

**BELGIUM***(2001)***Amendments and proposed amendments to competition law and policy**

1. In 2001 there was only one amendment to the Act on the protection of economic competition, co-ordinated in 1 July 1999.

2. On 10 August 2001 a Royal Decree ("arrêté royal") was adopted modifying article 53 of the Act on the protection of economic competition, co-ordinated on 1 July 1999<sup>1</sup>.

3. Article 53 in its previous form gave competence to the Competition Council to apply article 81 (1) and 82 EC Treaty.

4. Article 53 is now amended as follows:

"Lorsque les autorités belges ont à statuer, en application de règlements ou de directives pris sur la base de l'article 83 du Traité instituant la Communauté européenne, sur l'application des principes inscrits aux articles 81 et 82 de ce Traité, la décision est rendue par les autorités prévues par la présente loi, en conformité avec ces règlements ou directives, selon la procédure et les sanctions prévues par la présente loi."

5. The amended article 53 makes it possible for the Competition Council to exercise the new competence conferred by Commission Regulation (EC) n°2790/1999 of 22 December 1999 on the application of article 81 (3) of the Treaty to categories of vertical agreements and concerted practices and in particular Article 7. According to article 7 of Regulation n°2790/1999 the competent national authority may under certain conditions withdraw the benefit of application of this Regulation in respect of the national territory or a part thereof. Since this competence is not only based on article 81 (1) and 82 but also on article 81 (3) it was necessary to modify article 53.

6. Moreover, the actual formulation of article 53 would make it possible to immediately implement the proposed reform of Regulation 17 having as an object to confer competence to national authorities to apply article 81 (3) EC Treaty.

**Implementation of competition law and policy*****Organisation****Competition Service*

7. During 2001 there were no major changes as to the organisation of the Competition Service and the staff remained stable.

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<sup>1</sup> Moniteur belge of 22 September 2001, p. 31914

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### *Corps of rapporteurs*

8. In 2001 two rapporteurs were appointed.

### *Competition Council*

9. By law, the Competition Council is made up of 20 members, appointed for a six-year renewable term, some from among judicial magistrates and some by virtue of their expertise in the area of competition. The Chairman, Vice-Chairman and two other members hold full-time positions.

10. During 2001, the Chairman, Vice-Chairman and one full-time member were appointed. The other full-time member was already appointed in 2000.

### ***Anti-competitive practices, including agreements and abuse of dominant position***

#### *Competition Service and Corps of rapporteurs*

11. The Competition Council refers requests and complaints regarding anti-competitive practises to the Corps of rapporteurs whose members supervise the Service's investigations.

12. The Corps of rapporteurs submitted 3 investigative reports to the Competition Council Chairman concerning a request for interim measures, 1 investigative report concerning an agreement and 15 investigative reports concerning complaints.

#### *Competition Council*

13. Requests and complaints regarding restrictive practises are brought before the Competition Council, which refers them to the Corps of rapporteurs for investigation.

14. The decisions taken by the Council or its Chairman in 2001 concerned 6 complaints, 8 requests for interim measures and 2 notified agreements.

### ***Brussels Court of Appeal and the Cour de Cassation***

15. In 2001 two decisions of the Competition Council were appealed against, namely the Incine bvba/Rendac nv decision<sup>2</sup> and the BATC-BIAC nv / Restair nv decision<sup>3</sup> (see below).

