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(1998)

Summary

1. New legislation and proposed reforms

1. A number of Royal Decrees implementing the Act of 5 August 1991 on the protection of economic competition entered into force in 1998, including one that amended the Royal Decrees governing the notification of agreements, notification of concentrations, and procedures, and another concerning the lodging of complaints.

2. In addition, Parliament continued to discuss proposed reforms of the Act of 5 August 1991, the main objectives being:

- to give the Competition Council more resources, so that it can work effectively;
- to ensure the capability, specialisation and continuity needed to conduct investigations;
- to spare firms from having to report concentrations having no impact on the Belgian market.

3. Moreover, there were further regulatory reforms leading to a gradual opening of public monopolies to competition.

2. Implementation of competition law and policy

2.1 Anticompetitive practices (agreements and abuse of dominant positions)

2.1.1 Summary of the activity of the Competition Service

4. In 1998, the competition sector of the Prices and Competition Division (the "Competition Service") was restructured. Three specialised sections (one dealing with concentrations and two with restrictive practices) were created and granted additional—although still insufficient—material and human resources.

5. The two sections specialised in anticompetitive practices submitted a total of 20 cases to the Council, involving agreements, complaints and applications for provisional measures.

6. Among these cases, abuse of dominant positions and agreements notified in the insurance sector were most prevalent, along with issues involving relationships between certain professional associations and practitioners of those professions.

2.1.2 Summary of the activity of the Competition Council

7. As in 1997, the Council experienced some operational difficulties which limited the scope of its activities regarding restrictive competitive practices. In respect of all the cases submitted to it, the Council took decisions regarding only two agreements and three applications for provisional measures.

2.1.3 Summary of the activity of the Brussels Court of Appeal

8. A ruling by the Council Chairman on an application for provisional measures (in the Daube vs. National Lottery case) was appealed to the Brussels Court of Appeal.

9. In 1998, that same court rendered an important decision in the Laroy-Duvo case by upholding the argument of the Competition Service and the Competition Council concerning the prohibition of resale price maintenance in the animal feed sector.

2.2 Concentrations

2.2.1 Notifications to the Competition Service

10. Activity regarding mergers and acquisitions was down slightly from the previous year, with 52 operations notified instead of 60. After investigation, all of the cases notified were forwarded, along with a report, to the Competition Council. The medical products sector accounted for a particularly significant number of the operations being carried out.

11. The number of notifications of concentrations having only a limited impact on the Belgian market or markets concerned would suggest, however, that the primary concern of the economic agents involved was legal security.

2.2.2 Activity of the Competition Council

12. Based on the case files handed over by the Competition Service, the Council took three decisions to launch Phase II investigations and 15 authorisation decisions, and it issued one refusal (regarding pharmaceutical market research). The 39 other operations received tacit approval as the deadlines for action expired.

3. Role of the competition authorities in framing and implementing other policies

13. As yet, neither the Competition Service nor the Competition Council has any direct sway over the framing and implementation of other policies. Such influence would be conceivable only after these bodies have proven their worth in their own area of jurisdiction.

4. Publication

14. Belgian legislation on competition law (the Act of 5 August 1991 on the protection of economic competition and its implementing decrees), along with certain information from the Belgian competition

authorities, is available from the Ministry of Economic Affairs web site at the following address: http://mineco.fgov.be/.

Report

I. Amendments and proposed amendments to competition law and policy

1. Summary of new provisions involving competition law and related matters

15. A Royal Decree amending Royal Decrees of 15 March 1993 on procedures, of 23 March 1993 on applications and notifications in respect of restrictive practices, and of 23 March 1993 on the notification of business concentrations, entered into force in 1998. The amendments, which were essentially procedural, were intended to specify the respective attributions of the competition authorities in line with the principles laid down by law.

16. A second Royal Decree on the filing of complaints and applications under the Act also took effect in 1998 and was intended to make up for the lack of specific guidelines in this area.

