,⁶⁷ one might expect that the Minister for SMEs will take the initiative to launch investigations tailored at the redress of anticompetitive conducts that specifically impact SMEs.

3. Leniency for SMEs

Because of their small size and limited financial means, one may fear that SMEs be easy targets for retaliatory measures after leniency applications. However, no specific rule exists under Belgian Antitrust law to protect SMEs against big undertakings after denunciation. Regarding possible *commercial retaliation*, denouncing firms may benefit from the protection of unfair competition law provisions.⁶⁸ Regarding possible *judicial retaliation*, Belgian law provides protection against “*temerarious and vexatious*” proceedings⁶⁹ that any person might introduce – and among those, proceedings that could be launched by big-sized undertakings willing to retaliate.

On this point, we favor the status quo as, to our best knowledge, no retaliation attempt after denunciation has been reported in Belgium so far.⁷⁰ Additionally, one may wonder what *kind* of protection mechanism could effectively (i) induce denunciation and (ii) protect SMEs from retaliation (iii) without impairing the normal course of business activities. Hence, no specific rules should be enacted to facilitate the participation of SMEs to leniency proceedings. A priori, SMEs and big-sized undertakings have all an equal and fair chance to apply for a first-rank leniency once they have made the decision to do so.

⁶⁵ See for instance: ECHR, 16 December 1992, No13710/88, *Niemietz v. Allemagne*, stating that the entitlement of Contracting States to interfere with situations where professional or business activities or premises are involved is more far-reaching than in situations where the domicile of a private individual is involved.

⁶⁶ Loi sur la protection de la concurrence économique, 15 September 2006, op. cit., Article 44.

⁶⁷ The two portfolios have often be in the hands of the same man. Currently, Vice-Minister Johan VANDE LANOTTE is in charge of the Economy and Minister Sabine LARUELLE is in charge of SMEs.

⁶⁸ Loi relative aux pratiques du marché et à la protection du consommateur, 6 April 2010, *M.B.*, 12 April 2010.

⁶⁹ Cass. 31 octobre 2003, RG C.02.0602.F, *J.T.*, 2004, liv. 6127, p. 135.

⁷⁰ True enough, leniency applications before the NCA are uncommon under Belgian law. For some examples of cartel cases initiated following a leniency applications see : Council Press Release, « Le Conseil de la concurrence impose des amendes pour un cartel dans le secteur chimique », 4 avril 2008 ; « Le Conseil de la Concurrence impose des amendes pour un cartel dans le secteur des radiateurs », 20 mai 2010 ; « Ententes sur les prix entre les entreprises de manutention dans les ports belges », 26 avril 2012, available at : http://economie.fgov.be/fr/entreprises/concurrence/Activites/Actualites_communiquees_presse/. Because leniency applications remain unfrequent, no relevant analysis of the order of application according to the size of the applicant is feasible, though.

Moreover, economic theory teaches that collusion is all the more sustainable when firms are symmetric and have similar profiles (with regard to size, cost structure, etc.).⁷¹ As detection of deviation is more difficult where firms of dissimilar proportions are active on the same market, the most durable cartels gather undertakings of similar sizes. Hence, the adoption of specific rules to deal with small v versus big issues in this area should not be a priority in Belgium but instead efforts should be made to popularize the knowledge of the existence of a leniency programme.

4. Sanctions: different penalties for different size?

The Belgian guidelines for setting fines⁷² do not establish any specific rule for SMEs. However, the guidelines indirectly take into account the size of the infringer for the calculation of the sanction as they define the basic amount of the fine according to the concerned turnover – i.e. the value of the sales of goods or services made by the infringer and to which the infringement relates – or, if unavailable, according to a percentage of the total turnover of the infringer. In the same vein, the fact that the fine is capped to 10% of the total turnover of all the undertakings that are part of the same group,⁷³ indirectly takes into account the size of the undertakings. As a SME is supposed not to be part of a group whose global size would exceed the financial thresholds set in the law, the maximum fine will be lower for SMEs than for other undertakings.

Beyond these preliminary remarks, sanctions for SMEs have also been partially adapted out of the scope of the Guidelines for setting fines. In practice, here and there, the case law of the BCA has adjusted the repressive regime to the small size and small means of the infringers.