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<sup>2</sup> Council decision n°2001-V/M-12 of 9 March 2001 (*Moniteur Belge*, 28/09/2001)

<sup>3</sup> Council decision n° 2001-E/A-14 of 30 March 2001 (*Moniteur Belge*, 03/10/2001)

*Statistical assessment***Table 1: Anti-competitive practices in 2001**

	Notification	Report	Decision
Agreements	3	1	2
Complaints	12	15	6
Interim measures	3	3	8
Investigations at Council's request	-	-	1
Investigations at Minister's request	2	-	-
Investigations at own initiative	1	-	-
<b>Investigation at initiative of a public institution</b>	1	-	-
<b>Total</b>	<b>22</b>	<b>19</b>	<b>17</b>

**Table 2: Anti-competitive practises - Recap 1993-2001**

	Notification	Report	Decision by the Council
Agreements	58	20	8
Complaints	141	56	17
Interim measures	46	46	31
Investigations at Council's request	6	1	1
Investigations at Minister's request	7	1	-
Investigations on own initiative	3	-	-
Industry-wide surveys	2	-	-
Investigation at initiative of a public institution	1	-	-
<b>Total</b>	<b>264</b>	<b>124</b>	<b>57</b>

*Important cases**Incine bvba / Rendac nv<sup>4</sup>*

16. In this case Incine bvba, an undertaking active in the collection and processing of pet animals, has lodged a complaint for abuse of dominant position against Rendac nv, an undertaking active in the collection and processing of bodies of agricultural and pet animals and the commercialising of animal powder and fat.

17. The alleged abuse of dominant position constituted in charging discriminating prices to Incine bvba, cross-subsidising and predatory pricing.

18. Incine bvba also requested the President of the Competition Council to take interim measures.

<sup>4</sup> Council decision n°2001-V/M-12 of 9 March 2001 (*Moniteur Belge*, 28/09/2001)

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19. The President of the Competition established the abuse of dominant position by Renda nv and ordered Rendac nv to suspend its abusive practises.

20. This decision was appealed against at the Brussels Court of Appeal.

### *BATC-BIAC nv / Restair nv<sup>5</sup>*

21. In 1995 BATC-BIAC nv and Restair nv notified their exclusive long-term agreement (10 years) concerning the exploitation of lounges in the airport of Zaventem in order to be granted a negative clearance and subordinately an exemption.

22. The Competition Council decided that although the agreement was restrictive of competition it could be capable of exemption because of, amongst others, the necessity of a profitable exploitation of the available spaces. The long duration of the agreement could be justified by the high investment costs, safety and image reasons and the benefits for the consumers.

23. The Council granted an exemption for the period as from the notification until 1 January 1998. For the period after 1 January 1998 the Competition Council has declared itself incompetent in view of the EC Groundhandling Directive 96/67 of 15 October 1996.

24. The notifying parties have lodged an appeal against this decision.

## **Mergers and acquisitions**

### *Activities of the Competition Service and the Corps of rapporteurs*

25. The Corps of rapporteurs submitted 46 investigative reports to the Council. In respect of 2 notified mergers, a Phase II investigation was carried out.

### *Activities of the Competition Council*

26. During the year 2000, 48 operations were notified to the Council.

27. On the basis of the investigative reports submitted by the corps of rapporteurs, the Council took 2 decisions to launch a Phase II investigation. The Council took in total 49 authorisation decisions.

### *Activities of the Brussels Court of Appeal*

28. In 2001, no merger decisions were appealed against neither did the Brussels Court of Appeal take a decision concerning appeals lodged against merger decisions.

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<sup>5</sup> Council decision n° 2001-E/A-14 of 30 March 2001 (*Moniteur Belge*, 03/10/2001)

*Statistical assessment***Table 3: Merger control - Recap 1994-2001**

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Notifications	39	48	46	60	52	35	43	48	<b>371</b>
Decisions to launch Phase II	3	1	1	4	3	1	1	2	<b>16</b>
Decisions to approve	41	45	27	22	15	5	35	49	<b>239</b>
Decisions not to approve	1	-	1	1	1	1	-	-	<b>5</b>
Tacit approval	-	3	17	36	39	30	5	-	<b>130</b>
Cases outstanding	3	3	4	5	5	1	5	6	<b>32</b>
Cases appealed	1	-	1	1	1	1	-	-	<b>5</b>
Concentrations approved on appeal	-	-	1	1	1	-	-	-	<b>3</b>
Divers	-	-	-	-	-	-	2	-	<b>2</b>

*Important cases**CMB nv- Hessenatie nv/ Noord Natie nv<sup>6</sup>*

29. Noord Natie nv, an undertaking active in transshipment, storage and shipping brought in two of its subsidiaries (Noord Natie 1548 nv and Schelde Container Terminal Noord nv) in Hessenatie nv, an undertaking active in the handling of goods and a subsidiary of CMB nv. The resulting new entity is a joint venture, controlled by CMB nv and Noord Natie nv, that would operate under the name of Hesse Noord Natie nv.

