# FRANCE

*1998*

## Summary

## 1. Changes to competition laws and policies adopted or envisaged

1. There were no legislative or regulatory changes to the provisions governing competition law in 1998. It should be noted, however, that special attention was paid to enforcement of the Fair Trading Act of 1 July 1996, which amended Title IV of the Ordinance of 1 December 1986 with respect both to trade practices carrying criminal penalties (involving invoicing, selling at a loss, resale price maintenance and term of payment) and to those covered by Article 36 and subject to civil jurisdiction (such as unlawful discrimination or refusal to deal).

## 2. Implementation of competition law and policy

### *2.1 Anti-competitive practices (agreements and abuse of dominant position)*

#### *2.1.1 Summary of the activities of the Directorate General for Competition, Consumer Affairs and Product Safety/Quality (DGCCRF)*

2. In 1998, the DGCCRF worked to uncover the most significant anticompetitive practices and conduct a policy of information and warning vis-à-vis parties that were engaged in behaviour detrimental to competition.

3. DGCCRF units found evidence of 278 instances of anticompetitive practices and initiated 187 investigations, 12 of which at the request of the Competition Council, leading to the preparation of 205 investigative reports. The Minister of the Economy made 30 referrals to the Competition Council under Article 11 of the Ordinance of 1 December 1986.

4. As in the previous year, the DGCCRF's efforts focused on anticompetitive practices **involving public procurement**. In particular, the DGCCRF made several referrals to the Competition Council and in some cases suggested that the public prosecutor's office file criminal charges.

5. **The water collection and distribution sector** also received special attention, with regard to improving the transparency of pricing, consumer information, oversight of public procurement and control over the outsourcing of public services. From the Paris Court of Appeal, the Minister of the Economy obtained the protective measures he was seeking so as to restore order to the water distribution market.

6. Lastly, the DGCCRF continued to monitor **sectors recently opened up to competition**, including the telecommunications and electricity industries.

### *2.1.2 Summary of the activities of the Competition Council*

7. In 1998, the Competition Council recorded 107 adjudicative referrals, including 28 that were accompanied by petitions for protective measures, and 29 requests for advisory opinions, for a total of 164 cases. The number of adjudicative referrals was up sharply from the previous year, due to a large increase in the number of referrals from businesses (up by 23 from 1997), *making the highest volume of such referrals since the Council's creation*.

8. Of the 29 recorded requests for advisory opinions, ten involved general competition issues and one was submitted by a court. The Minister of the Economy petitioned the Council for its opinion 18 times, six of which in respect of concentration transactions. The Council received three referrals from the Telecommunications Regulatory Authority. For the first time, an opinion was requested under Article 44, paragraph 3 of the Ordinance which provides, in the event of non-compliance with concentration-related decisions by the Minister of the Economy, that "the Minister of the Economy and the Minister for the relevant economic sector may, after consulting with the Competition Council and within the limits of the Council's opinion, impose a monetary penalty...".

9. The following table shows the number of referrals and requests for opinions since 1990.

| Referrals or requests | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|---|---|---|---|
| Adjudicative | 103 | 117 | 109 | 103 | 113 | 128 | 115 | 93 | 135 |
| Advisory | 22 | 12 | 12 | 24 | 27 | 19 | 27 | 27 | 29 |
| Total | 125 | 129 | 121 | 127 | 140 | 147 | 142 | 120 | 164 |

*Injunctions*

10. The Council held 89 sessions and rendered 109 decisions and 25 advisory opinions. Among the 109 adjudicative decisions, 32 involved the imposition of penalties or injunctions:

- in 17 of these cases, the Council imposed monetary penalties only;
- in four decisions, it issued injunctions only;
- in 11 decisions, penalties and injunctions were imposed.

11. Finally, the Council has, in two decisions, decided that they should be published.

*Protective measures*

12. Out of the 22 petitions for protective measures that were examined, three were granted. The others were denied, either because the basic conditions were not satisfied, or because they had accompanied referrals that were deemed fundamentally inadmissible.