It is noteworthy that in the first times of enforcement of the Belgian competition act, no fine could be imposed on SMEs. According to the first version of the BCA, SMEs were immune from fines⁷⁴ with the consequence that, even were competition law breaches were found by the public authority, infringers were left with a mere prohibition decision.⁷⁵

The abrogation of the immunity system with the 2006 reform of the BCA may be seen as a step towards more severity against SMEs. The case law of the NCA reveals that this reform has only mild effects on the fine SMEs incur. Admittedly, the Belgian competition authority is not in a position to exhibit any kind of convincing track record on fines whatever the size

⁷¹ M. MOTTA, *Competition Policy. Theory and Practice*, Cambridge, Cambridge University Press, 2004, p. 147.

⁷² Communication du Conseil de la concurrence, Lignes directrices sur le calcul des amendes imposées en matière de pratiques restrictives de concurrence en application de l'article 63 de la Loi sur la protection de la concurrence économique, 19 Décembre 2011, para. 21, available at: http://economie.fgov.be/fr/binaries/Communication_Lignes_directrices_amendes_tcm326-158194.pdf.

⁷³ Loi sur la protection de la concurrence économique, 15 September 2006, *op. cit.*, Articles 63 and 86.

⁷⁴ Loi sur la protection de la concurrence économique, 5 August 1991, *op. cit.*, Articles 31 and 36 of the coordinated version of 1st July 1999.

⁷⁵ Raad van Mededinging, Decision n°2007-I_O-05, 29 January 2007, MEDE-I/O-04/0072, *Fedoba*; Raad van Mededinging, Decision n°2007-I/O-19, 21 August 2007, MEDE-I/O-00/0027, *Orde der Dierenartsen*; Raad van Mededinging, Decision n°2008-I/O-04, 25 January 2008, MEDE-I/O-04/0045, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC)*; Conseil de la concurrence, Decision, n°2008-P/K-43, 7 July 2008, CONC-I/O-98/0031, *ISC c/ FAB et ses membres*, CONC-P/K-05/0023, *Test-Achats c/ auto-écoles de Belgique*.

of the infringer.⁷⁶ Still, the NCA shows substantial punitive moderation when it comes to setting fines for SMEs.

We have already mentioned the strong proclivity of the NCA to bring proceedings against associations of undertakings. This may be seen as an adaptation technique to the fact that otherwise the NCA would have to bring proceedings against a myriad of SMEs with the negative consequences it may have on the investigation resources of the competition authority. Moreover, the imposition of a fine to an association of undertakings presents the advantage that the fine will in principle be passed-on to its members.⁷⁷ The fining of professional associations may thus be used as a convenient mean to discipline SMEs.

Such policy is not without consequences on the level of fine, though. First, the turnover of an association that has for sole object the defense of the interests of a profession is often limited and is in all cases inferior to the sum of the turnovers of its members. Hence, the maximum possible fine – and its deterrent effect – are lower than the total amount that could be imposed on the members of the association.

Considerations inherent to the punishment of associations of undertakings may also lead the NCA to limit the level of its fines. For instance, in the *Belgian driving schools* case, the competition authority limited the amount of the fine because the membership of the professional association had evolved between the period of infringement and the date of the ruling. Because it would have been unfair to impose a too heavy fine on the new members, the NCA limited the fine to its most basic amount.⁷⁸ This, notwithstanding the fact that the infringement related to price coordination and was said to be serious.

Likewise, in several cases (*Interior Architects*⁷⁹, *Real Estate Agents' Institute*⁸⁰) the NCA ruled that it would be more efficient to condemn the professional associations to the publication of its decision on their website and to inform their members of the state of the law rather than to impose a fine.⁸¹ The fining policy of the NCA is thus affected by the capacity of the association to reach its members, what could not be required from a mere SME.

Speculatively, one may finally add that the targeting of professional associations is also likely to dissuade the competition authority from charging heavy fines. Considering that the

⁷⁶ See the stats we publish in L. DE MUYTER and N. NEYRINCK, “Une transaction en droit belge de la concurrence ? Approche critique de la proposition de la Direction Générale de la Concurrence”, *Revue de droit de la concurrence belge*, 2012, n°2-3, pp. 106-118.