2. The government's proposed amendments to competition law and policy

17. The main features of the reform of the Act of 5 August 1991, the draft of which is currently under discussion in Parliament, are as follows:

- an increase in the resources made available to the Competition Council, enabling it to respond effectively to the many problems involved in enforcing competition law. In particular, the functions of four members of the Council, including those of the Chairman and Vice-Chairman, are to be converted into full-time positions;

- capability, specialisation and continuity in conducting investigations would be ensured, in particular through the creation of a team of rapporteurs in the Competition Service. Initially four in number, their rank and pay should ensure their independence; among their responsibilities would be to head investigations, issue instructions to agents assigned to carry out investigative measures, prepare investigative reports and submit them to the Competition Council. Moreover, parties would be advised of any charges against them;

- notification thresholds would be changed so that businesses would not be required to report operations having no impact on the Belgian market, and to simplify decision-making in respect of notification requirements. The market share threshold would be abolished, and turnover thresholds alone would remain: at least two of the firms involved must have turnover in Belgium of at least BF 400 million, and their total combined Belgian turnover must exceed BF 1 billion;

- if the Competition Council were to decide that a concentration was not permissible, the Council of Ministers would be able to authorise it on the grounds that its contribution to the common good would outweigh the risk of restraint of competition.

18. Regulatory reforms enabling a gradual opening up to competition of public monopolies include a preliminary bill on the organisation of the electricity market, transposing into domestic law European Directive 96/92/EC, which was approved by the Council of Ministers. This new legislation gradually

liberalising the electric power segment, which was recently adopted by Parliament, will enter into force during the first half of 1999. Draft legislation has also been prepared to transpose the European Directive on the liberalisation of the gas market.

II. Implementation of competition law and policy

1. Action against anticompetitive practices, including agreements and abuse of dominant positions

a) Summary of activities

1. Summary of the activities of the Competition Service

19. In 1998, the competition sector of the Prices and Competition Division (the "Competition Service") was restructured, being divided into three sections—two specialising in restrictive practices (agreements and abuse of dominant positions) and one in business concentrations. The material and human resources allocated to these activities have been increased, even if they remain clearly inadequate for optimal operational effectiveness. Pending expansion of the Competition Service, which should enable recruitment of the 20 additional staff for which the government called at the end of 1997, the Service was strengthened by ten new agents hired on a contractual basis.

20. The two sections specialising in anticompetitive practices submitted five cases to the Council concerning agreements and eight on complaints. In addition, seven applications for provisional measures were investigated and reports filed with the Chairman of the Council.

21. The cases dealt with—or still under investigation—focused primarily on abuse of dominant positions, agreements in the insurance sector and problems involving relations between practitioners of certain professions and their respective professional associations.

22. Although the restructuring of the Service is beginning to pay off in the area of restrictive practices (the rising number of cases under investigation would suggest that the volume of cases to be submitted to the Council will be increasing significantly), current staffing levels (in terms of both numbers and experience) are still insufficient to absorb the backlog that has built up since the years when the Act was first applied. The table in section 4 below shows that again in 1998, and despite a certain stability in the number of cases introduced, more cases have been filed with the Service than the Service has been able to process.

23. The Service has noted a certain correlation between "sensitive" concentration cases and complaints about practices in those same sectors. It would therefore appear that the publicity surrounding certain cases—and direct interrogation of the market—tends to make economic agents more aware of the existence of competition rules. Even so, this awareness will depend to a large extent on the credibility that the Belgian competition authorities will be able to build up.

2. Summary of the activities of the Competition Council

24. The Competition Council's operational difficulties persisted in 1998. Despite a budget increase for the year, the Council's activities with regard to restrictive practices were scaled back pending a reassessment of the rules governing the Council and the proposed reforms. It is in fact difficult for Council

members to combine their demanding primary occupations with the no less difficult job—given the complexity of the cases they deal with—of sitting on the Council. In this regard, the creation of four full-time Council positions should allow that body to optimise its operations while significantly easing the burden on members who do not work there on a full-time basis.

