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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BELGIUM

-- 2004 --

This report is submitted by the Belgian Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting (1-2 June 2005).

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1 Amendments and proposed amendments to competition law and policy

1.1 Summary of new developments in competition law and related fields

Royal Decree of 25 April 2004 amending the Act on the Protection of Economic Competition (LPCE) co-ordinated on 1 July 1999.

1. On 25 April 2004 a royal decree was adopted amending the Act on the Protection of Economic Competition Act, co-ordinated on 1 July 1999 (*Moniteur belge* (Belgian Official Gazette) of 3 March 2004, p. 36537).
2. The purpose of this decree is to align the provisions of the law to the text of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty.
3. Although the Regulation is directly applicable and takes precedence over any contrary national provision, European law requires member States to formally amend any contrary national provision in the interests of legal certainty. That is why a certain number of amendments were found to be necessary.
4. To make these amendments, the Competition Service prepared the above-mentioned royal decree¹. It came into force on 1 May 2004 at the same time as Regulation No. 1/2003.
5. Overview of the amendments introduced by the royal decree of 25 April 2004 amending the Act on the Protection of Economic Competition, co-ordinated on 1 July 1999.
6. Prior to its amendment, article 50 of the Act provided that only the Competition Service could communicate documents and information to the European Commission and other national competition authorities.
7. To conform to the obligations laid down in article 11 (cooperation between the Commission and the competition authorities of the Member States) and article 12 (Exchange of information, including confidential information) of the Regulation, the royal decree also grants this power to the Corp of Rapporteurs and the Competition Council.
8. Similarly, originally, article 18bis stated that: “The members of the Competition Council shall be bound by professional secrecy and may not divulge to any person or authority whatsoever the confidential information to which they are privy by virtue of their functions, except in cases where they are summoned to testify before a court of law”. This formulation was contrary to articles 11 and 12 above since the Competition Council may be required, in application of those provisions, to communicate confidential information to the European Commission or another competition authority.
9. Prior to its amendment by the royal decree of 25 April 2004, article 31 of the Act provided that the Competition Council “may find that a restrictive practice does not exist”. Such a finding in European competition law is the sole prerogative of the European Commission. Consequently, that provisions had to

¹ The Act of 20 July 1987 on the implementation of regulations and directives in application of article 87 of the Treaty instituting the European Economic Community (M.B. of 24 September 1987) provides in article 1 that “the King may, by royal decree examined in the Council of Ministers, take the measures necessary to carry out obligations arising under regulations and directives adopted in application of article 87 of the EEC Treaty (new article 83)... These measures may include amendment or repeal of existing legal provisions”.

be amended to limit its scope to the application of national competition law (where trade between Member States was not affected). On the other hand, article 5, last paragraph of the Regulation provides that: “Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part”. Article 31 should therefore also be amended to allow the Competition Council to find that with regard to European competition law, there are no grounds for action.

10. Finally, article 23 of the Act envisaged that placement under seal can last no longer than 48 hours. This provision was contrary to article 20 of the regulation which provides for sealing for the entire duration of the inspection.

11. In addition, the royal decree of 25 April 2004 states that: “for the application of article 35 (designation of competition authorities of Member States) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, “competition authority” can be taken to mean “the Competition Council, the Corps of Rapporteurs and the Competition Service, each acting within its powers as defined in the present Act.”

The Royal Decree of 12 March 2003 on conditions of use of the railway infrastructure

12. This decree was the subject of comment in the previous annual report. It was amended by the royal decree of 11 June 2004 (M.B. of 15 June 2004) and confirmed by article 311 of the programme act of 27 December 2004 (M.B. of 31 December 2004). The new article 91 reads as follows:

- 1. §1. An applicant or railway enterprise may complain to the Competition Council if it considers itself to be the victim of unfair treatment, discrimination in particular resulting from decisions taken by the management of the railway infrastructure or the Minister which do not relate to its contractual rights and obligations.
- §2. The Competition shall give a ruling by a decision:
 - on a complaint by a railway enterprise or an applicant to whom a licence has been refused, suspended or withdrawn or who has been refused a temporary licence. An appeal does not entail suspension of the Minister’s decision;
 - on a complaint by a railway enterprise or an applicant whose safety certificate has been refused, suspended or withdrawn by the Minister. An appeal does not entail suspension of the Minister’s decision;
 - on any complaint, in particular by the management of the infrastructure, if it considers itself to be the victim of unfair treatment, discrimination or any other damage;
 - on any complaint against a decision of the management of the railway infrastructure relating to access to the network, except those relating to contractual rights and obligations. An appeal does not entail suspension of the decision which is the subject of the complaint;
 - on any infringements of competition rules or the present decree or decrees and regulations made in implementation thereof pronounced by the Minister;
 - on a complaint by a railway enterprise or an applicant relating to a network reference document or the criteria contained therein;

- on a complaint by a railway enterprise or an applicant concerning the procedure for sharing and its results, or the level or structure of the fees for use of the infrastructure set out in chapter IX.

1.2 Other measures taken in this field.

(a) *Introduction of a programme of clemency and guidelines on fines applicable in the case of infringement of the Act on the Protection of Economic Competition co-ordinated on 1 July 1999 (M.B. 30 April 2004 + Errata M.B. 30 April 2004-Ed. 2, p.36912).*

13. On 30 April, the Moniteur Belge published a joint communiqué by the Competition Council and the Corps of Rapporteurs on immunity from fines and reduction of the amount of fines in cases involving cartels.

14. This communiqué allows enterprises that so wish to terminate their participation in an illegal cartel and collaborate actively in the dismantling of that cartel in order to obtain immunity or a reduction in fines under certain conditions.

15. To benefit from immunity from fines, the enterprise must:

1. be the first to provide evidence of a nature to allow the Competition Council to determine a violation of article 81 of the EC Treaty and/or article 2 of the LPCE affecting Belgian territory;
2. provide the Belgian competition authorities with total, constant and prompt co-operation throughout the process and provide them with any evidence that may come into their possession or which they possess relating to the suspected violation. In particular, it must hold itself at their disposal to respond promptly to any request which might help to establish the facts of the case;
3. terminate its involvement in the presumed illegal activity at the latest at the time when it submits its request for immunity from fines to the Competition Council;
4. not to have taken any measures to force other enterprises to participate in the offence.

16. In addition, the Belgian competition authorities must not, at the time when such evidence is provided, have sufficient information and evidence to determine a violation of article 81 EC and/or article 2 LPCE relating to the presumed cartel. These five conditions are cumulative.

17. To benefit from a reduction in fines, the enterprise must:

1. provide evidence of the presumed violation which provide significant added value to the evidence already in the possession of the Belgian competition authorities;
2. terminate its involvement in the presumed illegal activity at the latest at the time when it submits its request for immunity from fines to the Competition Council;
3. provide the Belgian competition authorities with total, constant and prompt co-operation throughout the process and provide them with any evidence that may come into their possession or which they possess relating to the suspected violation. In particular, it must hold itself at their disposal to respond promptly to any request which might help to establish the facts of the case.