⁷⁷ Whether it is via an express requirement to pay the fine or via an increase of the subscription fees, the sole exception being the situation where the association has sufficient cash reserves to pay the fine.

⁷⁸ “Moreover, when a fine is inflicted to an association, members may be held liable by the association for the payment of the fine. Yet, in the case at hand, the current number of members is only a tiny proportion of the number of members at the beginning of the instruction. It does not seem justified that current members suffer disproportionate consequences.” Conseil de la concurrence, Decision, n°2008-P/K-43, *op. cit.*, *Test-Achats c/ auto-écoles de Belgique*, para. 81.

⁷⁹ Raad voor de Mededinging, Decision n° 2008-P/K-45, 25 July 2008, MEDE-P/K-06/0006: *Review BVBA/Associatie van Interieurarchitecten van België vzw – [...]*, para. 61 and ff.

⁸⁰ Raad voor de Mededinging, Decision n° 2010-I/O-30, 26 August 2010, CONC – I/O-01/0042: *Beroepsinstituut van Vastgoedmakelaars*.

⁸¹ Formally, NCA decisions *first* rule out the imposition of a fine because of the unreasonable duration of the investigations and *then* separately decide to impose publication duties. However, the discretion the NCA enjoys regarding the consequences to give to any kind of breach of Article 6 ECHR may perfectly be instrumentalized to make a trade-off between a fine and a publication decision.

association's members could prefer declare the association bankrupt and set up a new one rather than make the effort to clear the debts, the NCA could be more receptive to inability to pay allegations.⁸²

C. PRIVATE ANTITRUST ENFORCEMENT AND SMES

1. Substantive rules, procedural aspects for SMEs in civil suits

1.1. Obstacles

To our best knowledge, no final decision⁸³ has been published⁸⁴ on private damages for victims of cartels in Belgium so far.⁸⁵ In our opinion, the main possible reasons for this are threefold. First, victims of cartel damages often ignore that a possibility is open to them to claim money back in cartel cases. As shows the great number of cases dealing with work associations in Belgium, even the most respectable professionals act in breach of competition law, partly because they disregard the gravity of their coalition, partly out of blunt ignorance of competition law.⁸⁶ Along the same line, victims of antitrust breaches may simply ignore they can mobilize the law for violations of antitrust.

Second, potential litigants may ignore the existence of the specific cartel that affected their business. Despite the efforts made by the EU Commission⁸⁷ to report and disseminate news of cartel infringements, the visibility of such information is often short lived. Hence, it is very likely that many SMEs ignore having been victim of a cartel, and do not consider to act against the detrimental consequences of a conspiracy they are not aware of.

⁸² Interestingly, much like Regulation 1/2003 (Art. 23(2) and Art. 23(4)4), the Belgian Guidelines for setting fines state that in case of insolvency, associations could be obliged to request the contribution of their members. However, one may question the legality of a rule that would inflict to several undertakings the sanction pronounced against another, distinct legal person. Communication du Conseil de la concurrence, Lignes directrices sur le calcul des amendes, *op. cit.*, para. 40.

⁸³ Following its fining decision in the elevator cartel case, the Commission sued the cartelists for private damages before Belgian civil courts. To date, this case only led to an interlocutory judgment with several questions asked to the EU Court of Justice. Kh. Brussel, 18 April 2011, *RCB*, 2011-2, p. 156.

⁸⁴ One decision was identified as dealing with private damages in Belgium in a 2004 EU survey. This decision does not deal with a cartel case though, but with a distribution agreement subsequently declared void. The decision is not published but kept in the NCA's library. Ashurst – EU DG Competition, Study on the conditions of claims for damages in case of infringement of EC competition rules, Report for Belgium, August 2004, p. 1, available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

⁸⁵ This statement should not lead to a too negative view regarding private antitrust enforcement in Belgium. An upsurge of cases may be observed since 2004 with several rulings being issued each year on claims for annulment of anticompetitive contracts or cease and desist orders, if not on cartel damages.

