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I. Description of Belgian competition law

1. Introduction

1. Belgium has had new competition legislation since 1 April 1993, when the Act of 5 August 1991 on the protection of economic competition (hereinafter "the Act") entered into force.

2. On an equal footing with European Union law and the national law of other countries, the enactment of this legislation demonstrates the Belgian Parliament's determination to ensure and safeguard effective competition in the marketplace by means of a genuine, effective competition policy.

3. The Act also fills a gap in Belgian legislation, in which competition law was long neglected in comparison with other aspects of economic statutes.

4. By adopting the Act of 27 May 1960 on protection against the abuse of economic power, the Belgian Parliament had taken a cautious step towards enacting a genuine regulatory framework for competition, inasmuch as the legislation applied solely to abuse of economic power. Inter-company agreements in restraint of competition were not prohibited *per se*, but only when the public interest was at risk.

5. While this legislation was able to cover a number of anticompetitive situations, its application never really matched the expectations generated by a provision that was supposed to protect market competition.

6. For its part, the new law was framed primarily to safeguard and promote effective, workable competition. Its objective is twofold: to guarantee the right of individual firms to do business in the markets of their choice, within clear and plainly circumscribed limits; and to create a framework in which businesses and individuals alike reap the favourable effects of competition on prices and product quality.

7. To achieve these goals, and in order to make companies legally secure, the Act was deliberately based on European Union legislation in this area.

2. Scope of application

2.1 *Ratione materiae*, the Act covers two forms of competitive practices:

a) Restrictive practices, in respect of which the Act adopts the principle of prohibition, and which encompass:

- agreements between undertakings, decisions by associations of undertakings and concerted practices, the object or effect of which is to prevent, restrict or materially distort competition in the relevant Belgian market or a substantial part of it (Sec. 2) ;

- the fact that one or more undertakings abuse a dominant position in the relevant Belgian market or a substantial part of it (Sec. 3).

8. These provisions correspond to Articles 85 and 86 of the Treaty of Rome establishing the European Community. In addition, the Act comprises a definition of dominant position which was inspired by case law of the Court of Justice of the European Communities: a position that enables a firm

to impede effective competition by behaving in a significantly independent manner vis-à-vis its competitors, customers or suppliers (Sec. 1).

9. As in the European system, such agreements and decisions may be exempt from prohibition if companies give notice thereof. Exemptions may be granted, *inter alia*, if agreements help to improve the production, distribution or competitive position of small or medium-sized enterprises. Exemptions of this sort may be granted individually or collectively.

10. In the case of abuse of dominant position, the prohibition is absolute; there is no possibility of obtaining an exemption.

b) Business concentrations (mergers, take-overs and creation of certain types of joint ventures), in which there is presumption of control if the firms in question have aggregate consolidated turnover in excess of BF 3 billion and control over 25 per cent of the market concerned (Sec. 11). These two conditions are cumulative.

The only permissible concentrations are ones that do not result in acquisition or reinforcement of a dominant position that significantly impedes effective competition in the Belgian market concerned or in a substantial part of it (Sec. 10).

Nevertheless, an exception is possible if the Competition Council finds that an operation's contribution to improving production or distribution, enhancing the market's competitive structure or promoting technical or economic progress overrides the resulting restraint of competition.

11. In making its assessments, the Council considers the general economic interest and the capacity of the sectors involved to compete internationally, as well as consumer interests.

12. In addition, the Act excludes concentrations "of Community-wide dimensions" from its scope of application (Sec. 13).

2.2 *Ratione personae*, the Act is applicable to "undertakings", i.e. to any physical or legal person pursuing an economic objective in a sustainable manner (Sec. 1).

13. This definition draws upon EU law and is broad in scope: the form of an undertaking, whether it is public or private, and its nationality are of little importance. The only restriction, taken from Article 90 §2 of the Treaty of Rome, consists in the fact that public undertakings and undertakings to which public authorities grant special or exclusive rights are subject to provisions of competition legislation only insofar as the application thereof does not obstruct performance, in law or in fact, of the particular tasks assigned thereto under or by virtue of Belgian law.

3. Bodies

14. The Act confers responsibility for overseeing competition to original bodies which it institutes:

1. the Competition Service;

2. the Competition Council;

3. the Competition Commission.

15. In addition, the portfolio of the Minister with responsibility for Economic Affairs comprises a number of competition-related powers.

16. ***The Competition Service***, which is a unit of the Ministry of Economic Affairs, is responsible for seeking out and noting the existence of competitive practices (Sec. 14). It investigates all cases in which action must be taken and enforces any rulings. It also assists European competition authorities with enforcement of EU rules on competition (Sec. 49).

17. The main function of the Service is one of case investigation, after which it submits a report to the Competition Council for decision (Sec. 24).

18. Institution of an entity responsible for investigation and distinct from a Council invested with decision-making authority is a departure from EU practice. Avoiding a concentration of investigative and decision-making powers within one and the same decision-making body provides a stronger guarantee that the rights of defendants will be upheld.

19. The Service also acts as secretariat to the Competition Council (Sec. 14).

20. **The Competition Council**, set up under the auspices of the Ministry of Economic Affairs, is an administrative entity having the authority to take decisions, put forward proposals and give opinions (Sec. 16).

21. Under its decision-making powers, the Council ascertains whether or not prohibitions of restrictive practices have been infringed, and it alone is empowered to grant individual exemptions at the request of the undertakings involved. It also rules on the acceptability of concentrations.

22. In matters of overall competition policy, the Council has general advisory powers which it exercises on its own initiative or at the Minister's request (Sec. 16).

23. The Competition Council is made up of twelve active members, six of whom, including the Chairman and Vice-Chairman, are judicial magistrates, while the six others are appointed by virtue of their expertise in the area of competition. Twelve alternate members are appointed on the same basis. Their term of office is six years and may be renewed (Sec. 17). The Council's membership addresses two concerns: to ensure that Councillors are independent, and that they possess specialised expertise.

24. **The Competition Commission**, set up under the auspices of the Central Economic Council, is an advisory body representing the viewpoints of labour, industry, agriculture, commerce, crafts and consumers (Sec. 21).

25. Among its functions is to issue opinions, on its own initiative if it so chooses, on any matter involving general competition policy. It informs the relevant parties when the Competition Service files a report with the Competition Council, thus enabling them to react thereto[1].

26. **The Minister** *has the power to grant exemptions for particular categories, on the Council's proposal and upon consultation with the Commission (Sec. 28)*[2]. *However, jurisdiction over individual cases lies exclusively with the Competition Council.*

27. The Minister can also ask the Service to investigate alleged violations involving competitive practices (Sec. 23). He represents the Belgian State when appeals are lodged against it with the Brussels Court of Appeal (Sec. 43).

4. Rules of procedure

4.1 Procedures before the Competition Service

28. Cases are investigated by the Competition Service, either as a matter of course, at the request of the Minister with responsibility for economic affairs, the Council or certain public bodies; or following a notification or request for negative clearance by the undertakings involved; or following a complaint by a person showing a direct and current interest (Sec. 23).

29. To fulfil its mission, the Service possesses broad investigative powers comparable to those of the DG IV. For any coercive investigative measure, the Act calls for intervention by the Chairman of the Competition Council in his capacity as a judge (Sec. 23). Under certain conditions, Service staff may conduct searches and effect seizures on the spot.