18. These conditions are cumulative.

19. The first enterprise which satisfies these three conditions obtains a reduction of between 30 and 50%. The second enterprise which satisfies these conditions obtains a reduction of between 20 and 30%. Other enterprises which satisfy the conditions obtain a reduction of between 5 and 20%.

20. In addition, to benefit both from immunity from fines and a reduction in fines, however, the enterprise which has reported the facts of a cartel to which it belonged and which has proved evidence establishing the existence of that cartel may not dispute the facts included in the application which it has submitted.

(b) In addition, the Competition Council also defined the guidelines for fines applicable in the case of violation of the Act on the Protection of Economic Competition co-ordinated on 1 July 1999. These guidelines were also published in the Moniteur Belge of 30 April 2004.

1.3 Amendments to competition law and policy proposed by the authorities

21. A new bill on the protection of competition is currently under discussion.

22. The chief changes are adapting the existing act to European modernisation and the new EC Regulation on the control of concentrations.

2. Implementation of competition law and policy

2.1 Action against anticompetitive practices, including cartels and abuse of dominant positions.

(a) Summary of activities:

-- Competition authorities:

Table 1 (during 2004)

	Notifications	Investigation reports submitted	Decisions
Agreements	3	0	1
Complaints(*)	23	1	0
Interim measures	5	5	3
Total	31	6	5

() including investigations at the investigator's own initiative.*

Table 2 (summary of 1994 to 2004)

	Notifications	Reports	Decisions
Agreements	68	26	14
Complaints	213	81	54
Interim measures	60	64	48
Total	341	171	116

Written observations of the Competition Council

23. The Act on the Protection of Economic Competition allows the Competition Council to submit written observations to the Brussels Court of Appeal.

24. Article 42bis, §4 of the LPCE allows this in the context of interlocutory questions put by the courts and tribunals to the Brussels Court of Appeal. This power to submit written observations is also available to the Corps of Rapporteurs and the Minister of the Economy.

25. Article 43 bis, §2, last paragraph also provides the possibility of submitting written observations in the context of an appeal to the Brussels Court of Appeal against a decision by the Competition Council or its president. Unlike what is stipulated in article 42 bis, §4 of the LPCE, this power to submit written observations is not available to the Corps of Rapporteurs.

26. During 2004, the Competition Council submitted written observations in five cases relating to interlocutory questions and in one appeal against ones of its decisions.

27. In the context of cases which led the judges on the merit to put interlocutory questions, the Competition Council recalled that it was not up to the Council in the context of a proceeding involving interlocutory questions to pronounce on the merit of cases before the appeal judges or expressly to qualify practices under national or community competition law.

28. Indeed, only referred litigation giving rise to a full hearing before the Competition Council would be such as to lead to a decision on the legality of the reported practices in terms of national or community law prohibiting illegal cartels or abuse of dominant positions.

29. Consequently, the written observations that the Competition Council may submit in the context of a proceeding involving interlocutory questions are of a rather general character and recall the principles of competition.

30. Thus, in a case of abuse of dominant position involving the Société Belge des Auteurs, Compositeurs and Editeurs (SABAM), an enterprise that manages copyright and similar rights, the Competition Council recalled its jurisprudence resulting from several previous cases submitted to it or to its president.

31. In another case, although the referring judge put his interlocutory question while considering that there were no grounds in the particular case to apply community law, the Competition Council nevertheless made the point in its written observations. Indeed, this case gave the Competition Council the opportunity for the first time to apply both national and community competition law simultaneously.

(b) Description of important cases, in particular those with international consequences

32. During 2004, the Belgian Competition Council dealt with a very interesting case concerning suspected restrictive practices by Banksys S.A. in relation to electronic payments by debit card.

33. The Banksys company, created and controlled by the four main Belgian banks, is involved in the design, implementation and operation of activities relating to integrated and securitised payment systems. Banksys also produces payment terminals and provides services related to those terminals (installation and maintenance). Banksys is thus the operator of the Belgian Bancontact/MisterCash debit card system (BC/MC) and has also developed the Proton electronic chip card.

34. At the initiative of the Council, an investigation was opened into this company which was suspected of applying discriminatory and excessive prices and unfair trading terms to small businesses.
35. The question of the definition of the market for the product in question was discussed at great length in the Competition Council.
36. The Competition Council defined as markets of relevant products, firstly the market for integrated services and systems related to securitised electronic payments in cash by the final consumer and payment cardholder, and secondly, the market for payment terminals accepting BC/MC. The geographical market concerned was limited to the entirety of the territory of Belgium given that at the time of the facts, debit cards, for technical reasons, could only be used within the national territory.
37. After defining the markets concerned, the Competition Council found that, at the time of the facts, the Banksys company was the only operator in Belgium in these markets and held (and still holds) a dominant position.
38. The Competition Council also considered that the investigation was not complete. Indeed, one of the main complaints mentioned in the complaints by users of payment terminals allowing securitisation of payments by debit card concerns the practice of “unjustifiably high” charges and excessive prices concerning transaction costs and rent of terminals.
39. The Competition Council recalled that under article 82 of the European Union Treaty, Belgian law on the protection of economic competition prohibits an enterprise from abusing a dominant position by imposing directly or indirectly unfair purchase or sales prices or other unfair terms of trade.
40. The application of excessive sales prices may come from fixing of sales prices without reasonable regard to the economic value of the product or service offered by the enterprise in the dominant position.
41. The determination of abuse for application of excessive tariffs may in particular be inferred from an analysis of the profitability of investments in relation to the cost of capital employed.
42. Thus, the return on capital invested may be compared to the average weighted cost of capital. In theory, if the return is equal to the cost of capital, the market is in equilibrium in competition terms and there is no reason to conclude the existence of excessive prices. In that case, consumers are protected against prices higher than the equilibrium price and investors are rewarded at market rates.
43. Conversely, in a market where there is a dominant position, a return structurally and significantly higher than the cost of capital may be characteristic of abuse.
44. It may also be shown by a considerable disproportion between costs incurred and prices asked. To identify abuse, therefore, it is necessary to investigate whether the holder of the dominant position has used the opportunities deriving there from to obtain advantages which he would not have obtained in a situation of practicable and reasonably efficient competition.
45. The Competition Council therefore considered that, before ruling on the complaints against Banksys, it must invite the Corps of Rapporteurs to supplement its report with an economic analysis of this specific point, and examine whether, between 1997 and 2002, a comparison of returns (including transactions between Banksys and all or some of its shareholders) on investments by Banksys and the cost of capital employed indicate the imposition of unfair sales prices.
46. The supplementary investigation is currently still in progress.

Source Belgium/Febelco – Decision of the President of the Competition Council of 25 March 2004

47. By a decision of 25 March 2004, the President of the Competition Council ordered interim measures against an enterprise which appeared to be abusing a dominant position.

48. The plaintiff carries out quantitative studies of the number of pharmaceutical products of each brand purchased by each wholesale and pharmacist in Belgium. These data are sold to pharmaceutical companies which wish to know the buyers of their products and the geographical breakdown of their distribution. In the Belgian market for such pharmaceutical studies, there are only two firms, IMS Health Inc, with an estimated market share of 90% and the plaintiff, Source Belgium S.A., which has a market share of around 10%.