30. Hesse Noord Natie nv would be active in container transshipment (including container repairs), transshipment of cargo, transshipment of roll on/roll off freight, shipping and agency, software development for terminal management and consulting.

31. The Competition Council has defined the relevant product market as the market for container transshipment with hinterland destination, the market for transshipment of roll on/roll off freight and the market for container repairs. The Competition Council also decided to open the second phase of the investigation in order to receive more information on the relevant geographical market for container transshipment with hinterland destination and container repairs. In the second phase decision the Competition Council concluded that the relevant geographical market for container transshipment with hinterland destination was the range Le Havre-Hamburg. As to the relevant geographical market for container repairs the Competition Council concluded that this was the harbour of Antwerp.

32. The concentration was declared admissible since it did not lead to the creation of a dominant position in the relevant market.

<sup>6</sup> Council decision n°2001-C/C-34 of 18 June 2001 and Council Decision n°2001-c/c-41 of 3 August 2001 (*Moniteur Belge*, 15/03/2002)

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### *Telenet Bibco NV/de 10 Vlaamse Gemengde Intercommunales/Mixt NV<sup>7</sup>*

33. The acquiring undertaking was Telenet Bibco NV, a telecommunication company with exclusive rights as to voice telephony and internet on coaxial cable networks of 16 “intercommunale”<sup>8</sup> cable undertakings in Flanders. The acquired undertaking is Mixt NV, in which 10 mixed “intercommunales” put all their cable television and cable network activities. Telenet Bibco NV has become 100% owner of Mixt NV and therefore acquired control over all cable activities of the mixed “intercommunales”. The Competition Council has declared the concentration admissible since it did not create or strengthen a dominant position on the relevant market.

### *Publium nv, Centrica plc/Luminus nv/Interelectra cvba, Pligas cvba, WVEM cvba, PBE cvba, IVEG cvba, VEM cvba<sup>9</sup>*

34. On the basis of a “Share Purchase Agreement” and a “Joint Venture Agreement” Centrica plc and Publium nv would exercise joint control over Luminus nv. Furthermore, the branches supply of electricity and gas of the pure “intercommunales” Interelectra cvba, IVEG cvba, PBE cvba, VEM cvba and WVEM cvba would be transferred to Luminus.

35. The Competition Council concluded that the market concerned (which is the relevant market where the parties have together a market share of 25% or more) is the market for electricity supply to private consumers and the market for gas supply to private consumers in the distribution area of the “intercommunales” in Flanders.

36. The Competition Council has declared the concentration admissible despite of the large market shares held by the parties taking into account the liberalisation process where more and more players would become active in the market.

## **Competition authorities: resources**

### *Competition Service and Corps of rapporteurs*

#### *Annual budget*

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

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<sup>7</sup> Council decision n°2001-C/C-43 of 23 August 2001

<sup>8</sup> An “intercommunale” is an undertaking in which several municipalities participate for the provision of certain services. A distinction should be made between a pure “intercommunale” in which only municipalities participate and a mixed “intercommunale” in which private companies as well as municipalities participate.