30. Following its investigation and prior to making its report, the Service summons the undertakings involved in order to let them comment. It then hands the case over to the Competition Council along with a reasoned report containing a draft ruling.

4.2 Competition Council

31. After it receives the Service's report, the Competition Council forwards copies to the undertakings concerned, as well as to the plaintiff if it deems this appropriate. If need be, the Council can send the case back for further investigation.

32. The Council conducts hearings, hearing the undertakings concerned and any plaintiffs that so request. Similarly, requests to be heard are granted to persons able to show sufficient cause (Sec. 27).

33. The Council states the grounds for its decisions.

34. With regard to concentrations that are notified, the Act sets very strict deadlines for review. The Council must take a decision within one month after the Service has received notification. In cases where there is serious doubt as to an operation's acceptability, the Council's decision may consist in instituting a second phase lasting a total of 75 days, during which time the Service conducts a supplementary investigation and drafts a new report, and the Council takes another decision. If the Council hands down no opinion within the aforementioned one-month or 75-day deadlines, the concentration is deemed approved (Sec. 33).

35. Decisions of the Competition Council are generally published in the Moniteur belge, except for those ordering a second phase in respect of concentrations and those relating to requests for provisional measures. Decisions are notified to the undertakings concerned and to plaintiffs.

5. Provisional measures (Sec. 35)

36. At the plaintiff's request, or that of the Minister, the Chairman of the Competition Council may take provisional measures to suspend restrictive practices under investigation if there is an urgent need to

avert a situation that could cause serious, imminent and irreparable harm to the undertakings whose interests are affected by such practices, or that is contrary to the public interest.

37. The Chairman takes his decision after the Competition Service submits an advisory report.

6. Judicial control over decisions of the Council and its Chairman

38. In order to foster uniformity in competition-related case law, Belgian law has empowered the Brussels Court of Appeal to hear appeals of decisions by the Competition Council and its Chairman. The Court of Appeal has unlimited jurisdiction over such appeals (Sec. 43).

39. Rulings by the Brussels Court of Appeal can themselves be appealed to the *Cour de Cassation* (the supreme court of appeal).

40. Furthermore, if the outcome of a case hinges on whether or not a competitive practice is lawful, an ordinary judge may stay the proceedings and request a preliminary ruling from the Brussels Court of Appeal (Sec. 42). The Court of Appeal may ask the Competition Council to investigate. It issues a reasoned decision which is not open to any appeal.

Comment by the Competition Council:

41. Appeals against decisions of the Council and its Chairman are directed against the Belgian State. The Competition Council is not able to intervene in appellate procedures.

42. In a number of rulings, the Brussels Court of Appeal has expressed perplexity over the role that the Belgian State has taken on with regard to its mandatory intervention before the Court, pursuant to Section 43 of the Act of 5 August 1991, but it has not given any opinion on the subject.

43. For its part, legal literature has severely criticised the way in which the Belgian State has emerged in the appeals process, inasmuch as it has not upheld the public interest: in most cases, the means invoked by the State have had nothing to do with competition-related aspects[3].

7. Implementation of the Act by courts of law

44. Courts may invalidate agreements that are prohibited under the Act and enjoin abuses of dominant positions. Judges may also draw all civil consequences from such prohibition (e.g. by awarding compensation), but they may grant neither exemptions nor negative clearance.

45. It should be noted that Belgian case law considers the violation of competition law as a practice contrary to proper business behaviour.

II. Draft amendment to the Act and measures taken

46. Since the Act of 5 August 1991 entered into force, a number of difficulties have arisen, stemming from the competition authorities' lack of resources and from differences in how the Act has been interpreted and applied by the Competition Service and the Competition Council[4].

47. Given these difficulties, the Belgian Government has adopted two types of measures.

1. Short- and medium-term measures

48. Additional resources have been allocated to strengthen the Service [20 more Level I (professional) officials], and four "rapporteurs" (a new function created under the draft amendment) are to join its staff.

49. At the end of 1997, the Government decided to give the Competition Council its own budget.

50. Royal decrees intended to enhance co-operation and reciprocal information flows between the Competition Council and the Competition Service were enacted on 22 January 1998 but have yet to be published.

51. Lastly, it was decided in principle to invest the Competition Council with four full-time officers, including a Chairman and a Vice-Chairman. This last measure requires a legislative amendment.

2. Draft amendment to the Act

52. In early December 1997, the Belgian Government adopted draft legislation that would amend the current Act. The *Conseil d'État* must give its opinion on the bill before it is submitted to the houses of Parliament.

53. The bill does not alter the principles underlying the Act of 5 August 1991, i.e. prior control over concentrations and prohibition of practices that restrict competition in the Belgian market.

54. The main changes contained in the bill are as follows:

1. A *corps of rapporteurs*, initially made up of four people, is to be set up within the Competition Service.

   Their administrative status and compensation arrangements should ensure their independence. Among their tasks are to head investigations, issue travel orders to investigators, establish investigative reports and present those reports to the Competition Council.

   Investigative reports are to contain a list of allegations. The Council may also make allegations, which the rapporteurs must then examine before the allegations are notified to the parties.

   These provisions ensure greater protection of the rights of defendants, and they also stipulate the respective powers of the competition authorities, pursuant to the principles laid down in the Act. They should also ensure competence, specialisation and continuity in the leadership of investigations.

2. If the Competition Council has ruled that a concentration is unacceptable, the notifying parties, acting jointly, may request that *the Minister with responsibility for economic affairs* authorise the concentration on public interest grounds that override the risk that it will be

harmful to competition. In any event, authorisation to proceed with a concentration does not preclude any subsequent actions based on abuse of dominant position.

3. The *thresholds* above which concentrations must be notified are amended. The market share criteria, which is a source of judicial insecurity, is eliminated. Two new thresholds are set, in reference respectively to the aggregate turnover of the undertakings concerned in Belgium, and to the Belgian turnover of each of those undertakings. The new thresholds should make it possible to avoid requiring firms to notify concentrations that would have no impact on the Belgian market.

4. Other changes are to be made, *inter alia* with regard to *costs and fees* chargeable to the parties, *the rights of defendants*, protection of *business secrets*, the nature and length of *deadlines*, and avenues of *appeal*.

III. Implementation of the legislation

1. Competition Service

1.1 Organisation of the Service

55. Investigation of cases submitted under the Act being its primary responsibility, the Competition Service has run up against operational difficulties ever since the Act entered into force. These problems stem primarily from the large volume of concentrations to be notified—for which there is extremely little time to investigate—in relation to the limited number of Service staff available to make the necessary inquiries.

56. The priority given to concentration cases and requests for provisional measures has made it impossible, within reasonable amounts of time, to deal with cases involving restrictive practices.

57. In view of this fact, and the realisation that violations involving restrictive practices, which have a direct detrimental effect on economic life in Belgium, required greater attention, an internal re-organisation of the Service, based on the structure of the European Union's DG IV, was carried out in September 1997.

58. The fifteen case officers were divided into three sections: a first "restrictive practices" section (for the telecommunications, information, multimedia, basic industries and energy sectors); a second "restrictive practices" section (for the service, appliance and consumer goods sectors); and lastly, a "concentrations" section (for all sectors).