25. Specifically, the decisions taken by the Council—or by its Chairman—in 1998 involved an agreement [in the Gebroeders Mermans/Van Cauwenberg case, discussed in section b) below], a request for negative clearance (involving Canal Plus, which was already discussed in the 1997 annual report) and three requests for provisional measures (in the Daube vs. National Lottery case[1], which was also discussed in the 1997 annual report, the Executive Limousine vs. Regie der Luchtwegen case[2], involving a complaint of alleged abuse of dominant position in the market for transport within and outside Brussels-National Airport, and the Narrow Casting vs. Interelectra case[3], concerning the refusal of certain cable television companies to carry a special-interest channel aimed at the medical sector).

26. The Council was also asked to give its opinion on proposed reforms of the Act of 5 August 1991 on the protection of economic competition.

3. Summary of the activities of the Brussels Court of Appeal

27. In 1998, the Brussels Court of Appeal handed down an important decision in the Laroy-Duvo case. In it, the Court upheld the position of the Service, with which the Competition Council concurred in its decision prohibiting retail price maintenance.

28. It will be recalled that the Council, in a decision of 25 March 1997[4], had ruled on SA Aniserco's complaint against SA Laroy-Devo, both companies being active in the animal feed sector.

29. The plaintiff accused the Laroy-Devo company of the anticompetitive practice consisting for Laroy-Devo in forcing retail price maintenance for the products it manufactured on the members of its retail distribution network.

30. The Council deemed that the agreement under which retailers pledged not to sell the product for less than the price set by the supplier was prohibited under Section 2, paragraph 1 a) of the Act, and that it failed to meet the criteria needed for an individual exemption, *inter alia* because Laroy-Duvo had failed to demonstrate any improvement in the distribution of its products, and because retail price maintenance quite certainly constituted a disadvantage for the consumer.

4. Statistical assessment

31.

Table 1: Competitive practices in 1998

	Notification	Report by the Service	Decision by the Council
a) Practices restricting competition			
Notifications	6	5	2
Complaints	22	8	0
Provisional measures	7	7	3
Investigations at Council's request	1	0	0
Total	36	20	5
b) Merger control	52	52	17
Grand total	88	72	22

32.

Table 2: Practices restricting competition – Recap 1993-98

	Notification	Report by the Service	Decision by the Council
Notifications	50	15	6
Complaints	133	32	7
Provisional measures	30	30	16
Investigations at Council's request	5	0	0
Investigations at Minister's request	3	0	0
Industry-wide surveys	2	0	0
Total	233	77	29

b) Important cases

33. In the Gebroeders Mermans / Van Cauwenberg case[5], only one of the two parties involved applied for negative clearance in respect of a vertical price agreement between the firms, which were both producers of concrete paving blocks. The companies had made an agreement to purchase exclusively from each other certain types of paving blocks that they did not manufacture themselves, and to do so at contractually set wholesale prices that would enable each firm to be competitive in those products. However, the buyers were prohibited from reselling the products in question at discounts exceeding x percent. The agreement also called for the "customer" to be penalised if it purchased similar products from a third party. Furthermore, it barred the buyer from developing its own production.

34. The prices of some of the products involved having dropped sharply, whereas the agreement had called for base prices to remain unchanged, one of the two firms was no longer competitive in the markets in question. This turn of events prompted the company that considered itself an injured party to petition the competition authorities for negative clearance.

35. In its decision, the Council noted that the effect of the agreement was to restrict competition in the markets in question, insofar as it effectively prevented the emergence of a new competitor in certain product markets, and it limited customer choices and opportunities for existing competitors to expand in those same markets.

2. Mergers and acquisitions

a) Statistics on the number, size and types of mergers notified or subject to control

1. Activities of the Competition Service

36. In a large majority of cases, it is still standard practice for the Service to hold a pre-notification meeting with the parties to a proposed concentration. While the Service must be especially cautious in giving its opinion, since the Council alone is empowered to make rulings in this area, such meetings have nonetheless resulted in a significant reduction in the number of reported operations. In addition, in many cases in which notification proves compulsory, the task is simplified and the burden on the parties involved is eased.