49. To obtain this data, the plaintiff relies on pharmaceutical wholesalers, one of which is owned by Febelco S.A.

50. Febelco had decided to end the contract for the supply of data with Source Belgium. In addition, it made the conclusion of a new contract subject to acceptance by Source Belgium of a price which the President of the Competition Council characterised as excessive. The proposed price, although the same as paid by IMS Health Inc., would have had no relation to the cost of making the data available, and was not less than sixteen times higher than paid under the previous contract.

51. The President of the Competition Council described the relevant market as that for supply of data on pharmaceutical products which Febelco distributes to pharmacists in the Belgian market. Consequently, Febelco inevitably has a dominant position in the market. (Its share of the Belgian wholesale market was estimated at 28.55% in 2002).

52. By making the continuation of the contractual relationship with Source Belgium subject to payment of an excessive price, Febelco was favouring Source Belgium's competitor, IMS Health Inc.

53. In its decision of 25 March 2004, the President of the Competition Council ordered Febelco to continue to supply data in accordance with the contract between the plaintiff and the defendant which the latter had terminated until the decision on the merits by the Competition Council or the conclusion of a new contract between the parties.

2.2 *Mergers and acquisitions*

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

Table 3 (during 2004)

	Notifications	Reports	Decisions
Concentrations	46	55	64

Table 4 – NOTIFICATIONS - (summary 1994 to 2004)

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Notifications of concentrations	39	48	46	60	52	35	43	48	53	59	46

Table 5 – DECISIONS (during 2004)

Approvals (Phase 1)	55 including 7 with undertakings
Decisions on serious concerns and thus initiation of phase 2	0
Approvals (phase 2)	1
Denials	0
Tacit approvals	0
Other(*)	8
Total	64

(*) procedural decisions (extension of time limits...), withdrawal of notification, etc...

Table 6 – DECISIONS (summary of 1994 to 2004)

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Approvals (phases 1 and 2)	41	45	27	22	15	5	35	49	40	57	56
Approvals (phase 2)	3	1	1	4	3	1	1	2	7	16	1
Denials	1	-	1	1	1	1	-	-	3	1	0
Tacit approvals	-	3	17	36	39	30	5	0	0	0	0
Other(*)	-	-	-	-	-	-	2	-	8	25	8

(*)procedural decisions (extension of time limits...), withdrawals of notifications including findings of serious concerns etc...

(b) *Important cases:*

54. During 2004, the Belgian Competition Council ruled on 64 cases of concentrations of which 37 (58%) were under a simplified procedure. This confirms, if need be, the real value of the simplified procedure the conditions for which were fixed in a joint communiqué of the Competition Council and the Corps of Rapporteurs of 16 December 2002.

55. It is not possible to describe all the decisions taken by the Competition Council in this annual report.

56. Several decisions, however, deserve very brief consideration.

Concentration in the press sector:

Decision No.2004-C/C-16 January 2004: Rossel & Cie – De Persgroep – Editeco (Case CONC-C/C-03/050).

57. The Competition Council was called to rule at the end of a second phase on the admissibility of the joint takeover of Editeco S.A. (which publishes and sells the Belgian French language financial newspaper “L’Echo”) by two Belgian press groups, namely Rossel & Cie (a French-language group) and De Persgroep (a Dutch language group).

58. One of the chief questions argued before the Competition Council concerned the definition of the markets for the products concerned.

59. In its Decision No. 2003-C/C-90 of 17 November 2003 at the end of the first phase in this case, the Competition Council had decided that there were grounds, in line with its previous jurisprudence² and

² In particular, Decision No. 2003-C/C-69 of 22 August 2003, case Imprimerie des Editeurs – NV Regionale Uitgeversgroep-SA Mass Transit Media

the practice of the European Commission, to make a distinction between readership markets and advertising markets³ and between the French-speaking readership and the Dutch-speaking readership⁴.

60. In terms of readership, the Corps of Rapporteurs selected three possible markets for relevant products based on replies provided during the investigation: the French language daily press as a whole, the “quality papers” market within the French language daily press and the market for French language financial dailies.

61. The Corps of Rapporteurs also recalled that the European Commission in case IV/M.1401 Recoletos Undedisa (decision no. IV/M.1401 of 1 February 1999) had selected the markets for newspaper publishing, publication and newspaper distribution and sale of advertising space in newspapers. From the reader’s point of view, it considered that the daily press can be divided into three categories: general news, sport and daily financial newspapers. In some countries, a distinction based on the editorial quality could be made, thus leading to a distinction between quality newspapers and the tabloids. The European Commission had thus separated general newspapers from financial and sporting newspapers observing that the former had a wide coverage including international news, opinion, national politics, environment, culture, economic news and television pages while the latter contained more specialised news. The Commission, however, added that in some cases the dividing line between the categories was blurred.

62. In the Gruner v. Jahr/Financial Times/JV case (decision no. IV/M.1455 of 20 April 1999), the Commission divides the daily press market into a domestic market and a regional market. It segments the national press either according to the content (general news, sport and financial) or the editorial line or even the quality of the news, in other words, putting the tabloids in a separate market. In the case in question, it judged the choice of the content relevant since the proposal was to create a new financial information base.

63. The European Commission has thus so far not made a definitive pronouncement on the definition of markets to be selected in the press sector.

64. The Competition Council has also paid heed to the considerations of Professor François Heinderyckx, doctor of philosophy and literature and President of the Communication, Information and Journalism Section of the Free University of Brussels, where he is head of courses in *sociology of the media, public opinion and the media, methodology of media studies*. Professor Heinderyckx considers that although there is a specific market in Belgium of the French language daily press in which the Echo has a monopoly, the economic supplements of the dailies “Le Soir” and “La Libre” occupy a very significant place, but on a weekly basis.

65. Furthermore, the tightness of the market and declining readership force the printed press titles to reposition themselves by widening their target readership and extending the editorial policy. The dailies “La Libre” and “Le Soir” thus depart from the orthodox model of the quality press, in particular by giving considerable space to small news items, regional news and sport. The endemic decline in the readership is even more marked among young people than managers and leaders. An active policy of cultural, sports and economic supplements seeks to attract more targeted readerships. To maintain a critical mass,

³ In particular, decision of 1 February 1999, IV/M.1401-Recoletos/Unedisa, decision of 20 April 1999, IV/M.1455-Grüner-Jahr/Financial Times/JV, Media Market Definitions – comparative Legal Analysis, Report by Institute of European Media Law e.V. (EMR) for the European Commission, DG Competition, European Union, Volume II, October 2003.

⁴ Cf. decision 99-C/C-06 of 23/08/1999 : Mediabel - Evêché de Namur / S.B.E. - Imprimerie St Paul and n° 2003-C/C-69 of 22/08/2003 : Imprimerie des Editeurs/ Regionale Uitgeversgroep / Mass Transit Media).

newspapers have widened the targeting in two ways, towards local and “popular” news and towards more specialist content (economic supplement of “Le Soir” and “La Libre”).