59. Whereas, previously, each official has had to deal with all types of cases, one of the goals of the internal restructuring is to achieve a certain degree of specialisation and, in any event, to have a limited number of officials assigned primarily to investigating concentrations, so that the other members of the Service can devote themselves full-time to the investigation of restrictive practices.

60. In this regard, the arrival of the first of the Government's planned reinforcements—six new officials recently took up duty—should allow the Service to handle all cases more efficiently, and to reach the goals laid down in the reform more quickly.

1.2 The approach taken towards cases

61. Along with this restructuring of staff assignments, the Service has explored ways of dealing with concentration cases, taking account of the fact that, on an equal volume basis, the number of staff assigned to handle them is still limited.

62. Apart from more systematic use of logistical support staff, and of form letters during investigations, it was decided that the Service, working together with the Competition Council, would determine how thoroughly each case should be investigated in view of its theoretical impact on the Belgian market.

2. Competition Council

2.1 Anticompetitive practices

63. The recent entry into force of the Act of 5 August 1991 on the protection of economic competition, and the lack of resources allocated to the Competition Service and the Competition Council (see below), explain the limited number of complaints and agreement-related decisions on the merits.

64. In 1997, the Competition Council rendered a decision on the merits in respect of a complaint filed against the Laroy-Duvo company for imposed prices.

65. With regard to agreements, in early 1998 the Council made a ruling concerning a request by Canal+ for negative clearance.

66. In contrast, the Council Chairman, bound to abide by relatively short deadlines, made a number of major decisions (described in detail below) in response to requests for provisional measures.

67. In addition, a number of the Council Chairman's rulings that had been appealed were echoed in 1997 by the decisions of higher jurisdictions.

2.1.1 Requests for provisional measures

68. Decisions taken in response to requests for provisional measures have enabled the Chairman of the Competition Council to pinpoint the Act's scope of application as set forth in Section 1 of the Act of 5 August 1991.

69. First, the Chairman has followed the legal precedent of the European Commission as regards application of the rules of competition to the professions. There is no doubt that the professions are subject to Belgian law on the protection of economic competition. Nevertheless, a recent ruling by the *Cour de Cassation* has put an end to the controversy surrounding the Chairman's authority to grant temporary injunctions against acts issued by official bodies of the professions. This controversy arose in connection with the "Clarysse" case (see below).

70. Second, he has elucidated the meaning of the term "undertaking" as cited in Section 1 of the Act, *inter alia* in decisions in the "Red Cross" and "Daube v. National Lottery" cases.

71. Lastly, he has handed down a decision in the area of selective distribution of "Vichy" brand products.

a) The "Clarysse v. Architects' Association" case[5]

72. On 22 May 1995, a Mr. Clarysse, architect, lodged a complaint with the Competition Service against the Belgian Architects' Association (*Ordre des architectes*) for violation of Section 2 §1 of the Act. In his opinion, Article 12 of the Architects' Code of Ethics, as approved by the Royal Decree of 18 April 1985, and Ethical Standard No. 2, introducing a scale of architects' fees set by the Association's National Council, constituted restrictive practices.

73. Just one day after lodging his complaint, Mr. Clarysse filed a request for provisional measures, petitioning the Chairman of the Council to enjoin the Architects' Association from applying the aforementioned Article 12, on pain of penalty, until such time as a decision on the merits was handed down.

74. The complaint and the request for provisional measures came in the wake of disciplinary procedures undertaken against Mr. Clarysse. Those procedures had culminated in March 1995 with a decision by the Council of the Architects' Association of the province of West Flanders, issued *in absentia*, whereby Mr. Clarysse was expelled from the Association. He was accused, *inter alia*, of having charged fees that did not comply with Ethical Standard No. 2 and that were inconsistent with professional responsibility (under the aforementioned Article 12).

75. After pointing out that each of three conditions had to be met if provisional measures were to be granted—namely:

> "the existence of a substantive suit in process (which in this case there was), the probability of serious and irreparable harm establishing the urgency of adopting provisional measures, and the likely existence of an anticompetitive practice prohibited by Sections 2 and 3 of the Act of 5 August 1991"
>
> the Chairman found that in this case Mr. Clarysse's expulsion did in fact involve a risk of irreparable harm.

76. Then, referring to the case law of the Court of Justice of the European Communities, the Chairman of the Council dismissed the parties' contention that the Act of 5 August 1991 did not apply to the professions.

77. Lastly, he examined the anticompetitive nature of the disputed practice, concluding that

> *"Article 12 paragraph 3 of the Code of Ethics and Ethical Standard No. 2 are clearly decisions by associations of undertakings which prevent, restrict or significantly distort competition in the Belgian market or a substantial part of it, and which consist in setting prices directly or indirectly."*

78. Finding that all of the conditions enumerated in Section 35 of the Act were met, the Chairman enjoined the National Architects' Association from taking its intended action until such time as the Competition Council had ruled on the merits of the case.

79. Following the appeal lodged by the Architects' Association, the Brussels Court of Appeal[6] reversed the Council Chairman's decision on the grounds that the provisional measures he had ordered directly or indirectly prevented bodies of the Architects' Association, as instituted by the Act of 26 June 1963, from exercising its lawful disciplinary authority.

80. The Court stated the grounds for its decision as follows:

> "Overwegende dat uit hetgeen voorafgaat volgt dat de wet de uitoefening van het tuchtrecht jegens o.a. de architecten die zijn ingeschreven op de tabel van de Orde van Architecten uitdrukkelijk en uitsluitend heeft toevertrouwd aan twee der wettelijk ingerichte organen van de Nationale Orde van Architecten; dat noch een administratief rechtscollege, zoals de Raad voor de mededinging en zijn voorzitter, noch een rechtbank of hof van de rechterlijke macht vermogen hetzij rechtstreeks, hetzij onrechtstreeks door een bevel of een verbod de uitoefening van dit tuchtrecht door de bevoegde organen van de Nationale Orde van Architecten te verhinderen of te belemmeren."[7]

81. However, the Court stipulated that the decision on the merits that would be handed down by the Council as to the legality of the aforementioned Article 12 and Standard No. 2 vis-à-vis the Act of 5 August 1991 would apply *erga omnes*, and that the bodies set up under the aforementioned Act of 26 June 1963 would be bound by it, at the risk of having their decision invalidated by the *Cour de Cassation* in the event of non-compliance.

82. The appeal lodged against this latter ruling by architects Clarysse and Bossuyt, parties intervening before the Brussels Court of Appeal, was rejected by a *Cour de Cassation* decree of 27 November 1997[8]. The *Cour de Cassation* ruled that the Chairman of the Council had no authority to order provisional measures in this area.

b) The "Tambue v. Bar Association" case[9]

83. The purpose of the complaint introduced by Mr. Tambue was to have the Belgian National Bar Association (*Ordre national des avocats de Belgique*) convicted of violating Sections 2 and 3 of the Act insofar as the Association made registration on its membership rolls conditional upon successful completion of a professional training examination, and made continued registration on the list of trainees (*stagiaires*) conditional upon successful completion of the same examination (the so-called "CAPA" examination) within a certain amount of time.

84. In addition, he accused the Association's Arlon Chapter of limiting the number of trainees to one per partner, and of making ten years' membership of the Association, at least five of which on the rolls of the Arlon bar, a requirement for sponsoring a trainee lawyer.