⁸⁶ As already mentioned above, the track record of the NCA is not tremendous (L. DE MUYTER and N. NEYRINCK, *op. cit.*). Only five cartels have been detected and condemned by the NCA between 2007 and 2011. Thus, in order to encourage private action from SMEs, the NCA should not only communicate more on its results, but also investigate and condemn more.

⁸⁷ Disregard towards market discipline and competition law are often stressed in continental Europe, especially when the introduction of criminal sanctions against antitrust infringement is discussed, with some groups pleading that public moral condemnation is not strong enough to justify such kind of penalties. M. ZULEEG, "Criminal Sanctions to Be Imposed on Individuals as Enforcement Instruments in European Competition law", 2001 EU Competition Law and Policy Workshop/Proceedings, EURSCAS, p. 8 (available at <http://www.eui.eu/>).

Third, the difficulties inherent to the quantification of damages – amply illustrated by the Commission’s Draft Guidance Paper⁸⁸ – may also play a role in the decision of potential litigants not to act for the reimbursement of their losses. Thus, while extra efforts should be made towards a more efficient communication on the availability of civil recourses against cartels, clear proxies to assess cartel damages⁸⁹ should simultaneously be adopted in order to develop private enforcement.

1.2. Best practices

In spite of taking specific, tailored measures to protect SMEs’ ability to take legal action against anticompetitive practices, diverse soft measures could be adopted to prioritize the action of the investigation authority in a way favorable to SMEs.

Belgian case law shows that SMEs that are party to antitrust proceedings may have utmost difficulties to use economic tools to articulate a convincing market definition before the Courts. Not surprisingly, this weakness is particularly pregnant in abuses of dominance cases where – contrary to illegal coordination cases – the boundaries of the relevant market must be precisely defined before any condemnation⁹⁰. Here, small versus big issues are most relevant as big undertakings may use superior financial means to look for – or even order – the market analyses needed to counter allegations of dominance. The *Vlan* case is a textbook example of the struggle SMEs are sometimes confronted to when dealing with market definition.⁹¹ In the case at hand, a small entrepreneur willing to create a website for online classified ads decided to challenge the bundle offered by Vlan, a highly well-known ads publisher that offered to its advertisers a free publication on its website for any paid publication in its paper. Debates on the relevant market raised a whole host of sophisticated issues with discussions related to (i) the existence of separate markets for the diffusion of online and physical ads, (ii) the existence of separate market for free and paying papers and (iii) the boundaries of the different product markets. On multiple occasions the Court’s ruling stresses that the claimant failed to provide any relevant price analysis (SNIPP test, price elasticity) or any market study to support its allegations of dominance. Logically, the Court rebutted the claims brought by the applicant.

⁸⁸ EU Commission, DG Competition, *Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty*, June 2011, 69 p.

⁸⁹ *Ibidem*, para. 5: Some legislators have established presumptions regarding the amount of the damages and allowed a shift of the burden of proof. Another solution could be for the investigation authority to provide an estimation of the cartel’s surplus with the condemnation decision.

⁹⁰ Compare: Conseil de Concurrence, Décision n°2008-P/K-43, 7 July 2008, aff. CONC-I/O-98/0031, *I.S.C./F.A.B. et ses membres* (“regarding agreements (...) the obligation to thoroughly delimitate the market at stake does exist only to the extent that this exercise is necessary to determine if the agreement or the decision fulfills the conditions of Article 2 BCA or of Article [101 TFEU]”) and Conseil de la Concurrence, Décision n°2009-P/K-10, 26 May 2009, CONC-P/K-05/0065, *Base/ BMB* (“In the framework of Article 3 BCA and of Article [102 TFEU], it is essential to define the relevant market to be able to conclude to the existence of a possible dominant position”).

⁹¹ Bruxelles, 24 April 2009, *Les Editions Urbaines SA / F. Peters*, *Annuaire Pratiques du commerce & Concurrence*, 2009, p. 928.