*Penalties*

13. The number of businesses sanctioned was 76, and the fines against them totalled FF 90 million (€13.7 million). In addition, 14 trade organisations were sanctioned and fined a total of FF 3 million (€457 347).

14. The following table shows the main information concerning the penalties imposed by the Council over the past six years:

| | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|---|
| Number of decisions imposing penalties | 22 | 27 | 38 | 41 | 36 | 32 |
| Number of firms or groups of firms to be sanctioned | 69 | 119 | 163 | 99 | 82 | 76 |
| Fines (in French francs) | 109 746 500 | 68 895 000 | 478 105 500 | 105 044 849 | 161 900 500 | 90 073 000 |
| Number of trade organisations sanctioned | 7 | 28 | 23 | 14 | 39 | 14 |
| Fines (in French francs) | 750 000 | 7 845 000 | 3 077 000 | 1 272 000 | 2 522 500 | 3 002 000 |
| Total fines in French francs | 110 496 500 | 76 740 000 | 481 182 500 | 106 316 849 | 164 423 000 | 93 075 000 |
| Total fines in euros | 16 846 000 | 11 699 000 | 73 356 000 | 16 208 000 | 25 066 000 | 14 190 000 |

15. The proportion of the Council's decisions to be appealed to the Court of Appeal remained stable (30%), as did the proportion of decisions upheld on the merits by the Paris Court of Appeal (81%).

### *2.1.3 Summary of the activities of the Court of Appeal*

16. In 1998, the Court of Appeal handed down 36 judgements confirming the Competition Council's main decisions in respect of ministerial referrals.

17. The main sectors involved in the Court of Appeal's rulings were:

- Network industries: telecommunications, electricity;
- The service sector: lawyers, pharmacists.

18. The abuses of dominant positions sanctioned by the Court of Appeal involved former monopoly service providers [France Télécom, Électricité de France, PFG (Pompes Funèbres Générales)] and operators controlling essential resources for the production of drinking water (Suez Lyonnaise des Eaux).

19. Convictions for unlawful agreements involved primarily the ready-mix concrete sector, for dividing up a number of markets in the Provence-Alpes-Côte d'Azur region, and the organised professions (lawyers, pharmacists): *inter alia*, the Court convicted pharmacists who had organised a boycott of door-to-door marketing companies, and the Marseilles bar, which had circulated scales of lawyers' fees. Lastly, the Court also upheld the Competition Council's conviction of concerted practices between the building and public works federations of the departments of Isère and Savoie, which had blocked the pricing of services by temporary employment agencies.

20. In addition, the Court of Appeal upheld the conviction of the Héli Inter company for non-compliance with an injunction of the Competition Council, on the basis of Article 14 of the Ordinance.

## *2.2 Mergers and acquisitions*

### *2.2.1 DGCCRF intervention*

21. In 1998, there was a great deal of merger activity, as evidenced by the highly publicised wave of "mega-mergers".

**Over the course of 1998, notice was served of 28 concentration transactions.**

22. In two of these cases, notice was served after the deadline had passed (i.e. more than three months after the concentration transaction was completed), and one was not subject to control, since none of the relevant thresholds had been reached.

23. **Of the remaining 25 transactions, 14 were authorised unconditionally**, three were approved subject to commitments to restore effective competition (the commitments having been made by virtue of Article 40, i.e. at the time of the initial two-month review phase), and four others were referred to the Competition Council. There were two other such referrals—one for a transaction reported in 1997 and the other for a transaction that had not been reported.

24. **With regard to the three transactions that were authorised subject to commitments**, the commitments involved disposing of assets, refraining from pooling or combining the product lines of the merging firms and preservation of the quotas allotted to their competitors (in a regulated market).