85. Lastly, he charged both bodies with:

> "having adopted written or unwritten rules, notable effects of which are to limit the number of trainees per partner or per law firm; to require partners who sponsor trainees to have been on the rolls of the chapter concerned for a certain amount of time, or to have been so authorised; to require sponsors and trainees to enter into contracts that are subject to prior approval or that necessarily contain certain conditions (e.g. concerning the compensation of trainees); to limit the amount of trainees' previous creditable service if performed under the jurisdiction of another

> bar; to set conditions for extending their term of service beyond three years; and to prohibit the dissolution of contracts even when both parties so agree."

86. The plaintiff contended that the effect of these provisions, which were contained in the regulations established by the Association's General Council by virtue of its regulatory authority, as well as in those of the Association's various Councils, was to restrict access to, and the exercise of, the profession of lawyer.

87. The request for provisional measures was intended to prevent the Council of the Arlon Chapter from taking any decision on the basis of the regulations in question following the plaintiff's failure to pass the CAPA examination, the Arlon Council having informed the plaintiff of its decision to initiate action to remove his name from the list of trainee lawyers.

88. The National Bar Association and the Association's Arlon Chapter contended that the Competition Council, and consequently its Chairman, had no jurisdiction—first, because the Bar Associations did not constitute an association of undertakings under the meaning of the Act; and second, because the fact that the Act reserved the power to invalidate General Council regulations and acts of the disciplinary authorities to the *Cour de Cassation* suggested that Parliament's clear intention had been to exclude the jurisdiction of administrative tribunals. Moreover, the *Conseil d'Etat* had ruled along these lines by stating that it had no jurisdiction[10].

89. Following the plaintiff's arguments, which alleged unequal treatment and discrimination between lawyers, on the one hand, and those exercising other professions and enterprises in general—over which the Competition Council had jurisdiction—on the other hand, the Chairman decided to ask the *Cour d'Arbitrage* for a preliminary ruling as to whether the provisions of the Act of 5 August 1991 infringed Article 10 of the Constitution if it were deemed that the rules and practices applicable to a lawyer's functions escaped the Council's jurisdiction, which would imply differential treatment between lawyers and persons exercising other professions.

90. In a decision of 30 April 1997, the Cour d'Arbitrage responded in the negative to the Chairman's question, holding that:

> "Article 10 of the Constitution is not infringed by provisions of the Act of 5 August 1991 on the protection of economic competition that relate to submissions to the Competition Council and to the Competition Council's jurisdiction over undertakings and associations of undertakings, and particularly Sections 6 §1, 10 §1, 12 §5, 16, 23 §1, 27-33, 35 and 36-41, in that these provisions, interpreted in the light of Sections 468, 469bis, 477, 502, 611 and 1088 of the Judicial Code, exclude from the Competition Council's jurisdiction—assuming they constitute restrictive practices under the meaning of the Act of 5 August 1991 or Articles 85 or 86 of the Treaty of Rome—the rules and practices of the profession of lawyer as established in regulations of the General Council of the National Bar Association, or resulting from acts of authorities of the bar, including regulatory resolutions adopted by the Councils of the Association."

91. However, this ruling remains especially ambiguous insofar as, in item B.7.2, the Court stipulates that "it is incumbent upon the jurisdictions designated by law to invalidate or to refuse to apply regulations that would impose an unjustified restraint on the rules of competition."

92. By this, was the Court referring solely to the Cour de Cassation? The question is still an open one.

c) The "Red Cross" case[11]

93. In contrast to the Competition Service's viewpoint that the request should be rejected, the Chairman stated that the Red Cross should be considered an undertaking within the meaning of the Act, and that the form of the undertaking made little difference. He therefore sent the case for investigation.

94. A further ruling has yet to be made, despite the fact that the Service completed its investigation on 16 May 1997.

d) The "Daube v. National Lottery" case[12]

95. Since 1991, a Mr. Daube, who operates a bookshop in Ligny, has been attempting to get his business certified as an official National Lottery outlet, and to obtain a machine to validate lottery tickets.

96. In 1995, after successive refusals by the National Lottery, Mr. Daube lodged a complaint with the Competition Service based on Sections 2 and 3 of the Act of 5 August 1991.

97. He accused the Lottery, apart from basing its refusal to grant a validating machine on inaccurate grounds and refusing to inform him of the reasons for its refusal, of abusing its dominant position by attributing Lotto validating machines on non-objective criteria.

98. Noting that the Service had not produced an investigative report, he decided in February 1997 to petition the Chairman of the Competition Council for provisional measures.

99. Mr. Daube's intention was to obtain a judgement whereby the Chairman would direct the Lottery to supply him with a validating machine for a one-year trial period and levy a fine of BF 100 000 for each day of delay.

100. Mr. Daube justified the urgency of provisional measures by the substantial decline in his turnover, claiming that the lack of a Lotto validating machine had lost him many customers.

101. The National Lottery's main argument was that the Chairman lacked jurisdiction in this case, contending that the Lottery was not subject to the provisions of the Act of 5 August 1991 and that, in addition, it had discretionary authority over the allocation of validating machines under the Act of 22 July 1991. It also invoked the Lottery's status as a public service, whose profits were intended for a host of public service purposes, to justify the profitability concerns that must necessarily underpin its management.

102. In its own defence, the Lottery also contended that when allocating validating machines it weighed a number of criteria that had been discussed by Parliament when the Act of 22 July 1991 was adopted—criteria that should have been enumerated in a Royal Decree. Among those criteria were: the location of a business, the owner's experience, population density, the nature of the business, the appearance of the premises, etc.

103. The Chairman did not agree with the National Lottery's line of reasoning. He deemed, first, that the Act of 5 August 1991 was applicable, thus confirming his previous ruling[13], and, second, that the Lottery had replaced the criteria discussed by Parliament with *"anticompetitive criteria based in particular on the goal of protecting the existing network."*

104. Indeed, it was the Lottery's practice to use the population criterion to prevent a new "Lotto Centre" from setting up if another such centre already existed in the area in question and if, in the Lottery's opinion, the break-even point had already been attained. Moreover, the Lottery neglected to define either the population density criterion or the break-even point.

105. Similarly, the argument that provision was free of charge was not accepted.

106. The judge then found that there was *prima facie* evidence that the Lottery was abusing its dominant position in the market concerned, i.e. that of National Lottery products on offer to consumers by businesses equipped with an on-line terminal, by applying the few objective criteria in a discriminatory manner and by applying anticompetitive criteria as well.

107. Nevertheless, he rejected Mr. Daube's request for failure to show urgency, the plaintiff not having shown that "the alleged decline in his turnover was linked to the fact that he cannot satisfy a large number of customers."

108. The National Lottery appealed that ruling to the Brussels Court of Appeal, which has jurisdiction over appeals of decisions of the Council and its Chairman.

109. It should be noted that the Court of Appeal had previously issued a decision regarding the same practice[14]. On 9 September 1996 it had ruled on a similar case involving the National Lottery's refusal to grant a validating machine to a bookseller.

110. This ruling followed an appeal against the decision of the Presiding judge of the Commercial Court of Louvain[15]. That court held, first, that the Act of 5 August 1991 was applicable in these circumstances but, also, that the National Lottery had not abused its dominant position when it refused to grant a validating machine, because to have done so would have entailed a financial effort that would have jeopardised fulfilment of its lawful purpose.