<sup>9</sup> Council decision n°2001-C/C-47 of 10 September 2001

*Staff (man-years)*

	<b>1999</b>	<b>2000</b>	<b>2001</b>
Lawyers	8	13	14
Economists	9	11	12
Other professionals	3.5	6	5
Support staff	6.5	6.5	5
<b>Total</b>	<b>27</b>	<b>36.5</b>	<b>36</b>

38. All of the graduates, except for one, have civil servant status.

*Human resource allocation*

a) anti-competitive practices:	16
b) concentrations:	7
c) rapporteurs:	2
d) support rapporteurs:	2
e) other activities (general policy):	4
f) secretariat: - Service:	3
- Corps of rapporteurs:	2

**Competition Council***Annual budget*

39. The Council has an operating budget of 178.483,33 €.

*Staff*

40. The Competition Council is composed of 20 members, appointed for a six-year renewable term, some among judges and some by virtue of their expertise in the area of competition. The Chairman, Vice-Chairman and two other members hold full-time positions.

41. Furthermore, the secretariat of the Competition Council is composed of a secretary (lawyer), an adjunct secretary (lawyer) and four support staff members.

**Publication**

42. Belgian legislation on competition law (the Act on the protection of economic competition, coordinated on 1 July 1999, 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/>

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BELGIUM  
ADDITIONAL REPORT BY THE COMPETITION COUNCIL**

**Foreword**

1. This report, focusing specifically on the activities of the Belgian Competition Council, is intended to supplement the annual report prepared by the Belgian Competition Service.
2. The Belgian Competition Council endorses the contents of that report.

**New or proposed competition law and policy**

3. New internal regulations of the Competition Council were approved by Royal Decree and entered into force on 29 June 2001, the date of their publication in the *Moniteur Belge* (the Belgian official gazette). The regulations set forth the Council's internal organisation and supplement the Act of 5 August 1991 on the protection of economic competition, in respect of the procedure applicable at hearings in particular.

**Implementation of competition law and policy**

4. It would be instructive to review the Belgian competition authorities and their respective roles.
5. In Belgium, the competition authority is composed of three distinct and independent bodies:
  - The **Competition Service** is made up of government employees from the Ministry of Economic Affairs. They conduct surveys and prepare reports on the findings of their investigations. They also enforce compliance with decisions of the Competition Council.
  - The **Corps of Rapporteurs**, currently comprising one Dutch- and one French-speaking rapporteur, directs and organises the instructions carried out by the Competition Service. The rapporteurs are government employees of the Ministry of Economic Affairs, but they have a special administrative and compensation status that ensures their independence. Based on the investigative evidence compiled by the Competition Service, the rapporteurs prepare reasoned reports and present them to the Competition Council.
  - The **Competition Council** is an administrative jurisdiction that hands down reasoned decisions in all of the cases brought before it, after hearing arguments from the businesses concerned or their respective legal counsel. The Competition Council is also empowered to issue proposals and opinions. In addition, it has broad authority to express opinions on general competition policy issues—an authority that it exercises on its own initiative or at the request of the Minister for Economic Affairs.
6. Both the Competition Council and the Minister for Economic Affairs may also intervene in any case pending before the Brussels Court of Appeal that involves potential restraint of competition or decisions of the Council or its Chairman, by submitting written comments to the registry of the Court after consulting the relevant case file. In practical terms, whenever an appeal is lodged against a decision of the Competition Council or its Chairman, a chamber is constituted to examine the grounds for the appeal, expressing its views on the advisability of intervening and, if necessary, drafting formal comments. In



order to avoid getting involved in arguments with the parties, the scope of the Competition Council's intervention is generally limited to questions of principle.

7. Apart from its decisions and other activities outlined in the annual report of the Competition Service, the Competition Council issued two reasoned opinions at the request of the Minister for Economic Affairs and deemed it necessary to submit formal comments concerning three cases taken before the Brussels Court of Appeal.