25. **Out of the six concentration transactions to be referred to the Competition Council** in 1998, one was abandoned and two were still under review at the end of the year. The three remaining concentration transactions culminated in two authorisations (Casino/Franprix and Leader Price; CGE/Havas) and one refusal (Coca-Cola/Orangina).

26. **A seventh referral to the Council involved an alleged breach of a commitment** made in connection with the Auchan/Docks de France take-over. This was the first instance of enforcement of Article 44-3 of the Ordinance, which provides for the imposition of fines.

27. Lastly, a very large number of transactions were reviewed outside the formal notification framework: for each transaction reported, three others received a varying amount of review.

### *2.2.2 Competition Council intervention*

28. In 1998, the Council rendered four opinions involving business concentration upon referral by the Minister of the Economy. These four opinions were published in the DGCCRF's official journal, along with the decisions taken by the Minister.

29. The following table shows the yearly number of concentration-related opinions rendered by the Council upon ministerial referral.

| 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|
| 9 | 15 | 5 | 5 | 7 | 4 |

## 3. Changes to competition law or policy proposed by the Government

30. The DGCCRF played an active role in exploring ways to **reform public procurement law**, and in intensive interministerial efforts regarding the **draft Audio-visual Act**.

## 4. The role of competition authorities in formulating and implementing other measures, e.g. with regard to regulatory reform, trade policy and industrial policy

### *4.1 The role of the DGCCRF*

31. The main changes proposed by the Government, in association with competition authorities, involved the **telecommunications sector**. In addition, the DGCCRF helped prepare the legislative and regulatory framework for introducing competition to the **electricity, gas and postal sectors**.

### *4.2 The role of the Competition Council*

32. The Competition Council was asked repeatedly to provide opinions dealing with regulatory reform and how competition law should be applied to regulated activities. In this area, the Council handed down 21 opinions in 1998. Ten of these were in response to competition questions, of which three had been submitted by the Minister of the Economy and five by trade organisations and a federation of local authorities. Seven opinions were issued in respect of draft decrees at the Government's request. Lastly, the Council issued three opinions at the request of the Telecommunications Regulatory Authority (ART). Moreover, one of the opinions issued by the Council in 1996 was published in 1997.

33. The following table shows the number of opinions handed down in each of the past six years.

| Subject of the opinion | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|---|---|
| Draft decree regulating prices (Art. 1). | 1 | 1 | - | 1 | - | - |
| Bill instituting a regime to restrict competition (Art. 6) | - | 5 | 4 | 2 | 4 | 7 |
| Competition questions (Art. 5) | 4 | 5 | 9 | 6 | 11 | 10 |
| Compliance with commitments (Art. 44) | - | - | - | - | - | 1 |
| Draft exemption decree | - | - | - | 1 | - | - |
| Practices detected in connection with jurisdictional procedures (Art. 26) | 6 | 6 | 1 | 3 | 2 | - |
| Other (ART) | - | - | - | - | 2 | 3 |
| Total | 11 | 17 | 14 | 13 | 19 | 21 |

**Report**

## I. Changes or proposed changes to competition policy and legislation

### *1.1 Summary of new legislation on competition and related issues*

34. There were no legislative or regulatory changes involving competition law in 1998.

### *1.2. Other relevant measures taken in this area (including new guidelines)*

35. None.

### *1.3 Government proposals to change competition law and policy*

#### *1.3.3 Opening up monopolies and public enterprises to competition*

36. In 1998, the French Government continued to make preparations for a law that would transpose the EU Directive adopted in Brussels on 19 December 1996.