66. The economic press is moving in the opposite direction. It is trying to expand its readership by stepping outside the purely economic line. The objective is both to seduce readers potentially put off by a content that is too specialist and stabilise the existing readership by changing from a supplementary daily to a full-blown daily which can stand alone.

67. Professor Heinderyckx also considers that “quality papers” such as Le Monde or The Times do not exist in Belgium (De Standaard and De Morgen are the two papers which come closest). This type of press is characterised in particular by an editorial programme centred on politics, economics, social and international news, employing journalists specialising in the chief fields and numerous foreign correspondents and a content whose level of language puts off the wider public. It requires human and material resources which cannot be made profitable from the readership for this kind of publication in a small market such as French-speaking Belgium.

68. The Competition Council consequently considered that despite the differences between the markets for general newspapers and those providing specialist news, the news function is the one that should be used to evaluate the relevant market. The recent trends in different newspapers justify this. Thus the specialist sections of general newspapers are on the increase while the specialist press is offering its readers more and more pages of general news.

69. The Competition Council therefore took the relevant market in terms of the readership as the French language daily press as a whole.

70. This definition, incidentally, is in conformity with the definition of the market used by the Council in the past in its decision 99-C/C-06 of 23 August 1999.

71. In this market defined thus, the Council considered that the transaction submitted to it did not tend to create or reinforce the dominant position of the notifying parties.

72. The Competition Council also recognised that press groups depend to a large extent on advertising revenues. This dependency may have repercussions both on the price of daily newspapers and their content.

73. Consequently, the Competition Council considered that the advertising market should also be considered as a relevant market.

74. The Competition Council thought that there were grounds for taking the different advertising markets as a whole and not in isolation, given that these markets may be inter-dependent, in particular through joint offers.

75. Indeed, through joint offers, one of the competitors could be excluded from the advertising market in that the coverage offered by those titles would become marginal and not profitable for the advertisers.

76. The share of the cumulative national commercial advertising market held by the notifying parties is close to 50%.

77. If the Council takes into consideration the commercial advertising market in the French language dailies, Rossel’s share alone is over 60%. For its part, Editeco’s share is over 5%.

78. Bearing in mind the market shares achieved by the notified transaction, and in accordance with the Commission's jurisprudence, the Council considered that the Rossel Group had a dominant position in the commercial advertising market in the French language press.

79. As regards the financial and legal notices market, the Council found that as a result of the notified transaction, the notifying parties acquire or reinforce their dominant position. Indeed, their market share combined with Editeco is over 70% for financial notices in the French language dailies.

80. As regards the market for job advertisements in the French language press, their market share is over 90%. The Competition Council found that in that market, the notifying parties also had a dominant position which was reinforced by the notified transaction.

81. Concerning the market for other classified advertisements in the French language press, Rossel's share alone is over 55%.

82. In these circumstances, the notified transaction has the effect of contributing directly or indirectly to strengthening the economic power of these groups.

83. The notifying parties themselves were aware of the effect on the advertising market of the transaction submitted to the Council and propose specific undertakings which were discussed, amended and supplemented during the hearings.

84. The Competition Council also imposed an additional condition to prohibit any form of exclusivity in advertising contracts.

85. The transaction was thus approved by a decision of the Competition Council delivered on 24 January 2004 taking into account that the transaction consisted of a joint takeover of the target enterprise by two competing enterprises and subject to various undertakings and compliance with the charges and conditions described below:

- For a period of five years, the advertising department responsible for the Echo's commercial advertising (and any successors to it) will not be merged with the advertising department of one of the general departments of the Rossel Group and De Persgroep. In particular, commercial advertising in the Echo will not be sold under the Full Page arrangement or NP3 deals (and any successors to these mechanisms);
- For a period of five years, commercial and financial advertising (including legal notices) in the Echo (and any successors to that paper) will not be subject to forced linkage with advertising in one of the general departments of the Rossel Group and De Persgroep, in the sense that it will be possible to buy advertising separately in the Echo, without also having to order advertising in a general newspaper of that kind;
- The notifying parties and the Echo themselves and their advertising departments will refrain from any agreements for a period of five years which would give them exclusivity in an advertising campaign in the Belgian French language press market."

86. A competitor nevertheless entered an appeal against this decision in June 2004. The Brussels Court of Appeal, the appeal jurisdiction for the Competition Council, has not so far handed down a decision.

Concentrations in the energy sector in connection with the liberalisation of the electricity and gas markets

87. As indicated in the previous annual report, the Competition Council had to pronounce mainly in 2002 and 2003 on concentrations aimed at liberalising the gas and electricity markets, in accordance with European directives 96/92/EC of 19 December 1996 and 98/30/EC of 22 1998 requiring limited and progressive opening of the electricity and gas markets.

88. As a result of the market share acquired progressively by the Electrabel Customer Solutions company (ECS) designated supplier by default and its parent company Electrabel, and undertakings given to offset the effects of reinforcement of their dominant position, the first decisions approved the notified concentration transactions subject to conditions. Approval of the other transactions was denied since the undertakings were not sufficient to offset the effects of reinforcement of the dominant position.

89. An appeal was made to the Brussels Court of Appeal against all the decisions by the complainant parties criticising the approvals subject to conditions and by the notifying parties challenging the denials.

90. The Brussels Court of Appeal, by an order of 31 January 2003, invited each of the parties and any person involved in the proceedings to communicate their observations on the extent of the powers of that appeal jurisdiction in the case of disputes concerning concentrations and in particular the Court's power to order the measures requested by the appellants (namely to annul the decision by the Competition Council, to find that the transaction strengthened the dominant position and that approval should be denied and to order the notifying parties to split the grouped enterprises or activities), as well as on the question of whether or not, in the event of annulment of a decision by the Competition Council concerning approval of a concentration, it was necessary to consider whether it was up to the Competition Council to make a new decision concerning the approval of the concentration. The Competition Council submitted an observation at that time indicating that

“in law, the Brussels Court of Appeal has full jurisdiction when it is called to rule on appeal on decisions given by the Competition Council. Legally, it does not, however, have the means available to the Competition Council to evaluate the effects of its decision on the market concerned bearing in mind any developments that have occurred between the date of the appealed decision and its order. It is thus forced to rely only on matters contained in the dossier at the date of the Competition Council's decisions and those submitted to it by the appellants and the respondents”.

91. In the note, the Competition Council also observed that :

“substantial developments had occurred in the context of other proceedings for notification of concentrations conducted before the Competition Council in the case of Electrabel Customer Solutions S.A. and other mixed inter-municipal enterprises concerning the same markets, in particular the significant offers of undertakings formulated by Electrabel Customer Solutions S.A. and its parent company, Electrabel S.A. in the context of proceedings..., currently pending before the Competition Council.

The notifying parties could thus if applicable, as they stated to the Competition Council in a hearing of 17 February 2003, withdraw their appeal in the proceedings pending before the Brussels Court of Appeal and submit a new notification of the concentrations renewing the undertakings together with new matters which were the subject of an approval in the context of other ECS-EBL proceedings. In that case, the appeal submitted... against decisions nos. 2002-C/C-61 and 62 of 30 August 2002 would cease to be relevant.”