37. Merger and acquisition activity remained brisk, despite a slight decline from the previous year: 52 operations were notified, as opposed to 60 in 1997. In each case, an investigation was held and a report then submitted to the Council. In respect of three of the notified mergers, further (Phase II) investigations were carried out.

38. The medical and petroleum products sectors underwent an especially great amount of reorganisation.

39. The number of reported concentrations having only a limited impact on the Belgian market or markets concerned remained substantial. This may be explained by the fact that economic agents place a high value on legal security.

2. Activities of the Competition Council

40. On the basis of case files submitted by the Competition Service, the Council took three decisions to launch Phase II investigations and 15 authorisation decisions, and it made one refusal (regarding pharmaceutical market research). The 39 other operations received tacit approval as the deadlines for action expired.

41. For the first time, the Council also ruled on a concentration that had not been reported. In its HIT / Trempe Superficielle - EAM decision[6], it held that the operation should have been notified and imposed a fine on the parties in question.

3. Statistical assessment

42.

Table 3: Merger control – Recap 1993-98

	1993	1994	1995	1996	1997	1998	Total
Notifications	30	39	48	46	60	52	275
Decisions to launch	1	3	1	1	3	3	12
Decisions to approve	24	41	45	27	22	15	174
Decisions not to	0	1	0	1	0	1	3
Tacit approval	0	0	3	17	36	39	95
Appeals against the		1		1	1		3
Concentration				1			1

b) Important cases

1. Bodycote International / HIT[7]

43. Bodycote International is a British holding company with subsidiaries in a dozen countries. It is active in a variety of sectors including heat treatment for metals, in which it has an operating unit in Belgium. The French company HIT, the target firm, is essentially involved in heat treatment and also possesses operating units in Belgium.

44. Because, *inter alia*, it was extremely difficult to assess the market concerned and the market shares of the parties and their competitors, the Council deemed, at the conclusion of Phase I of the procedure, that it lacked the elements needed to determine that the merger did not raise serious doubts as to its permissibility. It therefore decided to launch Phase II.

45. Upon further investigation by the Competition Service, the Council:

- found that the parties had taken irreversible measures without awaiting the Council's decision and without its receiving its authorisation, in particular by proceeding with the appointment of new directors, entailing the exercise of voting rights obtaining from the shares acquired;

- noted the emergence of an undisputed leader in the Belgian heat treatment market via the combination of the market shares of the sector's former first- and second-ranking firms;

- held, however, based on analysis of the market configuration (with four competing firms enjoying shares of between 7.3 percent and 10.2 percent), the degree of market openness (which was relatively high), and the behaviour of customers (most of which belonged to large international groups), that the new entity resulting from the merger could not behave independently vis-à-vis the market.

46. As a result, the Council decided not to oppose the merger, while at the same time imposing a fine on the acquiring party for having unduly taken irreversible measures.

2. Promedia CV / Belgacom Directory Services NV[8]

47. Historically, and until 1993, Promedia, under an agreement with Belgacom, the national telecommunications operator, held a monopoly on the production and distribution of printed telephone directories, as well as on the sale of advertising space therein. When negotiations to renew this contract failed, Belgacom decided to create its own subsidiary, Belgacom Directory Services NV, to compete with Promedia in the aforementioned sector.

48. After five years in business and severely mounting losses, Belgacom concluded that the Belgian market was not big enough for two identically designed products and, as a result, decided to cut its losses by negotiating to transfer the business of its subsidiary to Promedia in exchange for a minority stake in the latter.

49. In its decision, the Council held that the relevant markets were (1) the production and distribution of printed telephone directories that were distributed to subscribers free of charge, and (2) the sale of advertising space in those same directories. The Council deemed that the distribution of directories in other forms or by other media was in fact more of a complement than a substitute, with each medium having its own characteristics and its own audience.