Yet, beyond the complications SMEs may encounter when dealing with economic analysis and market definition⁹², what strikes us is that on top of all these troubles, heavy legal costs may fall on the failing applicant. In the *Vlan* case, the applicant had to pay 10.000 euros to compensate the legal costs of the winning party.⁹³ The Court ruling does not state the reasons for the level of these costs. However, it is very likely that these were requested by the winning party to compensate the efforts made to bring economic evidence of its non-dominance.⁹⁴

In order to compensate this asymmetry of means SMEs could prefer to introduce a complaint before the BCA to benefit from the economic expertise of the Prosecutor's Office instead of applying before a civil court where they would be on their own. This supposes however that the Prosecutor's Office welcomes such complaints and do not dismiss them on the basis of a non-priority assessment. The adoption of a SMEs agenda at the Prosecutor's Office level could thus induce small and medium undertakings to show more activism in the fight against anticompetitive practices. Voices here retort that SMEs should not be treated as an enforcement priority as it would produce underoptimal social results.⁹⁵ One must however distinguish the complaints that are targeted by SMEs towards bigger undertakings and those aimed at other SMEs adversaries. Undoubtedly, the formers would present the double advantage to compensate asymmetry of means between players and to help to discipline important market players in a way satisfactory for tax payers⁹⁶.

In the course of judicial proceedings, SMEs could also (i) bring to the attention of the court that it may ask to the Commission its opinion on questions related to the application of EU law or (ii) directly alert the NCA or the Commission of their situation and prompt the sending of an *amicus curiae* letter.⁹⁷

Another solution could be to exonerate SMEs from all or part of the legal costs due in case of rejection of an action introduced against a bigger undertaking. In this scenario, the respective size of the undertakings would affect the allocation of the proceeding indemnities linked to economic analysis. The sharing of these costs between the two parties could reduce the risks of litigation and induce SMEs to act.⁹⁸

⁹² Market definition issues also appeared in *'t Winkelke* case, where a small café-bookshop failed to prove the dominance of its press supplier that had terminated its supplies. The court stressed that the burden of proof lied on the applicant before rebutting its claim of abuse for refusal to supply. Voorz. Kh. Kortrijk, 6 February 1995, *Jaarboek Handelspraktijken & Mededinging*, 1995, p. 722.

⁹³ Bruxelles, 24 April 2009, *Les Editions Urbaines SA / F. Peters*, *op. cit.*

⁹⁴ Article 1022 of the Code judiciaire allows Courts to correlate the amount of the legal costs with the complexity of the case. See: Loi relative à la répétabilité des honoraires et des frais d'avocat, 21 April 2007, *M.B.*, 31 May 2007; Arrêté royal du 26 octobre 2007 fixant le tarif des indemnités de procédure visées à l'article 1022 du Code judiciaire et fixant la date d'entrée en vigueur des articles 1er à 13 de la loi du 21 avril 2007 relative à la répétabilité des honoraires et des frais d'avocat, *M.B.*, 9 November 2007.

⁹⁵ Cases against SMEs should not be treated as an enforcement priority as it would produce underoptimal results regarding the minimal prejudice SMEs are likely to cause to consumers. F. LÉVÊQUE, "Caractéristique des PME et droit de la concurrence : le regard de l'économiste", in Y. CHAPUT (dir.), *op. cit.*, p. 46.

⁹⁶ The spoiling of public money in SMEs v SMEs cases could be minimized though, with public investigations against SMEs targeted to those markets where support for economic analysis is the most needed, in opposition to easy cases – i.e. where prior market definition is provided by past case law, in after-market cases, etc.

⁹⁷ Regulation 1/2003, *op. cit.*, Article 15.

⁹⁸ Interestingly, Article 1022 of the Code judiciaire already authorizes Courts to take into account the financial capacity of the defeated party to modulate the amount of the indemnity allowed; however, this criterion may be counterbalanced by the complexity of the case, another factor that Courts must consider to allocate compensations for legal costs.

2. Collective redress

Third parties are in principle prevented from bringing an action before civil courts if SMEs do not take action. Under Belgian law, applicants need to have a personal, direct and immediate interest to fill a claim: only if the claim can result in a patrimonial or moral benefit for the applicant will its action be admissible.⁹⁹

This requirement is strict and in principle impairs the intervention of third parties. Exceptionally, consumers' associations and professional associations having specific provisions in their articles of associations for the defense of their members are allowed to bring cease and desist actions with respect to antitrust breaches.¹⁰⁰⁻¹⁰¹ The Belgian legislator did not allow them to bring action before civil courts on damages, though.