92. The Competition Council considered for those reasons that

“It would thus perhaps be appropriate to examine to what extent the examination, in particular of the appeal procedure concerning those decisions..., should occur after the final decision of the Competition Council in the ECS/... cases”.

93. Serious work was done in 2003 by the Belgian competition authorities to determine under what conditions these transactions could be approved and to encourage the notifying parties to formulate undertakings to ensure effective liberalisation of the electricity and gas markets which had formerly been a monopoly.

94. Various decisions of principle were adopted by the Competition Council on 4 July 2003 in favour of the liberalisation of the electricity and gas markets required by the above-mentioned European directives.

95. The Competition Council thus approved the concentrations subject to the undertakings proposed by the notifying parties in the form of various conditions and restrictions and imposing additional conditions.

96. All the previously notified concentration transactions which had been the subject of appeals were notified to the Competition Council renewing in the form of undertakings all the undertakings and conditions contained in the decisions of principle.

97. Those transactions were therefore approved in 2004 by the Competition Council.

98. All the parties (notifying and other parties) who had entered an appeal against the first decisions of the Competition Council withdrew their appeals, except for one appeal against a decision of the Competition Council imposing a significant fine specifically for taking measures to prevent the reversibility of the concentration prior to the decision of the Competition Council. The Brussels Court of Appeal was therefore able to note the withdrawals of the appeals in 2004.

99. In its order of 14 December 2004, the Brussels Court of Appeal decided that the notifying parties had not taken measures to prevent the reversibility of the concentration. In consequence, it annulled the decision to impose a fine.

100. The opening of the electricity and gas markets was also further strengthened in 2004 by new decisions of the Competition Council, in particular in March and June 2004⁵.

101. The decision of 9 March 2004 in the Elia – Suez – Tractebel case⁶ thus strengthened the independence of the management of the Belgian electricity distribution network from the historic operators in the electricity market by allowing it to have its own electrical engineering company totally independent of the Tractebel Group. This transaction also met with the wishes of the Belgian electricity regulator.

⁵ Decision n°2004-C/C-26 of 8 March 2004, case CONC-C/C-04/0005: Electrabel Customer Solutions/Sibelga; Decision n°2004-C/C-27 of 9 March 2004, case CONC-C/C-04/007: Elia/Suez/Tractebel; Decision n°2004-C/C-36 of 3 June 2004, case CONC-C/C-04/0023: GDF International / Association Liégeoise du Gaz - ALG Négoce; decision n°2004-C/C-40 of 29 June 2004, case CONC-C/C-04/0033: SPE / ALE - Ale Trading; decision n°2004-C/C-41 of 29 June 2004, case CONC-C/C-04/0042: Essent Belgium / Régie d'électricité ville de Wavre,...

⁶ Decision n°2004-C/C-27 of 9 March 2004, case CONC-C/C-04/007: Elia/Suez/Tractebel.

102. In addition, several decisions also approved transactions by which competitors of E.C.S. were designated as supplier by default for gas and/or electricity. The opening of the market was thus better assured.

Concentration in the air transport sector

Decision no. 2004-C/C-69 of 24 December 2004: SN Airholding II – Virgin Express (Case CONC-C/C-04/0064)

103. SN Airholding II S.A. holds a very big majority of the shares in Delta Air Transport S.A. which operates an airline under the name “SN Brussels Airlines”. It took sole control of the Virgin Express S.A. belonging to Virgin Express Holdings PLC, a company registered in England. Thus Delta Air Transport and Virgin Express became sister companies both controlled by SN Airholding II.

104. By a decision of 24 December 2004, the Competition Council in full session approved the concentration after the first phase (45 days from the notification of the concentration).

105. The Competition Council followed the practice of the European Commission confirmed by Community jurisprudence, in defining the markets concerned and to evaluate the position of the parties concerned in those markets. The following principles are applicable.

106. Relevant market is defined, both from the point of view of the product concerned and the geographical angle, based on the so-called “point of origin/point of destination” (O & D) method. Under this method, each combination of a point of origin and a point of destination is considered as a distinct market from the consumer’s point of view. The relevant market, depending on the case, will be either the route or set of routes to the extent that there is substitutability from the consumer’s point of view between the routes which make up the set.

107. To verify whether an O & D pair also constitutes a market for different products, various possibilities for the customer to travel between the point of origin and the point of destination are taken into consideration. Thus, it is not just a question of taking account of direct flights between the two airports concerned but also alternative means of transport, to the extent that they can be substituted for those direct flights. These alternative means of transport may include direct flights between other airports (substitutability of airports), indirect flights between the airports concerned, and transport by road, rail or sea (substitutability of modes of transport).

108. Added to this O & D approach is an examination of the structural conditions prevailing in an airport and the conditions relating to the capacity of that airport, as well as evaluation of their impact on the journey under consideration.

109. Delta Air Transport and Virgin Express were both present on six routes where they had a combined market share of 25% or more.

110. Based on market share and the presence of competing airline companies on the same route, the report of the Corps of Rapporteurs giving reasons concluded that the parties to the concentration did not have a dominant position of the Brussels-Milan, Brussels-Madrid, Brussels-Rome and Brussels-Barcelona routes.

111. Consequently, the decision was that there were no serious concerns regarding the approval of the concentration insofar as those routes were concerned.

112. On the other hand, on the Brussels-Geneva and Brussels-Nice routes, Delta Air Transport and Virgin Express were the only operators. The concentration would create a monopoly on those routes, or at the very least a dominant position, although that would not necessarily result in the concentration not being approved.

113. The Competition Council first recalled that the relevant market was not necessarily limited to the combination between a point of origin and a point of destination, and that there were reasons to fear that the markets concerned were defined too narrowly in the report giving reasons and that the market share of the parties concerned were over-estimated (cf. the principles mentioned above).

114. Following the practice of the European Commission, the Competition Council then decided that in order to assess whether competition in the markets concerned was likely to be seriously impaired, it should take into account not only the position occupied by the parties in the markets in question, the existing level of competition prior to the agreement and the residual level of competition, but also the probability of potential competition.

115. In that respect, the Competition Council found that the concentration would not significantly hinder the entry of new operators, given that the availability of slots, the criterion which would be critical for airline companies wishing to penetrate the market, seemed assured.

116. In that decision of 24 December 2004, the Competition Council formulated an observation of principle concerning the procedure for concentrations.

117. In its report, the Corps of Rapporteurs found that “it was not possible to obtain all the replies required to eliminate all the concerns present” and suggested that an additional investigation might be conducted if the Council decided to embark on a second phase (60 days). The report mentioned for example “the role that can be played by the use of “code shares” with respect to competition in the market”.

118. For the Competition Council, these considerations could not justify opening a second phase. That procedure, which has profound consequences, notably for the notifying parties which see the implementation of their transaction delayed, can only be undertaken if the Council finds that there are serious doubts concerning approval of the concentration. The burden of proof cannot be transferred to the notifying parties. If following the investigation, however understandable due to the extremely tight deadlines, questions remained open as to the existence or otherwise of serious concerns in the meaning of the law, that uncertainty may only be to the benefit of the notifying parties.