111. The Court of Appeal upheld the Lottery's discretionary power with regard to the selection of validation centres. It did stipulate, however, that this discretionary power did not allow the Lottery to deny applications on the basis of arbitrary criteria. It was incumbent upon the applicant to prove that the decision was arbitrary and not based on objective grounds.

112. In the case in question, the contention that the businessman considered his establishment's designation as an official "Lotto" centre as vital to its existence could not be upheld, insofar as the business had no subjective right to such certification.

113. Consequently, the appellant's motion was denied.

e) The "Vichy" case[16]

114. The Chairman's decision of 6 May 1997 is instructive in that it defines the notions of "relevant market" and "related market" in the realm of selective distribution.

115. The suit by the firm of Cosmétique Active Belgilux against the GB-UNIC company was filed in response to GB-UNIC's manifestation of its intention to market the Vichy-brand skin cosmetics that the plaintiff distributed through a system of selective distribution in pharmacies.

116. The plaintiff accused GB-UNIC of abusing its dominant position in mass marketing services by offering Vichy products exclusively, and by doing so without providing any presentation specially tailored to the line's image.

117. By not respecting the selective distribution criteria to be found in the Vichy network, GB-UNIC was displaying a desire to downgrade Vichy-brand products. As a result, Cosmétique Active Belgilux feared damage to the line's brand image, and ultimately its disappearance.

118. GB-UNIC took exception to the pharmaceutical nature of Vichy products, claiming that the differentiation between them and similar products was artificial, based solely on the fact that they were sold in pharmacies.

119. The Chairman upheld the plaintiff's definition of the relevant market, i.e.:

> "that the relevant market is not the one in which the dominant position of the firm being sued, i.e. mass marketing, is manifest, but the one in which the competition takes place and is likely to be affected by restrictive practices, i.e. the market for the products in question..."

120. Citing EU case law, the Chairman explained that, in order for the practices of an undertaking having a dominant position in one market to affect competition in a neighbouring market, that neighbouring market must be "ancillary" to the one in which the incriminated undertaking enjoys a dominant position.

121. He noted, however, that in this particular case the markets in question were independent of each other and that GB-UNIC was therefore in no position to affect or restrict competition in the market for skin cosmetics marketed via a system of selective distribution. As a result, the motion was denied.

122. Cosmétique Active Belgilux appealed that ruling. To date, the Brussels Court of Appeal has not yet issued a decision.

2.1.2 Complaints

123. In a decision of 25 March 1997[17], the Council ruled on a complaint filed by SA Aniserco against SA Laroy-Duvo.

124. The plaintiff accused the Laroy-Duvo company of an anticompetitive practice whereby Laroy-Duvo imposed retail selling prices on the merchants belonging to its sales network for the products it manufactured, in violation of Section 2 of the Act.

125. In the plaintiff's view, the agreement thus notified under Section 2 §1 could therefore not qualify for an exemption.

126. The Council deemed that the agreement whereby the retailer pledged not to sell a product for less than the price set by the supplier was prohibited by Section 2 §1 a) of the Act.

127. Moreover, he noted that the conditions for exemption were not all present, insofar as Laroy-Duvo had not provided proof of any improvement in the distribution of its products, or of any improvement in the competitive position of the small or medium-sized enterprises in the market concerned, or in the international market, as cited in Section 2 §3 of the Act.

128. In addition, the practice of imposed prices very certainly constituted a disadvantage for the consumer, for the following reasons:

" - *verticale prijsbinding verplicht de consument prijzen te betalen die niet aan de kostprijs van verdelers zijn aangepast;*
- *verticale prijsbinding kan tot prijsstijging leiden;*
- *verticale prijsbinding kan leiden tot het beschermen van minder productieve handelsondernemingen;*
- *verticale prijsbinding ontneemt de consument de mogelijkheid om het artikel tegen een lagere prijs te kopen en de consument kan ook geen prijsvergelijkingen meer maken omdat de prijzen alle wederverkopers dezelfde zijn. De keuzevrijheid van de consument wordt beperkt; ook het toestaan van kortingen door de wederverkoper ten gunste van de consument wordt uitgesloten."*[18]

129. Consequently, the Chairman found that Section 2 §1 of the Act had been infringed and directed the defendant to cease the restrictive practice in question or incur a fine of BF 250 000 per day.

130. Following an appeal by Laroy-Duvo, the Court of Appeal, in an interlocutory decree, suspended the sentence in respect of the fine until such time as a decision on the merits was handed down.

2.1.3 Agreements

131. The only decision taken by the Council in this area in 1997-98 was its ruling in the "Canal+" case[19].

132. The request for negative clearance filed by Canal+ Belgique SA sought exemption for a new subscription plan under which subscribers would not have to pay the normal deposit when taking delivery of their decoders from an authorised Canal+ distributor if they paid an additional BF 140 per month.

133. Canal+ questioned whether this plan would be compatible with competition rules if the Council found that the relevant market was that of pay television.

134. There were, in fact, two possible definitions of the market: either a restrictive one—that of pay television—or an extensive one—that of television networks available on cable.

135. For its part, the Service considered that the market in question was that of the television networks available in the geographic market in question, i.e. the French-speaking Community, since Canal+'s programmes were broadcast in the French-speaking part of the country.

136. Without defining the market in question, the Council noted that, in any event, Canal+ did not itself have a position whereby it could restrict or distort competition. First, consumers remained free to choose the first plan offered by Canal+, and second, apart from any subscription to Canal+, consumers had a very wide choice among a large number of channels, all of which provided films and/or sporting events.

137. He therefore noted that there were "no drawbacks with regard to the contract notified by SA Canal+ Belgique."

2.1.4 Ordinary jurisdictions

138. Disputes over the lawfulness of competitive practices are often referred to courts of law, and particularly those that deal with urgent matters and cease and desist orders.

139. Under Section 42 of the Act, a court may request a preliminary ruling from the Brussels Court of Appeal. The Court of Appeal may, in that connection, ask the Competition Service to investigate.

140. The Court has received an extremely limited number of requests for preliminary rulings: just six questions in five years.

141. While the Act does not expressly enable judges to request information from the Competition Council, the Council made known at the time of its decision of 7 April 1998[20]—a decision inspired by the Notice on Co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty[21]—that it would respond favourably to requests for information, under certain conditions.

142. This report will look only at two decisions that are especially revealing of the courts' attitude concerning application of the Act of 5 August 1991.

143. The first decision was handed down on 24 January 1997 by the Commercial Court of Antwerp[22]:

144. The Court was presented with a dispute opposing the firm of Moretus Motors (hereinafter "Moretus"), an authorised dealer in Rover-brand vehicles, and the firm of Rover Belgium (hereinafter "Rover"), concerning the legality of the distribution system for Rover vehicles.

145. Moretus cited the agreement that bound it to Rover, under which Rover awarded the plaintiff the non-exclusive right to sell vehicles within a designated geographical area, providing that Moretus refrain from selling outside that area, and provided that it not sell products other than those covered by the agreement.

146. The plaintiff accused Rover of failing to adhere to the said agreement in that, first, it had authorised a new dealer within the area designated in the agreement and, second, it had terminated the agreement thirteen months after concluding it.