The obligation for litigants to exhibit legal interest to act also prevents collective action. However, natural or legal persons who have individually suffered damage can regroup themselves and file a single claim as a closed group of applicants.¹⁰² In such a case, damages are awarded to each person individually and not to the group as a whole.

This kind of arrangement offers the advantage to allow claimants to share the risks and mutualize lawyers' fees. Hence, while the introduction of a collective redress mechanism would require a substantial reform of Belgian judicial law¹⁰³, the organization of industrial associations of SMEs could provide an efficient palliative to class action. In order to best defend the interests of their members, industrial organizations could then embrace the mission to survey cartel decisions and communicate to their members the possible opportunities to act collectively against antitrust infringers. Along this line, the Prosecutors' Office could take the initiative to directly communicate cartel condemnation decisions to those industrial organizations that are the most likely hit by the antitrust infringement.

3. Additional substantive rules

⁹⁹ Code judiciaire, Articles 17 and 18.

¹⁰⁰ Loi relative aux pratiques du marché et à la protection du consommateur, 6 April 2010, *M.B.*, 12 April 2010, Article 113 ; Loi concernant le règlement de certaines procédures dans le cadre de la loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur, 6 April 2010, *M.B.*, 12 April 2010, Article 2. The cease and desist action available under unfair competition law may be invoked to bring cease and desist proceedings against anticompetitive behaviours. D. GÉRARD, "Le droit belge des pratiques restrictives de concurrence" in N. PETIT (dir.), *Le nouveau droit belge de la concurrence. Bilan et perspectives après quatre années d'application*, CUP n°124, Liège, Anthémis, 2010, p. 30.

¹⁰¹ The procedure before the NCA being an objective procedure, complaints before the NCA are open to any natural or legal persons. Hence, contrary to the limitations they know before civil courts, consumer's associations may introduce a complaint before the NCA without having to demonstrate any kind of personal interest. See Conseil de la concurrence, Decision, n°2008-P/K-43, *op. cit.*, *Test-Achats c/ auto-écoles de Belgique*.

¹⁰² Ashurst – EU DG Competition, *op. cit.* p. 3.

¹⁰³ M. PIERS, "Class actions", *Nieuwe Juridische Weekblad*, 2007, pp. 825 et s.

Most antitrust litigations involving SMEs relate to vertical relationships.¹⁰⁴ The proportion of cases dealing with refusal to supply or, conversely, with attempts to prevent the distribution of products by undesirable retailers, is substantial.

In order to somehow police supplier-retailer relationships, the Belgian legislator enacted two laws whose objective is to curb the commercial freedom of the one undertaking who is perceived to be the strongest party – i.e. the supplier. The first statute¹⁰⁵ deals with exclusive concession agreements in cases where the supplier imposes on its distributor obligations such that the latter would suffer serious damages in the event the supplier should terminate the contract – e.g. where specific investments were made by the distributor for the sale of the supplier's products. Under such circumstances, the law subordinates the termination of the agreement to (i) the sending of a significant advance warning and (ii) the payment of an additional indemnity, two obligations that are supposed to secure the supplying of the concessionaire. The second statute¹⁰⁶ imposes a one month cooling-off period before the signature of franchise agreements. It requires precise information on the duration of the contract, prorogation opportunities, termination conditions and non-compete clauses with the objective to anticipate and diffuse possible future conflicts in the supply relationship.

The two mentioned statutes are not limited to any sector but apply transversally. The notoriety of the first legal instrument and the fact it has not been amended since 1971 demonstrate that it efficiently protects small and medium operators against abrupt termination of supply.

¹⁰⁴ We observe that, while NCA case law primarily focuses on the decisions of professional associations, judicial case law mainly deal with supplier-buyer issues. This observation is also made by D. GÉRARD, “Le droit belge des pratiques restrictives de concurrence”, *op. cit.*, p. 66.

¹⁰⁵ Loi relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée, 27 July 1961, *M.B.*, 5 October 1961.

¹⁰⁶ Loi relative à l'information précontractuelle dans le cadre d'accords de partenariat commercial, 19 December 2005, *M.B.*, 18 January 2006.