-- Cases in the courts:

Brussels Court of Appeal, order of 28 September 2004 (Lodisco v. SPRLU Monde)

119. Under article 42bis of the Act on the Protection of Economic Competition co-ordinated on 1 July 1999, jurisdictions seized of a dispute the solution of which depends on the legal character of a competition practice are required to suspend their ruling and [pose an interlocutory question to the Brussels Court of Appeal.

120. In its order of 28 September 2004, the Brussels Court of Appeal was replying to an interlocutory question put by the Tournai (Hainaut) Court of first instance.

121. The Court’s question was the following: “is ethical standard no.2 of the Order of Architects, specifically article 4, contrary to articles 81 and 82 of the Treaty of Amsterdam (ex articles 85 and 86 of

the Treaty of Rome) and the provisions of the Act of 1 July 1999 on the protection of economic competition and, thus, should it be considered as null in law?”.

122. This question arises in the context of a dispute apposing the architect to the SPRLU Monde company (MONDE) concerning payment of the architects fees.

123. The Council of the Order of Architects had established a scale of minimum recommended fees for architects. The scale is known as “ethical standard no. 2”. The contract for the architect’s assignment comprised several clauses which referred to ethical standard no. 2.

124. Monde asserted the nullity of ethical standard no. 2 and thus nullity of the agreement binding it to the architect.

125. In its decision of 24 June 2004, the Commission found that:

126. “from 12 July to 21 November 2003, the Order of Belgian Architects had been in breach of article 81.1 of the Treaty when it adopted, by a decision of 12 July 1967, as amended in 1978 and 2002, and publishing a scale of minimum fees, known as ethical standard no.2”.

127. The Order of Architects was fined 100,000 EUR.

128. In consequence, following that decision, in reply to the interlocutory question put to it, the Court of Appeal found (in the absence of an appeal against the Commission Decision) that ethical standard no.2 is null in law under article 81 of the Treaty.

Anvers Court of Appeal, orders of 21 June 2004 and 21 September 2004 (The Diamond Trading Cy Ltd/SPRL Diamanthandel A.SPIRA)

129. A. SPIRA issued a writ against The Diamond Trading CY (a company representing the De Beers Group) conserving the merit of the case, for loss of its specific status as “sightholder” (which means the right, ten times a year, to examine batches of rough diamonds at the premises of The Diamond Trading CY which will be delivered to it subsequently) following the unilateral termination of the contract by the defendant after 68 years, the cancellation being accompanied by a six month period of notice. The cancellation, according to the defendant, was the result of the new selection procedure known as “supplier of choice” organised by it and notified to the European Commission and in respect of which the defendant had also received a comfort letter in 2003.

130. A. SPIRA, however, lodged a complaint with the European Commission in order to establish that the manner in which the De Beers Group had acted was inconsistent with European Competition law.

131. A. SPIRA also sought a summary injunction in order to preserve its rights.

132. In the context of that proceeding, the President of the Commercial Court ordered that the delivery of diamonds to A. SPIRA as “sightholder” should continue. It is, indeed, prima facie impossible for a distributor to change supplier within a deadline of six months. This situation could cause him irreparable harm.

133. The Diamond Trading Cy applied to the Court of Appeal to overturn that decision.

134. In its interlocutory order of 21 June 2004, the Court of Appeal ordered the hearings to be reopened in order to allow the parties to take a position on the effect of the interim measures that the national judge could take simultaneously with the examination by the European Commission of the

complaint lodged and the related investigations. The Court held in particular that the parties should take a position on the application at the time of Regulation 1/2003 and the Communication from the Commission on cooperation between the Commission and national jurisdictions on the application of articles 81 and 82 of the EC Treaty.

135. In its final order of 21 September 2004, the Court pronounced on the merit of the request.

136. Firstly, the urgent character of the request was accepted as proved.

137. Next, the interim nature of the injunction was assessed. It involved examining, in the light of the jurisprudence, whether it was a case of apparent rights justifying the measure taken in summary proceedings. The judge in chambers may exceptionally intervene in the context of the unilateral cancellation of contracts of indefinite length in order to prevent a probable bankruptcy, even though it is only a matter of creating a temporary situation. The Court of Appeal concluded that the A. SPIRA company had produced sufficiently plausible arguments as to the existence of a serious risk of disappearance of the market in the absence of interim measures. Moreover, A. SPIRA had established clearly that since the sending of the comfort letter concerning the “supplier of choice” system, the situation had changed, and the Commission had indeed re-opened an investigation into the above-mentioned system and its proper application.

138. The Court held that in the event the existence of exceptional circumstances justifying the interim measure ordered by the judge in chambers had been shown. The Court also considered that the first judge had correctly ordered an interim measure. It even extended from 9 to 18 months the time within which A. SPIRA retained its right to delivery as “sightholder”.

139. Nothing in Regulation 1/2003 or the Communication of the Commission on cooperation between the Commission and national jurisdictions on the application of articles 81 and 82 of the EC Treaty impairs the principle whereby the Court must apply Belgian law in judging whether or not interim measures should be ordered in the present circumstances.

MSA SA/KONINKLIJKE GILDE VAN VLAAMSE ANTIQUAIRS CASE:

1. Background

Application for interim measures.

140. Under article 35,§1 of the LPCE⁷, the following conditions must be satisfied for the President to be able to take interim measures to suspend anti-competitive restrictive practices:

- the existence of a complaint leading to the investigation of anti-competitive restrictive practices going hand in hand with the existence of a direct and immediate interest of the applicant party in the indictment;
- apparent existence of a prohibited anti-competitive restrictive practice, in the event an agreement limiting competition and thus constituting a breach of article 2 of the LPCE;
- urgency in avoiding a situation which might cause serious, imminent and irreparable injury to the enterprises whose interests are affected by the practices in question or likely to harm the general economic interest.

⁷ LPCE: Act on the Protection of Economic Competition co-ordinated on 1 July 1999.

Facts

141. MSA SA is an advertising and public relations firm which, in particular, organises trade fairs.

142. Each year, it organises two international art and antiques fairs, one in Knokke in August and the other in Bruges at the end of October/beginning of November.

143. The “Koninklijke Gilde van Vlaamse Antiquairs” is a trade association which organises antiques fairs in Knokke and Ghent.

144. When the Guild decided to arrange its own antiques fair in Knokke, it prohibited its members from participating in the Knokke or Bruges fairs which are not organised by it.

145. The MSA firm then lodged a complaint on 24 June 1998 with the Competition Council and asked the President of the Council to take interim pleasures.

Decision no. 2002-V/M-38 of 27 May 2002 of the President of the Competition Council concerning the taking of interim measures relating to MSA SA/Gilde Van Vlaamse Antiquairs

146. The President of the Competition Council was requested to order the Guild to suspend its decisions concerning the prohibition on participating in other fairs to inform its members of that suspension.

147. The President of the Council held that the complaint by MSA SA was sufficiently justified and that it defined and explained, in a sufficiently clear manner, the anti-competitive restrictive practice concerned and, contrary to the opinion of the Competition Service, declared the application for interim measures admissible in a decision of 27 May 2002.