37. The aims of the French bill are to create a framework for effective competition, adopt the necessary regulations and institute suitable regulation of competition. This involves:

- defining the conditions of market entry for producers, with a compulsory authorisation mechanism and an optional bidding procedure mechanism, along with principles for consumer eligibility;
- pricing rules for activities that are still monopolies;
- technical and environmental regulations allowing any operator to do business in the market with transparency and with no discrimination whatsoever;
- mandatory separation of accounts for the generation, transmission and distribution of electricity, along with diversification of integrated electric companies;
- rules to ensure the independence of the grid manager, notwithstanding the fact that the grid manager remains a part of the integrated electric company Électricité de France (EDF);
- a definition of public service obligations;
- for grid access, a system for settling disputes between operators, featuring intervention by a regulatory authority, the Electricity Regulatory Board (CRE).

38. The CRE's administrative powers are also centred on problems of grid access and do not extend to all of the sector's activities. For example, authorisation to operate an electric power plant is issued by the Minister of Energy. Ultimate authority over the pricing of activities that are still monopolies is shared by the Minister of Energy and the Minister of the Economy.

39. In addition, the bill sets out in detail the interface between the sectoral powers of the CRE and those of the Competition Council. The CRE Chairman refers to the Competition Council those cases of abuse of dominant position and practices in restraint of competition of which he is aware in the electric power sector. Any other matter relevant to the Council's powers may also be referred to it for an opinion.

40. In addition, transmission over the electric power grid of electricity generated by independent suppliers, like any other economic activity, may give rise to disputes that do not lend themselves to analysis in terms of abuse of dominant position or anticompetitive agreements. It was to settle such routine disputes, involving straightforward individual interests and having no bearing on practices that affect the workings of the market, that the CRE was invested with adjudicative powers. The CRE will interpret legislation on grid access and will stipulate technical and financial conditions for dispute settlement in decisions that will state reasons and be notified to the parties.

41. It will be possible to appeal CRE decisions to the Paris Court of Appeal, which already has appellate jurisdiction over decisions of the Competition Council. It will therefore be possible to ensure coherency between decisions by the regulatory authority and those of the Council in the electric power sector.

42. In performing its traditional duties, the Competition Council will be able to draw on the Committee's technical expertise by consulting it with regard to competition disputes involving grid access, as well as any other matter involving the electric power sector.

43. Lastly, civil and commercial suits against electric power operators may be heard by the appropriate judicial courts, without prejudice to the jurisdiction of administrative judges in some cases.

### *3.1.2 Reform of public procurement law*

44. Work on a reform of public procurement law resumed on a new basis.

45. Aggregate goods and services purchased by government agencies is estimated at FF 740 billion (€112.81 billion) per year, or roughly 9% of GDP. The complexity of the current legal arrangements detracts from clarity and may facilitate practices that, by design or not, lie on the fringes of legality. This is why it was deemed necessary to conduct a thorough overhaul of public procurement law, in order to ensure its founding principles—free access to public contracts, equal treatment for prospective suppliers, and control over the use of public funds.

46. The ongoing reform is pursuing the following objectives:

- to make public procurement as accessible as possible to small and medium-sized enterprises (SMEs)—a dynamic and job-producing sector—through heightened competition;
- to bolster procedural transparency and enhance the legal security of buyers by strengthening competition and increasing the collegiality of decision-making, but also by making the rules clearer and simpler;
- to clarify the scope of application of renovated and simplified public procurement legislation, and delineate more sharply the borderlines with other means of intervention (outsourcing of public services);
- To enhance the efficiency of public procurement and public purchasing practices, through increased use of new information and communication technologies.

## 2. Implementation of competition laws and policy

### *2.1 Actions against anticompetitive practices, including agreements and abuses of dominant positions*

#### *2.1.1 Summary of the activities of the competition authorities*

##### 2.1.1.1 Summary of the activities of the DGCCRF

47. In 1998, the DGCCRF geared its action toward detecting the most significant anticompetitive practices and carried on a policy of issuing information and warnings to businesses that engaged in behaviour that was detrimental to free competition.

48. As in the previous year, one of the top priorities was to detect anticompetitive practices in **public procurement**. In particular, the Minister of the Economy referred matters to the Competition Council on a number of different occasions. In other cases, the DGCCRF proposed that the public prosecutor file criminal charges.