147. Noting that an investigation was under way at the Competition Service, following the complaint lodged by one of the parties, and that it was not in possession of reliable data on the Belgian and European markets, the court decided to stay the proceedings until a ruling was made by the European Commission, to which the matter had also been referred, or by the Competition Council. This attitude should be encouraged, since it avoids the risk of contradictory rulings that might exist when two different jurisdictions, each empowered to apply the Act of 5 August 1991, each act on the same case.

148. Such is the risk taken by the Presiding judge of the Brussels Commercial Court in making the following ruling[23]:

149. In reference to a cease and desist action brought by the Way Up firm against the Belgacom corporation, the Presiding judge noted that Belgacom granted preferential rates for its telephone services to the Belga press agency, whereas it refused to accord this benefit to Way Up, which engaged in an identical activity.

150. Having jurisdiction under the Act of 5 August 1991, the presiding judge deemed that the fact that this same case was under investigation by the Competition Service had no effect on the Court's authority to act.

151. He therefore found Belgacom guilty of abuse of dominant position, a "violation constituting an act contrary to proper business practices."

152. While the presiding judge's jurisdiction in the matter is indisputable, it is clear that such an attitude generates certain risks.

153. Whether or not the court should stay its proceedings if a case is under investigation by the Competition Service or pending before the Council should be decided case by case. For example, it is unnecessary to do so if the judge possesses all the elements necessary for his decision and he can draw upon precedents set by EU bodies or the Competition Council.

154. Lastly, in a great many cases, the presiding judges of ordinary courts, when ruling on cease and desist actions, make their decisions long before the Service has completed its investigation and the Council or its Chairman has made a decision with regard to provisional measures.

155. Examples of this are the decisions taken by the various jurisdictions in the Red Cross case, whereas the request for provisional measures is still pending before the Council.

156. An initial order handed down by the presiding judge of the Brussels Commercial Court on 19 February 1997 found the Red Cross guilty of violating the Act of 14 July 1991 on business practices insofar as it offered to transport people by ambulance, and in so doing engaged in a business activity without complying with the applicable laws, such as legislation regarding VAT or social protection, which enabled it to charge prices well below those of enterprises active in the market for transporting people by ambulance.

157. Having heard the appeal against the above decision, the Brussels Court of Appeal has already ruled[24]. In contrast, it held that there was no infringement of the Act of 14 July 1991 on business practices, that the Red Cross carried out its ambulance services for the common good, and that the plaintiff had failed to show that the fact that the Red Cross did not pay the volunteers that helped to transport people in its ambulances was harmful to it. Similarly, it had not been demonstrated that the Red Cross either had or abused a dominant position in the market for non-urgent transport by ambulance.

158. Consequently, the Court of Appeal quashed the decision of the judge in the court of first instance.

159. It should be noted that in Belgium there is a tendency to submit cases both to the Council and to ordinary jurisdictions, which are faster, and that the number of cases that have given rise to divergent decisions is disturbing.

160. This risk is aggravated by the abnormal slowness of procedures before the Council.

2.2 Concentrations

a) The "Callebaut/Barry" case

161. In 1997, the only concentration not to be approved by the Competition Council involved the companies Barry and Callebaut.

162. Callebaut and Goemaere, Barry's subsidiary in Belgium, both in the bulk-chocolate market, acquired a virtually monopolistic market share by concentrating.

163. The parties had initially notified the authorities of the concentration in 1996. Considering at that point that there were serious doubts as to its acceptability, the Council decided to launch Phase II of the procedure[25].

164. Referring to the procedural issues raised by the notifying parties, namely the legality of the checks made by a Council-appointed expert once the report had been filed, the Council recalled that it was still authorised to receive any information deemed useful to the concentration review. It was also empowered to appoint experts under Section 19 §2 of the Act.

165. The Council also rejected the argument whereby the Competition Service's report was equivalent to a statement of complaints, pointing out that it could find grounds for denial other than those mentioned in the Service's report.

166. By allowing the parties to react to information collected once the report had been filed, with the exception of industrial secrets belonging to third parties, the Council considered that it had complied with the principle of respecting defendants' rights.

167. It went on to define the relevant markets as the bulk chocolate ("*chocolat de couverture"*) market and the *Végécao* (chocolate substitute) market.

168. Having considered how much competition would remain after the concentration, the Council found

> "that the concentration strengthens the dominant position of Callebaut (...) and decides not to approve the concentration"[26].

169. An appeal against this decision was lodged with the Brussels Court of Appeal[27].

170. The parties maintained that the 75-day deadline as specified in Section 33 §3 had expired and that the duly notified concentration had therefore received tacit approval. The Act does indeed state that, in the absence of any ruling within 75 days of the decision to launch Phase II, the concentration is deemed to have been approved.

171. While the Court of Appeal found that the parties had informed the Competition Council of their agreement to an extension of the deadline, it nonetheless followed the arguments of the parties and the Belgian Government, holding that the Act of 5 August 1991 related to public policy, as did the disputed provision.

172. By ruling the concentration unacceptable after the deadline specified in the Act had expired, the Council had therefore, in the Court's opinion, exceeded its powers and the concentration had to be approved.

173. Even before lodging an appeal against the Council's initial decision, the same parties to the concentration decided to notify the authorities of an amended operation, differing from the first by virtue of undertakings which, in their view, addressed the Council's original objections.

174. Considering that such undertakings could attenuate the adverse impact of the concentration as recorded in the initial decision, the Council launched Phase II of the review[28].

175. Having completed its investigation, however, the Council concluded that the concentration as envisaged

> "significantly restricts effective competition in the Belgian markets for bulk chocolate and Végécao"[29].

176. The Council also specified that, following its refusal, the parties could either lodge an appeal against the ruling with the Court of Appeal or notify the authorities of another operation that took account of the grounds for refusal in the first case.

177. The parties were notified of the second refusal before the Court of Appeal had given its ruling.

178. Having received two conflicting decisions, Callebaut and Barry lodged an appeal against the Council's second decision with the Court of Appeal.

179. The parties maintained that the Council had exceeded its powers by refusing a concentration that had in fact been tacitly approved as of 25 November 1996, the date on which the 75-day deadline expired.

180. As a secondary issue, they maintained that the second notification was null and void, now being without purpose.

181. Since the parties agreed that the two notified operations were one and the same, the Court of Appeal held that the Council had exceeded its powers in ruling on the second notification. Similarly, it could not infer that the parties had acquiesced since a new notification had been submitted.

182. The Court therefore declared that the disputed decision was null and void, finding that "the second notification which relates to the same concentration, even if admissible, is without purpose"[30].

b) The "Mattel/Tyco" case

183. The notified operation related to the acquisition of the rights and obligations of Tyco Toys Inc. by the Mattel company.

184. However, the notifying parties maintained that the concentration did not exceed the 25 per cent market-share threshold specified under Section 11 of the Act. In their view, the relevant market was the toy market in its broadest sense, namely traditional toys, electronic toys, jigsaw puzzles, etc.

185. However, following the opinion of the Competition Service, the Council considered that the relevant market was the fashion-doll market. Moreover, it found that Mattel's share of that particular market might give it a dominant position.

186. Similarly, it envisaged the possibility that the parties might act independently in the relevant market.

187. It then decided to launch Phase II of the concentration review procedure[31].

188. The Competition Service conducted a supplementary investigation and reached the same conclusion as it had in Phase I: the fashion-doll market was a separate market, and indeed the only relevant one.