148. Before pronouncing on the merit of the application, the Council referred the matter back to the Competition Service for further examination. The Service was charged with drawing up an additional investigation report on the application for interim measures and, in particular, to examine in greater detail whether the following conditions were fulfilled:

- the prima facie existence of a violation of the LPCE;
- existence of a situation which might cause serious, imminent and irreparable injury to the enterprises whose interests are affected by the practices in question or likely to harm the general economic interest and which must be avoided as a matter of urgency.

Decision no. 2002-V/M-95 of 24 December 2002 of the President of the Competition Council concerning the taking of interim measures relating to MSA SA/Gilde Van Vlaamse Antiquairs

149. As regards the existence of an apparent violation of the LPCE, the President concluded on 24 December 2002 that the Guild was an association of enterprises and that its decisions should be considered as decisions of an association of enterprises in the meaning of article 2, §1 of the LPCE. The decisions concerned were held to be restrictive of competition since they prohibited members from participating in fairs organised by MSA SA.

150. As to the second condition, the President concluded that there was a situation which might cause serious, imminent and irreparable injury, that it clearly resulted from the impugned practice and that the condition of urgency was fulfilled.

151. The President of the Competition Council therefore declared the application for interim measures justified and ordered the suspension of the decision of the “Gilde van Vlaamse Antiquairs”. It also ordered the latter to notify that decision to all its members by registered letter and to mention the contents of the decision on its Website.

2. Order of the Brussels Court of Appeal of 29 September 2004

152. The Guild entered an appeal against the decisions of the President of the Competition Council of 27 May 2002 and 24 December 2002 relating to the interim measures in the meaning of article 35 of the LPCE.

153. Given that both decisions were made in respect of the same request for interim measures, the Court gave its ruling in a single judgement.

154. The appeal against the decision of 27 May 2002 relating to interim measures in the meaning of article 35 of the LPCE was declared inadmissible, as the Guild was unable to provide evidence of notice of its appeal to the respondents.

155. The appeal against the decision of 24 December 2002 also relating to interim measures in the meaning of article 35 of the LPCE was, however, declared admissible.

156. The Brussels Court of Appeal exercises full jurisdiction when it rules on an appeal against decisions of the Competition Council or its President. This does not necessarily mean, however, that the Council or the President are finally relieved of the case.

157. The Guild stated in its appeal that the impugned prohibition had been lifted at the general assembly of 7 December 1999. The minutes of that meeting do not, however, make any explicit mention of that decision. The Court concluded that the President had rightly decided that the impugned prohibition constituted an apparent violation of article 2 of the LPCE which prohibited cartels.

158. The Court observed, however, that since the pronouncement of the disputed decision, it was necessary to take into consideration article 3, paragraph 2, first sentence of EC Council Regulation no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty which states that:

“The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or are covered by a Regulation for the application of Article 81(3) of the Treaty”.

159. In other words, the Court of Appeal held that the application of our national law could not give rise to the prohibition of decisions by associations of undertakings authorised by European law. In the case where the impugned decision of the Guild did not fall within the scope of Article 81 (prohibition of cartels) of the EC Treaty, the Court would consider that the apparent violation of article 2 of the LPCE could not be prohibited and that the measures ordered cannot be maintained in the future.

160. Consequently, the Court examined whether the disputed decision was covered by Article 81, paragraph 1 of the EC Treaty and concluded that it could not be supposed that the effect of the impugned prohibition on intra-community competition would be perceptible. According to the Court, this prohibition would thus not constitute a decision by an association of undertakings prohibited under Article 81, paragraph 1 of the EC Treaty.

161. Given that national law cannot prohibit what is not contrary to Article 81 of the EC Treaty, the Court ruled that the President's disputed decision could not be upheld.

162. The appeal against the decision of the President of the Competition Council of 27 May 2002 was declared inadmissible by the Court of Appeal. The appeal against the decision of the President of the Competition Council of 24 December 2002, however, was declared admissible and justified.

3. The role of the competition authorities in formulating and implementing other policies, for examples regulatory reform measures, trade policy measures or industrial policy measures.

163. The Competition Council has been able, directly or indirectly, to provide opinions and engage in studies concerning a number of aspects of micro-economic policies in Belgium.

164. The LPCE provides that the King may, by royal decree debated in the Council of Ministers and after consultation with the Competition Council and the Competition Commission, raise the turnover thresholds for notification of concentration transactions. The Competition Commission, a joint body composed of representatives of trade unions and employers' organisations, may give advisory opinions.

165. The Council thus issued an opinion in October 2004 in which it proposed an increase in the thresholds.

166. At present, a concentration must be approved by the Council when the combined total turnover in Belgium of the enterprises concerned is over 40 million euros, and at least two of the those enterprises have a turnover in Belgium of at least 15 million euros each (art. 11, §1 LPCE). The Council proposed that the total turnover should be raised from 40 to 100 million euros, and the turnover of at least two of the enterprises concerned from 15 to 30 million euros.

167. The Council's opinion was based on several consideration:

- It is important to raise the thresholds to avoid making concentration transactions subject to control, costly to enterprises, which prima facie should not raise problems of competition. On the basis of the current thresholds, an extremely high proportion of concentrations must be approved under the LPCE because the undertakings concerned control at least 25% of the market concerned. These concentrations do not raise any competition issues.
- It is important at the same time for the competition authorities to be able to monitor the structure of markets and their development. The Council is thus of the opinion that increasing the thresholds must be perceptible without being excessive.
- It is true that even a modest increase in the thresholds will lighten the workload of the three organs of the competition authority in relation to concentrations, releasing resources for other aspects of competition policy and especially combating restrictive practices.

168. This opinion by the Competition Council relied in particular on the empirical analysis by a member of the Council, Professor Van Cayseele, with his colleagues of the Catholic University of Leuven. This research compares especially the degree of severity of controls of concentrations in different European countries based on notification thresholds (see references to this publication in section V below). The Council hopes to pursue this work during 2005 in an ad hoc working group on thresholds.

169. *The Competition Council* contributed actively to a training seminar on "European competition law since 1 May 2004". The participants in the seminar were Belgian judges dealing with cases involving

question arising from competition law. In the context of the reform of competition policy by the European Commission, the “modernisation package” had the objective, in particular, of increased participation by national jurisdictions by making the provisions of European law on restrictive practices directly applicable.

170. This training seminar was organised in May 2004 by the Supreme Council of Justice, an independent institution active since 2000 in training of judges and external control of the functioning of the Judicial Order. The interventions of the members of the Council covered substantive European competition law, the role of national jurisdictions and appeal bodies and the economic approach to competition law based on a case study in the cement industry.

171. The Council will continue its activities in training judges in 2005 and 2006.

172. *In the energy sector*, the Belgian competition authorities were involved in the implementation of competition law and the European directives on common rules for an internal market in electricity and gas. As explained above (Section II, 2: mergers and acquisitions) several decisions were taken by the Competition Council in 2002, 2003 and 2004 concerning concentration transactions relating to the liberalisation of the electricity and gas markets. These decisions contribute to increased competition, in particular by undertakings and conditions relating to tendering of virtual production capacities (Virtual Power Plant) of the traditional operator. Five auctions took place between December 2003 and November 2004. The Competition Service monitors the Council’s decisions on energy.