49. **The water production and distribution sector** also received special attention in a variety of areas, with enhancements to such areas as pricing transparency, consumer information, monitoring of public procurement and oversight over the outsourcing of public services. From the Paris Court of Appeal, the Minister of the Economy obtained the imposition of the protective measures he had requested so as to restore order to the water distribution market **(2)**.

50. Lastly, the DGCCRF put special emphasis on **sectors recently opened to competition**, such as telecommunications and electricity **(3)**.

Public procurement

*i)* Prevention

51. A precise definition of the community's need, appropriate publicity, giving firms enough time to prepare bids, and contracts for periods short enough to preserve government decision-making power over procurement policy and adapt it to changing economic and social trends are the chief means of maximising value for money. The DGCCRF advises public purchasing agents so that they can exploit competition to the fullest possible extent, in the public's interest.

*ii)* Enforcement

52. With a mandate to ensure fair competitive access to public procurement contracts, the DGCCRF exercises the powers vested in it by the Ordinance of 1 December 1986 to seek out and report anticompetitive practices on the part of bidders.

53. To this end, and in their capacity as representatives of the Minister for competition issues, DGCCRF agents sit on Contracts Boards and then conduct extensive investigations of certain controlled contracts, using the powers given to them under Articles 45-48 and 51 of that same Ordinance.

| Year | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|
| Instances of participation in Contracts Boards | 17 887 | 20 092 | 21 422 | 23 523 |

54. In 1998, DGCCRF agents also reviewed 11 510 public procurement case files submitted to them by prefects for expert opinions in connection with legality checks, along with 973 files concerning the outsourcing of public services.

55. Evidence of anticompetitive practices uncovered during the review of these public procurement and public service outsourcing files accounted for a substantial proportion of referrals to the Competition Council (17 out of 30 in 1998).

56. In addition, whenever an investigation uncovers a violation of Article 17 of the 1986 Ordinance prohibiting an individual's decisive personal involvement in the conception, organisation or execution of an anticompetitive practice, the case file is forwarded to the public prosecutor. Twenty-odd such referrals for prosecution under Article 17 were made in 1998.

57. Apart from referrals to the Competition Council and cases forwarded for prosecution for violation of Article 17 of the Ordinance of 1 December 1986, audits of public procurement and outsourcing of public services in 1998 gave rise to:

- 4 083 letters to prefects, 849 of which citing serious irregularities and proposing that the prefects refer the cases in question to the Administrative Tribunal;
- 17 referrals to regional audit bodies (*Chambres régionales de comptes*);
- 76 referrals to public prosecutors, under Article 40 of the Code of Criminal Procedure, for charges of improper granting or taking of benefits.

Monitoring of transparency and competition in the water and wastewater collection and treatment sectors

*i)* Context

58. Operations in these sectors show sharply rising prices and a lack of competition between the firms involved, in respect of both the outsourcing of public services and public procurement.

59. Since 1992, the average water bill has risen by 47%, while inflation has been only 9.6%. The increase has been far steeper for the purification component (up 72%) than for water itself (up 28%), and it applies equally whether services are government-operated or contracted out to the private sector.

60. There are two explanations for this. First, a direct consequence of the mounting volume of capital spending on purification programmes, in association with the water agencies, has been rate increases both for purification services and for water agencies. Agency rates more than doubled between 1992 and 1998, to 17% of the water bill. Furthermore, competition has not been working very well, since it depends in part on the number of players, which in water supply and purification markets is limited. Moreover, the market is largely locked in because of the large number of long-term concessions.

61. Even so, there are two factors that could enhance competition.

62. Act No. 93-122 of 29 January 1993 (the so-called "Sapin law") now requires local authorities wishing to contract out public services to advertise so as to attract a number of competing bids. The law should gradually stimulate competition as existing contracts come up for renewal.