189. With regard to this definition, the parties objected that fashion dolls and "large dolls" were substitutable. They submitted a study which they maintained would demonstrate this.

190. The Council, convinced by this study, ruled that the relevant market extended to the toy market as a whole and that the concentration would accordingly not fall within the scope of the Act[32].

c) The "Kinepolis" case

191. The operation notified to the Competition Service concerned a concentration of two undertakings, MAJESTIEK and CLAES INVEST, to form a group operating under the name "Kinepolis Group". The purpose of the concentration was to float the new company on the stock exchange.

192. In its report, the Competition Service found that the operation involved numerous risks, in particular that the undertakings would acquire a dominant position, and it therefore proposed to the Competition Council that several conditions be imposed on the notifying parties in order to limit those risks.

193. Considering that the concentration raised serious doubts as to its acceptability, the Council nevertheless found that it could not give a ruling solely on the basis of the information gathered by the Service during Phase I of the investigation. It therefore decided to launch Phase II[33].

194. Having completed its investigation, the Council found that since 1996 the two companies had already been operating under the name "Kinepolis Group" and jointly negotiating contracts with film distributors.

195. The Council defined the relevant market as the showing of films in cinemas, not the marketing of films in all its forms, as maintained by the notifying parties. It specified that, in order to assess the market shares of the undertakings concerned, audience was an important criterion.

196. An analysis of the competition showed that the competitors in the market lacked countrywide coverage, whereas the Kinepolis Group had multiscreen cinemas in most of Belgium's major towns and cities.

197. The Kinepolis Group was also present in the film distribution market via the limited company KFD, a joint venture set up prior to the concentration.

198. At the time of the review, the Group's market share was very small but most likely to grow in years to come, given that the multinationals competing in this market showed little interest in Belgian operations.

199. From its review of the concentration, the Council concluded that it could approve the operation only if some relatively strict conditions were imposed on the parties to maintain genuine, healthy competition on the relevant market[34].

> "1. The group formed by the concentration shall not:
>
> a) demand or request from film distributors exclusive showing rights vis-à-vis other cinema operators;
>
> b) confine the films it distributes to its own cinemas;
>
> c) demand or request that film distributors give it priority over competitors with regard to film availability, the same condition applying to films distributed by the group;
>
> d) give the films it distributes an advantage in terms of screening times, choice of cinema, etc.
>
> *2.* It shall terminate, within one year of the decision, its agreements with independent cinema operators on the scheduling of films. Similarly, it shall not draw up any new agreements.
>
> 3. The notifying parties shall not ask the "Gewestelijke Investeringsmaatschappij" (regional Flemish investment company), which is concerned by the concentration, to confine its investments exclusively to the Kinepolis Group, to the exclusion of other competitors, nor shall the company agree to do so.
>
> 4. The group formed by the concentration shall not build or take over a new cinema or multiscreen cinema, nor extend, renovate or replace an existing multiscreen cinema without the prior consent of the Competition Council", (except when this increases the number of seats by less than 20 per cent).

d) Final comments on the control of concentrations

200. Over the period in question, the Council imposed only one fine, in its decision of 15 September 1997, for failure to comply with the notification deadline as stipulated under Section 12 of the Act[35].

201. In the course of 1997, several concentrations were approved—by allowing the 30-day deadline to expire—on the grounds that they had little impact on the Belgian market or because some concentrations were notified merely as a legal safeguard.

2.3 Conclusion

202. Statistics show that the Competition Council has taken relatively few decisions on practices that restrict competition, and that it does not give its decisions within a reasonable period of time.

203. There are many reasons for this, and they are analysed in detail in the Council's latest annual report, which is available for consultation.

204. Apart from a lack of resources, the Council found that investigations were held up or brought to a halt because the Competition Service in charge of the investigation was reluctant to employ coercive investigative measures, all of which require prior intervention by the Chairman of the Council or a magistrate sitting on the Council (Section 23 of the Act).

205. Consequently, in virtually every case the brief that the Service forwards to the Council is confined to information volunteered by the undertakings concerned, in response to non-binding requests for information.

206. Furthermore, the Service does not have recourse to expert appraisement, although the head of the Service is authorised to designate experts.

3. Statistics

207. The statistics relating to restrictive practices and concentrations for the period 1 April 1993 - 1 April 1998 are annexed hereto.

IV. Competition authorities: resources

1. Competition Service

1.1 Overall resources

a) Annual budget

Expenditure relating to the activities of the Competition Service comes under the general budget of the Business Policy Administration and is not a separate item.

b) Staff (man-years)

	1994	1995
Lawyers	7	9
Economists	6	9
Other professionals	1	4
Support staff	4.5	5
Overal total	18.5	27

208. Other staff to be added to the 1997 figures in the short term include the 20 Grade I officials (professionals specialising mainly in law and economics) that the Government has decided to recruit to enlarge the Service (six had already taken up their posts by March 1998) and, in the medium term, four rapporteurs to fill new posts that have already received outline approval.

209. More support staff have also been taken on, and the number of posts now totals 7.5.

1.2 *Human resource allocation (after restructuring - status in 1997)*

a) restrictive practices: 12

b) concentrations: 5

c) Council secretariat: 2

d) other activities: 3

and support staff: 5, including 2 in the Council secretariat.

As of 1 April 1998, the staff of the Competition Service was as follows:

- Grade I: (professionals): 24, including 2 in the Council secretariat and 16 in the investigation department (6 of whom are new);

- Support Staff: 7.5, including 2 in the Council secretariat.

2 Competition Council (Council's own text)

210. "Since 1994 the Council has persistently denounced the severe lack of resources—persistently and without success". These words, with which the Chairman of the Competition Council introduced his presentation of the Annual Report to the Chamber of Representatives on 18 February 1997, sum up the situation facing the Council since its establishment in April 1993.

211. The entire membership of the Competition Council, including the Chairman and the Vice-Chairman who are both magistrates, fulfil their Council duties as well as holding full-time posts.

212. Within the space of five years, 13 Council members have resigned, partly because of the workload and partly because of the low attendance fees, thus making it very difficult to make up chambers.

213. Furthermore, the Council is not given adequate support. The secretariat comprises only two professional-grade officials who confine themselves mainly to administrative work owing to lack of time.

214. On 13 September 1996, a bill was presented to the Senate, proposing that the Chairmanship of the Council be a full-time post.

215. In December 1997, the Government tabled an amendment to create four full-time posts in the Council. To date, nothing has been done.

216. The Council does not have the necessary legal and economic literature at its disposal.

217. It still does not have its own budget and is therefore dependent on the Administration with regard to any expenditure.

218. In a letter dated 9 December 1997, the Minister for Economic Affairs informed the Council of the Decision by the Council of Ministers to allocate BF 7.1 million to the Competition Council. This will be listed as a special item in the Administration's general budget.

219. For any expenditure, the Council must still follow the administrative procedure, which requires prior authorisation.

220. Attendance fees are also to be increased by BF 6 000, from BF 2 000 to BF 8 000. However, the Royal Decree amending the Royal Decree of 30 April 1993, which sets the level of these fees, has not yet been adopted.

221. These decisions by the Government in December 1997 encouraged the 14 Council members who had handed in their resignations in October 1997—apart from the five members who had already resigned—to withdraw them.