173. The energy sector, and more generally, the network operators, are particularly important for the competition authorities since they have an impact on the economy as a whole. This consideration was underlined in the work of the OECD Global Forum on Competition and in particular in the oral interventions of the European Competition Commissioner, Mrs N. Kroes, and Professor F. Jenny, President of the Global Forum. This, according to Mrs Kroes, justifies sectoral studies with a view to removing barriers to competition.

174. In this connection, in 2005, the Council is carrying out analytical activities and general advice on competition policy for the network operators in the framework of collaboration with the sectoral regulators, such as telecommunications and the railways.

175. Members of the Council also actively monitored scientific meetings devoted to the economic analysis of competition practices and policies. Thus, two members participated in two international conferences organised in 2004 by ACE (Association of Competition Economics) and the conference organised by the Dutch NMA (Nederlandse Mededingingsautoriteit) in The Hague in November 2004. Professor Van Cayseele gave a presentation there on the use of simulation models in merger cases.

4. Resources of the competition authorities.

4.1 *Aggregate resources*

(a) Annual budget

176. The Competition Service does not have its own budget.

177. The Competition Council has a budget of 173,000 euros.

(b) *Establishment*

b1. Competition Service and Corps of Rapporteurs:

- economists: 9
- jurists: 24
- other: 6
- support staff: 5
- Total: 44

b2. Competition Council:

- jurists: 2 full-time members from 1.01.2004 to 30.09.2004 and 3 full-time members from 1.10.2004 to 31.12.2004; 13 other members; 1 member of the secretariat.
- economists: 3 other members and 1 full-time from 1.10.2004 to 31.12.2004; 1 member of the secretariat.
- support staff: 3
- Total: 7 full-time from 1.01.2004 to 30.09.2004 and 9 full-time from 1.10.2004 to 31.12.2004 (excluding the 16 members who are not full time).

4.2 *Human resources assigned*

178. The Competition Council does not have any staff specially assigned to the PCR, mergers or litigation.

5. *Bibliographic references to works and articles written by Belgian authors published by Belgian publishers or published in Belgian journals*

BUYDENS, M. & DE MUYTER, L., Le nouveau règlement d'exemption par catégorie pour les accords de transfert de technologie, *Cahier du juriste* 2004, p. 125-133.

DE BANDT P., BRENDAEL, S. & MISSON, L., Droit de la concurrence et exercice de pouvoirs réglementaires pour les ordres professionnels: quelques réflexions et une tentative de synthèse au vu de l'arrêt de la Cour de cassation du 25 septembre 2003 et de la jurisprudence récente de la Cour de justice, *Revue de droit commercial belge* 2004, p. 22.

DE BAUW, H. (ed.), *Annuaire 2003, Pratiques du commerce & Concurrence*, Kluwer 2004.

DE WOLF P., Les sanctions aux infractions commises en droit de la concurrence économique, *Revue de droit intellectuel, l'Ingénieur-conseil*, 2003-1 p.60-82 published in March 2004

GEENS, K., Vrij beroep en mededinging: deontologie is een remedie tegen, tucht dikwijls een gevolg van marktfalen, *Tijdschrift voor Privaatrecht*, 2004, p. 283.

- GOFFINET, P. & NIHOUL, P., Le nouveau règlement relatif aux concentrations. Le développement de l'analyse économique dans les décisions juridiques, *Journal des Tribunaux* 2004, p. 231-235.
- HUVENEERS, C., MISTIAEN, P. & VAN DER LINDEN, J., Industries de réseaux en Belgique: effets des réformes de marché récentes et prévues, Bureau fédéral du plan, *Analyses et prévisions économiques*, July 2004.
- LENAERTS, K. & GERARD, D., Decentralisation of EC Competition Law Enforcement: Judges in the front line, *World Competition. Law and Economics Review* 2004, p. 313-340.
- MEROLA, M. & MUNOZ DE JUAN, M., Le rôle des juridictions nationales dans le cadre de l'application décentralisée des articles 81 et 82 du Traité C.E., *Journal des Tribunaux* 2004, n° 6153 of 23 October.
- NIHOUL, P. (ed.), *La décentralisation dans l'application du droit de la concurrence. Un rôle accru pour le praticien ?*, Bruylant, 2004, with contributions by J.F. Bellis, K. Dekeyser, D. Gérardin, Ph. Lambrecht, P. Larouche, F. Moerman, P. Nihoul, A. Pappalardo, B. Ponet, Ch. Schurmans, J. Steenlant, J. Stuyck and B. van de Walle de Ghelcke.
- SMEETS, D., Nouveau règlement européen en matière d'ententes et nouveau rôle du Conseil de la concurrence, *Droit des affaires DA-OR*, n° 71, December 2004.
- STEENBERGEN, J., De nationale rechter en een coherente handhaving van de mededingingsregels na 1 mei 2004, *Rechtskundig Weekblad* 2004-2005, 321-325.
- STEENBERGEN, J., & VAN DER WOUDE, M.H., Het EU-mededingingsrecht na 1 mei 2004, *Verordening 1/2003 en Verordening 139/2004*, S.E.W. – *Tijdschrift voor Europees en economisch recht* 2004, p. 192 and p. 253
- VAN BAEL, I. & BELLIS, J.F., *Anti-dumping and Other Trade Protection Laws of the EC*, Kluwer Law International, fourth edition, 2004.
- VAN BAEL, I. & BELLIS, J.F., *Competition Law of the European Community*, Kluwer Law International, fourth edition, 2005.
- VAN CAYSEELE, P., KONINGS, J. & DE LOECKER, J., Merger Review : How much of industry is affected in an international perspective?, K.U. Leuven, Center for Economic Studies, December 2003.
- VAN DEN BOSSCHE, A.M., Het vrij beroep in Europees perspectief: storm op zee?, *Tijdschrift voor Privaatrecht* 2004, p. 795.
- VAN DEN BOSSCHE, A.M., *Handels- en Economisch Recht. Commentaar met overzicht van rechtspraak en rechtsleer. Artikelen 81 en 82 EG*, Kluwer, losbladig, 2004.
- VANDERELST, A., Het Adalat-arrest van het Hof van Justitie van de EG, *Tijdschrift voor Privaatrecht* 2004, p. 835.
- WIJCKMANS, F., BEEUWSAERT M. & STEENLANT, J., Zelfredzaamheid in het Europees Kartelrecht, *Tijdschrift voor Privaatrecht* 2004, 993.

DAF/COMP(2005)18/03

YSEWYN, J. & CAMESASCA, P., Overzicht van rechtspraak van de Raad voor de Mededinging in 2001-2002, *Revue de droit commercial belge* 2004, p. 99.

YSEWYN, J. & FRANCHOO, T., De opschortingsverplichting in rook vervolgen?, *Revue de droit commercial belge* 2004, p. 1018.

ZONNEKEYN, G., De interpretatie van de opschortingsverplichting voor concentraties door het Hof van beroep te Brussel – een brug te ver?, *Tijdschrift voor Rechtspersoon en Vennootschap* 2004, p. 698-702.