63. Local authorities can also help improve the competitive situation by tightening their control over concessionary water and water purification services or over the bidding process. In some cases they may consider putting services back under government control, thereby increasing the "competitive pressure" on private contractors when there are no potential rivals.

*ii)* Actions taken

64. The actions taken have involved improving transparency and monitoring water markets.

*a)* Improving transparency

65. Each year, the DGCCRF takes a survey of water and water purification prices among 738 local authorities representing a population of over 23 million. Data is collected on price levels nation-wide, by basin, by department and by type of operation. The survey was updated in 1998 in order to be published, as the previous surveys had been.

66. In addition, efforts to improve consumer information were continued. Following the enactment of Act No. 92-3 of 3 January 1992, setting rules for the pricing of water distribution and incorporating actual consumption, measures were taken to improve the clarity of water bills. An order of 10 July 1996 on invoicing in water distribution and wastewater collection and treatment set forth how bills should be presented. A circular of 14 December 1998 specified how the order should be applied.

*b)* Monitoring of the water purification and distribution markets

67. These markets are monitored as a result of DGCCRF's regular participation in public procurement and public service outsourcing committees. In addition, surveys are conducted regularly. In 1998, some ten surveys on outsourcing and works contracts in the water and purification sector were undertaken or concluded. One of these surveys led to a referral to the Competition Council, resulting in protective measures being ordered by the Paris Court of Appeal (in respect of the water distribution market in the department of Essonne).

Monitoring of sectors recently (or about to be) opened to competition

68. In 1998, there was a new opening up of network industries to competition, in the telecommunications sectors.

69. The fixed telephony market was effectively opened on 1 January 1998, and preparations to transpose the EU Directive opening the market for electrical supplies to competition continued all year long, culminating in the submission of a government bill on 9 December 1998.

70. The DGCCRF is helping to prepare the legislative and regulatory frameworks for the introduction of competition to the electricity, gas and postal sectors. It helps ensure that regulatory mechanisms function smoothly once they are in place.

*i)* Telecommunications

71. In this sector, three aspects of competition were watched especially closely:

*a)* Rates

72. Rates for services not yet facing effective competition are still subject to prior approval. Together with the State Secretariat for Industry, and in close co-operation with the Telecommunications Regulatory Authority (ART), the DGCCRF has taken on responsibility for monitoring rates. Out of more than one hundred rate proposals submitted by the utility in 1998, only eight prompted unfavourable opinions from the ART. In four of these cases, the Ministers suspended the proposals in question and, after additional work or new proposals from France Télécom, ART was able to make a favourable ruling. In all cases, market operators can subsequently make a referral to the Competition Council. This dual mechanism ensures effectiveness, speed and protection of competitors' interests in an area that is crucial to them.

*b)* Practices

73. The Regulation of Telecommunications Act (LRT) confirms that ordinary competition law is applicable to the telecommunications sector, and it requires the ART to refer to the Competition Council all cases falling within the Council's jurisdiction. LRT, which imposes a reciprocal consultation requirement on the two independent authorities, confirms the Competition Council's advisory role in the preparation of regulations affecting competition. The Council has repeatedly made its views known on practices involving the telecommunications sector *(see summary of those opinions below)*.

74. The Government also asked the Competition Council for its advice regarding the intervention of local authorities in the telecommunications sector, and it questioned ART regarding France Télécom's individualised offers. Lastly, as part of its customary function of protecting competition, the DGCCRF initiated surveys of a number of market segments, as it does in other sectors of the economy.

*c)* Consumer protection

75. To protect consumers, it was decided to create a working group of the National Consumer Council on mobile telephony, whereas the Unfair Clauses Committee made a recommendation on the contents of subscription contracts being offered to consumers by the various operators and marketers of mobile telephone services.