222. The Council considers, however, that it is still not in a position to fulfil its mandate.

223. It nevertheless wishes to stress that the Competition Council and the Competition Service have been working more closely since the publication of the last annual report, which had referred to a complete lack of collaboration.

224. For some months now, the Council has been receiving details of complaints and requests.

225. Similarly, the Service and the Council are endeavouring to work together on setting priorities.

Notes

1. The Act makes no provision for the publication of notices informing third parties of the existence of an investigation.

2. To date, this power has not been exercised.

3. Van den Bossche, A.M., *RDC*, 1996, p. 883 Nos. 4 and 5.

4. See the Competition Council's second periodic report (for 1994-95).

5. Council Decision No. 95-VMP-3 of 31 October 1995 (Clarysse v. *Ordre des architectes*).

6. Brussels (9th Chamber bis), 14 November 1996, *Moniteur belge* of 26 November 1996, p. 29790.

7. "Whereas it follows from the above that the Act [of 26 June 1963] explicitly and exclusively reserves the right to impose discipline on architects registered on the rolls of the Architects' Association to the two bodies of the Association instituted by the Act [the Association's provincial councils and appellate councils]; then neither an administrative jurisdiction, such as the Competition Council or its Chairman, nor a tribunal or court of law may, either directly or indirectly, by an order or a prohibition, impede or prohibit the exercise of this disciplinary authority by the competent bodies of the National Architects' Association.

8. Cass., 27 November 1997 (Clarysse and Bossuyt v. *Ordre des architectes*), unpublished.

9. Presiding judge's Decision No. 96-VMP-1 of 19 March 1996 (Tambue v. *Ordre des avocats*).

10. C.E., 15 September 1997 (Misson v. *Conseil de l'Ordre des Avocats du Barreau de Liège*).

11. Chairman's Decision of 16 April 1997, No. 97-VMP-2, *Unie des Belgische Ambulancediensten* v. *Rode Kruis*.

12. Chairman's Decision of 14 January 1998, No. 98-VMP-1, Daube v. *Loterie Nationale*.

13. Chairman's Decision of 2 December 1993, No. 93-VMP-1, Degheldere v. *Loterie Nationale*.

14. Brussels, 9 October 1996, *Pratiques du commerce*, 1996, p. 808.

15. Pres., Comm. de Louvain, 7 May 1996, *Pratiques du commerce*, 1996, p. 861.

16. Chairman's Decision of 6 May 1997, No. 97-VMP-3, Cosmétique Active Belgilux v. GB-UNIC.

17. Decision of 25 March 1997, No. 97-RPR-1, Laroy-Duvo v. NV Aniserco, *Moniteur belge*, 14 June 1997, p. 16057.

18. " - the practice of imposed selling prices obliges the consumer to pay prices that are not in line with cost prices;

    - the practice of imposed selling prices can lead to price increases;

    - the practice of imposed selling prices can lead to the protection of businesses that are less productive;

- the practice of imposed selling prices prevents the consumer from purchasing an article for a lower price, and he can no longer compare prices, inasmuch as they are identical everywhere. The consumer's freedom of choice is therefore limited; similarly, any reductions the retailer might offer the consumer are precluded."

19. Decision of 18 February 1998, No. 98-RPR-02, Canal+, unpublished.

20. Decision of 7 April 1998, No. 98-C/C-07, (BELGACOM/CIPE).

21. O.J.E.C., 13 February 1993, C 39, p.6.

22. Antwerp (13th Chamber), 24 January 1997, (BVBA Moretus v. NV Rover Belgium).

23. Presiding judge, Brussels Commercial Court, 7 November 1997 (SA Vau Up v. Belgacom).

24. Brussels (8th Chamber), 29 October 1997 (Belgische Rode Kruis v. Unie der Belgische Ambulancediensten).

25. Decision of 6 September 1996, No. 96-C/C-18, Callebaut/Barry, unpublished.

26. Decision of 19 December 1996, No. 96-C/C-29, Callebaut/Barry, *Moniteur belge*, 21 February 1997, p. 3587.

27. Brussels (9th Chamber bis), 25 June 1997, *Moniteur belge*, 4 July 1997, p. 17947.

28. Decision of 28 March 1997, No. 97-C/C-8, Callebaut/Barry, unpublished.

29. Decision of 3 June 1997, No. 97-C/C-14, Callebaut/Barry, *Moniteur belge*, 24 July 1997, p. 19190.

30. Brussels, (9th Chamber bis), 15.01.98, *Moniteur belge*, 12 February 1998, p. 4095.

31. Decision of 17 February 1997, No. 97-C/C-04, Mattel/Tyco Toys, unpublished.

32. Decision of 30 April 1997, No. 97-C/C-11, Mattel/Tyco Toys, *Moniteur belge*, 14 June 1997, p. 16060.

33. Decision of 3 September 1997, No. 97-C/C-19, (Groep Bert/Groep Claes), unpublished.

34. Decision of 17 November 1997, No. 97-C/C-25, (Groep Bert/Groep Claes), *Moniteur belge*, 5 February 1998, p. 3276.

35. Decision of 15 September 1997, No. 97-C/C-20, (De Post/NV Hagefin), *Moniteur belge*, 22 October 1997, p. 28124.

Annex

Practices restricting competition (as of 1 April 1998)

	1993		
	Notification	Report	Decision
Agreements	3	2	1
Complaints	21	9	3
Provisional measures	2	2	2
Investigations at Council's request	1	0	0
Investigations at Minister's request	0	0	0
Total =	27	13	6

	1994		
	Notification	Report	Decision
Agreements	9	5	1
Complaints	20	8	3
Provisional measures	5	5	5
Investigations at Council's request	2	0	0
Investigations at Minister's request	2	0	0
Total =	38	18	9

	1995		
	Notification	Report	Decision
Agreements	20	4	2
Complaints	20	7	1
Provisional measures	1	1	1
Investigations at Council's request	2	0	0
Investigations at Minister's request	0	0	0
Total =	43	12	4

	1996		
	Notification	Report	Decision
Agreements	8	2	0
Complaints	15	4	0
Provisional measures	9	9	6
Investigations at Council's request	2	0	0
Investigations at Minister's request	0	0	0
Total =	34	15	6

BELGIUM

	1997		
	Notification	Report	Decision
Agreements	4	0	0
Complaints	13	0	0
Provisional measures	6	6	2
Investigations at Council's request	0	0	0
Investigations at Minister's request	0	0	0
Total =	23	6	2

	1998		
	Notification	Report	Decision
Agreements	1	0	0
Complaints	6	0	0
Provisional measures	3	3	0
Investigations at Council's request	0	0	0
Investigations at Minister's request	1	0	0
Total =	11	3	0

	1993 to 1998		
	Notification	Report	Decision
Agreements	45	13	4
Complaints	95	26	7
Provisional measures	26	26	16
Investigations at Council's request	3	0	0
Investigations at Minister's request	7	0	0
Total =	176	65	27

Merger control (1st April 1998)

	1993	1994	1995	1996	1997	1998	Total
Notifications	30	39	48	48	60	16	239
Decisions to launch	1	3	1	1	3	1	10
Decisions to approve	24	41	45	27	22	4	163
Decisions not to	0	1	0	1	0	0	2
Tacit approval	0	0	3	17	36	12	68
Appeals against the		1		1	1		3
Concentration				1			1