### ***Opinions issued by the Competition Council***

*An opinion was handed down on 12 September 2001 regarding the proposed European Council Regulation on the implementation of competition rules provided for in Articles 81 and 82 of the Treaty and amending (EC) Regulations Nos. 1017/68, 2988/74, 4056/86 and 3975/87. The opinion dealt in particular with Articles 3, 5, 6, 11, 13, 14 and 15 of the proposed Regulation.*

8. In its opinion, the Competition Council called, *inter alia*, for:

- Specifying the respective scope of application of domestic law and Community law, redefining the criteria for attributing international trade. If those criteria could not be included in the Regulation itself, the Commission should at least issue a communication to national authorities and jurisdictions indicating interpretative guidelines and criteria for attributing trade between Member States.
- Clarifying the definition of the competition authorities in connection with the implementation of a co-operative system or network. Such clarification was deemed necessary because in Belgium, as in many other States, the competition authority was made up of a number of different bodies. It would also be necessary to specify at which level, and at what stage in the procedure, co-operation and collaboration mechanisms between the European Commission and the respective national competition authorities and jurisdictions ought to be put in place, insofar as investigative and decision-making powers were vested in distinct and independent bodies. If, at the investigative stage of a case, co-operation tends to involve primarily the Competition Service or the Corps of Rapporteurs, later on, or when a dispute is taken before ordinary jurisdictions, it is the Competition Council that works together with national courts. In addition, the Council expressed a reservation about exchanging confidential data at the investigative stage of a case. Under Belgian law, the Chairman of the Competition Council has sole responsibility for protecting the confidentiality of economic data provided by companies (business secrecy). The question therefore arises whether the Competition Service or the Corps of Rapporteurs is also required to maintain the confidentiality of data vis-à-vis foreign competition authorities or national courts.

At the stage at which, under Community law, cases are being assigned, the Competition Council should also determine whether it is the most appropriate competition authority to examine and judge a case.

- Replacing, in Article 11.4, the words “they shall first consult the Commission” with the words “they shall advise”. A clearer formulation of the second sentence of Article 11, Item 4 would also be advisable. In addition, a time limit could be placed on the Commission's response, beyond which it would be assumed that the Commission chose not to exercise its prerogative under Article 11, Item 6.

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- Appointing one or more of its full-time members to serve on the Advisory Committee on Cartels and Dominant Positions, the composition of which, under Article 14.2, is made up of representatives of the competition authorities of the Member States.

9. In this opinion, the Competition Council also addressed the consequences and impact on its resources and staffing if the proposed Regulation were adopted. Its adoption would trigger a series of measures that would lead inevitably to a large number of new activities for the Council. Depending on the new interventions and new responsibilities that would be needed under the proposed “modernisation”, serious consideration would have to be given to how to provide the required infrastructure in terms of personnel and skills.

*Another opinion was handed down on 17 December 2001 on the advisability of maintaining the system of contractual price controls for petroleum products.*

10. In Belgium, following the oil crisis of 1973-74, contractual arrangements were made between the Minister for Economic Affairs, on behalf of the State, and the petroleum industry to institute a system to smooth out price fluctuations, ensure the supply of petroleum products and establish mechanisms for capping prices in the industry, so as to protect consumers and avoid speculation in the event of a crisis.

11. The main purpose of the system was to determine and set the (maximum) prices charged by contracting businesses during a specified period.

12. In its opinion, the Competition Council examined these arrangements from the standpoint of Belgian competition law and Community law, and from an economic perspective.

13. Before issuing this opinion, the Council deemed it advisable to hear arguments by a number of senior officials of government agencies, federations and institutions concerned by petroleum products.

14. The Competition Council found that this contractual mechanism for setting maximum prices constituted a cartel that could encourage price increases by setting minimum price levels, and thus that it fell within the scope of Article 2 of the Act of 5 August 1991 on the protection of economic competition (the equivalent in Belgian law of Article 81 of the Treaty). The Competition Council should therefore have been notified of the arrangements, yet it never received application for negative clearance or an individual exemption. Moreover, the Council considered that the arrangements certainly did not stimulate free competition. Even so, it appeared that no linkages with anticompetitive behaviour could be established explicitly. As a result, it seemed desirable to pay closer attention to any anticompetitive behaviour on the market for petroleum products—in this case via a survey of the market structure and by monitoring the behaviour of industry businesses. Lastly, the Council stipulated that neither national nor Community competition legislation precluded a system of price controls administered across the board by the authority.