50. Even though the result of this merger was to create a de facto monopoly in the relevant market, the Council held that the advantages for advertisers, users and the community outweighed the resulting infringement of competition. Among the acknowledged benefits were:

- improved product quality;

- better returns for advertisers, who were no longer forced to pay twice to place ads in two virtually identical directories used by the same people;

- the ecological benefit, given the enormous waste of paper that had resulted from the production of twin directories;

- the fact that the market was being liberalised, with directories no longer having to be distributed nation-wide, therefore opening the door to potential competition on a more local level.

51. Accordingly, the Council decided to authorise the operation after Phase I of the procedure, on the condition that the Service monitor advertising rates, which were to remain equivalent to the prices that would be charged by a company facing competition.

3. IMS Health Incorporated / Pharmaceutical Marketing Services Inc.[9]

52. IMS Health Incorporated (IMS) is an American company operating in Belgium through IMS Belgium and Strategic Technologies, which includes Walsh International. IMS had been part of the Cognizant Group until 30 June 1998, at which time it became an independent company. IMS is active in the information sectors and monitors sales for pharmaceutical companies, and through Walsh it is also involved in standardised software.

53. Pharmaceutical Marketing Services Inc. (PMSI) is an American company active in Belgium through its subsidiaries PMSI Belgium and Source Informatics Belgium (“Source”). It is also active in information processing and in sales monitoring for pharmaceutical companies.

BELGIUM

54. At the end of April 1998, Cognizant and PMSI reported an operation under which Cognizant would take control of PMSI on a world-wide level. The report of the Competition Service, which was submitted after further investigation during Phase II of the procedure, concluded that the merger should not be allowed.

55. Shortly before the Council was to rule on the merger at the conclusion of the Phase II investigation, the parties informed it that they were withdrawing their notification, since a new agreement had been reached that altered the structure of the operation. Under the new arrangements, IMS would acquire certain PMSI assets, including all of its European and Japanese subsidiaries except the Belgian units, for which only an option to purchase shares would be granted.

56. The parties served notice of this new agreement on 25 August 1998, while at the same time claiming that the Council had no jurisdiction, since no transfer of assets or shares in Belgian subsidiaries would take place until and unless the options were exercised. Since the Council had decided to launch Phase II of the procedure, it was during the course of the investigation that IMS, on 3 November, informed the Service of its decision to exercise its option to purchase the shares in PMSI Belgium and to give up its option on Source Belgium. On 8 December, PMSI Inc. informed the Council of an agreement whereby the CEO of Source Belgium was offering to purchase all of the shares in that company.

57. The Council first affirmed its jurisdiction, despite the absence of any immediate transfer of shares and/or assets, on the following grounds:

- from the outset, IMS had stated its intention to exercise the options;

- if the options were not exercised, PMSI's Belgian subsidiaries, and especially Source, cut off from the group environment, would be effectively doomed to fail and forced to cede their market shares to IMS;

- the option prevented PMSI from negotiating with other potential competitors;

- at any time, the option could be exercised at IMS's sole discretion, thereby giving IMS control over the Belgian subsidiaries.

58. It was then noted, insofar as IMS would no longer be acquiring Source, that the Belgian market for quantitative studies in which Source and IMS were present was no longer directly affected by the "Source" aspect of the operation, and that the only relevant question was whether the acquisition of the assets of PMSI Belgium alone would have an anticompetitive impact.

59. After ascertaining (1) the products offered by IMS, collectively referred to as "quantitative products" because they consisted essentially of statistical data on sales of products in the pharmaceutical industry, at different levels of the chain and in specified areas or sectors, and (2) the products offered by PMSI Belgium, referred to as "qualitative products" because they consisted primarily of analysis of prescriber behaviour, the Council upheld the Service's view that the acquisition strengthened IMS's dominant position in the quantitative market.