### ***Formal comments submitted by the Competition Council to the Brussels Court of Appeal***

15. In 2001, through these formal comments, the Competition Council drew the attention of the Brussels Court of Appeal to the scope of decisions by the Council’s Chairman imposing interim measures, the Council’s role in relation to legal jurisdictions, etc.

16. Such comments are of course disclosed to both parties to the disputes in question.

*Formal comments submitted in the ASBL Radio Tienen and consorts / SABAM case*

17. In these formal comments regarding an appeal against a decision of its Chairman imposing interim measures, the Competition Council drew the attention of the Brussels Court of Appeal to lower court case law of the European Communities that was of relevance to the case in question. The Council also expressed its opinion regarding its own role and the roles of other legal jurisdictions as regards disputes involving economic competition and the scope of authority of the judgements of those jurisdictions. The Council underscored the autonomy of judicial authority that the Act on the protection of economic competition conferred on its Chairman with regard to decisions by the courts—in some cases in the same context and between the same parties. The intervention of the Competition Council Chairman (like that of the Council itself in respect of the issues) was in respect of an objective question of law and not a dispute over the subjective rights of the parties. Referring *inter alia* to parliamentary work on the Act for the protection of economic competition, the Competition Council also stated that its intervention was justified to ensure that protection, and that its rulings were based on analysis of the markets in question. The courts did not have such analysis at their disposal.

*Formal comments submitted in the S.A. Aqua Reno case*

18. In this case, the Competition Council felt compelled to denounce a problem that in fact was preventing it from performing one of its statutory duties. The Belgian Act of 5 August 1991 on the protection of economic competition provides that “the Competition Council and the Minister for Economic Affairs may each file their written comments with the registry of the Brussels Court of Appeal and consult the case file without having to visit the registry”. The Competition Council deemed that it could render a reasoned opinion only if it were in possession of a copy of the case file. Indeed, as explained above, a chamber of the Competition Council made up of four members must determine, after examining the file of a case pending before the Court of Appeal, whether it would be fitting to submit formal comments. This request by the Competition Council was rejected by the Court of Appeal, which felt compelled to give a restrictive interpretation to the Act.

*Formal comments submitted in the S.A. Rendac / SPRL Incine case*

19. The appellant contended that the Chairman of the Competition Council had exceeded his authority in ruling as to the issues in respect of interim measures whereas the ruling gave *prima facie* indication that a violation of the Act of 5 August 1991 on the protection of economic competition seemed to have been committed. The Council’s formal comments pointed out, *inter alia*, that such a finding was required by law if interim measures were to be imposed.

**Resources**

20. The legislative reform of 1999 changed the statutory composition of the Competition Council to twenty members appointed for renewable six-year terms. Four (“permanent”) members perform their duties full time—the Chairman, the Vice-Chairman and two other members.

21. The Chairman and Vice-Chairman are judges. At present, five other, non-permanent members are also judges. Judges preside over hearings.

22. In the second half of 2001, the Chairman, Vice-Chairman and one full-time member were appointed. The Competition Council was therefore able to operate properly, even though its membership

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was still too limited for such activities as active participation in international meetings of competition authorities.

### **Summaries of new reports and studies on competition policy issues**

23. In 2001, the Competition Council published its annual report for the year 2000. In accordance with the Act of 5 August 1991 on the protection of economic competition, the Competition Council is required each year to submit a report on the Act's application to the Minister for Economic Affairs and to the houses of parliament. The decisions, proposals and opinions of the Competition Council, the rulings of the Brussels Court of Appeal and decisions of the Council of Ministers dealing with economic competition are annexed to this report by the Competition Council.