60. Whereas the parties claimed that there was no overlap between their respective products, the Service deemed that the acquisition would in fact lead to a strengthening of IMS's dominant position, following a broadening of its product range in both the quantitative market (in which it already held a virtual monopoly) and in the closely related qualitative market, in which it was acquiring a leading position, since PMSI Belgium held a nearly 30 percent share amidst a host of small operators, most of which were one-man companies specialising in a particular segment.

61. This analysis was corroborated, *inter alia*, by the fact that one particular PMSI product—the "Scriptac" study (an annual survey of the prescription habits of medical specialists and general practitioners, by therapeutic category)—was found to have quantitative as well as qualitative value. The information provided by the Scriptac study supplemented, but could not replace, the services offered by IMS.

62. The Council also shared the Service's analysis concerning the existence of barriers to entry resulting, *inter alia*, from the size of the Belgian market, the historical presence (for over twenty years) of IMS with a virtual monopoly in the market for quantitative studies, and the need for historical data vital to clients that a new entrant would take many years to assemble. This view would seem to be confirmed by Source's difficulties in acquiring shares of the quantitative market, since its product was still only at the launch stage, despite the volume of investment to develop it, and by the fact that PMSI apparently did not even attempt to contest IMS's position in quantitative products other than by launching the particular product Scriptac.

63. The Council therefore deemed that, despite the sale of Source to an operator outside the IMS Group, IMS's already unquestioned market power would be further enhanced by the proposed move, which would lead to the withdrawal of a market player.

64. For these reasons, the Competition Council noted in its decision that the conditions for authorising the concentration had not been met, and it ordered the following measures:

- IMS was to sell all its shares in PMSI Belgium, at a reasonable price, to a buyer acceptable to the Competition Council, it being understood that the buyer had to be a current or potential competitor that was credible, viable, independent and in no way connected with the IMS group;

- IMS was to appoint a special administrator to be approved by the Competition Council, to act on its behalf, with an assignment to carry out good-faith negotiations with interested third parties, and to find a buyer for PMSI Belgium.

III. Role of the competition authorities in framing and implementing other policies, e.g. regulatory reform, trade policy and industrial policy measures

65. As yet, neither the Competition Service nor the Competition Council has any direct sway over the framing and implementation of other policies, even if a number of informal consultations have already taken place. In this regard, it must be borne in mind that the competition authorities cannot be expected to wield any real influence in sectors other than competition unless those same authorities first prove their worth in their own area of jurisdiction.

IV. Publication

66. Belgian legislation on competition law (the Act of 5 August 1991 on the protection of economic competition and its implementing decrees), along with certain information from Belgian competition authorities, is available from the Ministry of Economic Affairs web site at the following address: http://mineco.fgov.be/.

NOTES

1. Decision of the Chairman of 14 January 1998, No. 98-VMP-1, Daube vs. Loterie Nationale.

2. Decision of the Chairman of 7 April 1998, No. 98-VMP-3, Executive Limousine vs. Regie der Luchtwegen.

3. Decision of the Chairman of 12 March 1998, No. 98-VMP-4, the Narrow Casting vs. Interelectra.

4. Decision of 25 March 1997, No. 97-RPR-1, Laroy-Duvo vs. NV Aniserco, *Moniteur Belge*, 14 June 1997.

5. Decision of 8 December 1998, No. 98-RPR-6, Gebroeders Mermans / Van Cauwenberg.

6. Decision of 29 September 1998, No. 98-RPR-5, HIT / Trempe Superficielle - EAM, *Moniteur Belge*, 7 March 1999.

7. Decision of 26 May 1998, No. 98-C/C-10, Bodycote International PLC / HIT SA, *Moniteur Belge*, 1 July 1998.

8. Decision of 24 August 1998, No. 98-C/C-13, Promedia CV / Belgacom Directory Services NV, *Moniteur Belge*, 26 November 1998.

9. Decision of 14 December 1998, No. 98-C/C-16, IMS Health Incorporated / Pharmaceutical Marketing Services Inc., *Moniteur Belge*, 9 March 1999.