*ii)* Electricity

76. An essential activity in 1998 was the preparation, in association with other relevant ministerial departments, of the Government's draft legislation to transpose the EU Directive *(see above)*. In 1998, given the prospect of a newly competitive market, the DGCCRF kept close watch on three aspects related to competition in the electric power industry:

*a)* Electricity rates

77. Since 1986, prices for electricity—a monopoly service—have been governed on the basis of Article 1, paragraph 2 of the Ordinance of 1 December 1986.

78. This involves annual revision of the average rate, consistent with a target reduction (14% over four years) which is itself shaped by industry cost trends, a goal for improving corporate productivity and projections of general economic trends. The main objective of the measure, as with any price controls on monopoly services, is to limit the supplier's potential economic rent and thus protect its customers and the rest of the economy. In return, the electric company has wider latitude to adjust its rate structure, based on the principle of development costs.

79. This approach was adopted once again for the 1998 rate adjustments, but the effects induced by prospects of impending competition were already perceptible.

80. Significant changes in the structure and level of rates (a decrease and partial modulation) led to studies of whether the changes were compatible with the principles of sound competition. A trade union petitioned the Competition Council for an opinion, giving the Council an opportunity to carry out an initial analysis of the criteria applicable to prices and rates in the context of a competitive sector operating alongside a captive one. The draft Electricity Act sets forth the principle of continued price control on monopoly activities and pricing freedom for competitive services to ensure that there are no cross-subsidies between the two sectors. A great deal of thought must still be given to exactly how these measures should be implemented.

*b)* Rates for electric power transmission

81. Apart from the pricing of electricity itself, work was begun in late 1998 with the power company and the relevant government agencies on transmission pricing and terms of grid access for independent producers and eligible customers. Under the draft legislation, ultimate jurisdiction over these rates lies with the Government, the service in question being a monopoly.

*c)* Organisation of regulation

82. It was decided to institute a sectoral regulator and, at the same time, to invoke conventional mechanisms to regulate competition in these markets. The twofold task of the Electricity Regulatory Board is to set and monitor the terms of access to the transmission network in order to guarantee the rights of competitors, and to develop high-level expertise on a number of other regulatory issues, in order to furnish opinions to Government agencies and the Competition Council.

*d)* Control over diversification of the activities of the former monopoly service provider

83. Lastly, pending the effective introduction of competition, the DGCCRF continued to make regular controls through surveys in the sector. In addition to the usual topics (public procurement, marketing conditions), the emphasis has for several years now been put on controlling the diversification of activities by the public utility and monitoring its marketing conditions.

2.1.1.2 Summary of activities of the Competition Council

84. In 27 of the decisions handed down by the Council in 1998, the allegations centred wholly or in part on agreements, the intended or effective result of which was to prevent, restrict or distort competition in a given market. Fourteen of the Council's decisions cited abuses of dominant positions. In addition, the Council issued six decisions on practices that the plaintiffs claimed were in violation of Article 10-1 of the Ordinance prohibiting predatory pricing.

2.1.1.2.1 Agreements

*i)* Agreements in connection with public or private invitations to tender

85. The Council reviewed nine cases of concerted action or agreements in connection with public or private **invitations to tender.** In each case, bidders had exchanged information before submitting bids in order jointly to determine the lowest bidder and thus the winner of the contract, and to organise the submission of covering bids by the other firms in order to thwart the competitive process.

*ii)* Agreements on prices or margins

86. In eight cases, trade organisations either initiated or were associated with agreements that in most instances took the form of fee scales that they had drawn up and circulated. It was on these grounds that the bars of Alpes-de-Haute Provence, Aurillac, Colmar, Grenoble and Marseilles were sanctioned.

*iii)* Barriers to market access and predatory practices

87. In five cases, agreements concluded with the intent of **driving a competitor out of the market** were sanctioned. One case—Aéroports de Paris - Groupe Air France—warrants special mention, *inter alia* because it involved the air transport sector, in which the volume of international trade is substantial. The decision is not final, however, since it is under appeal.

88. The Council sanctioned Aéroports de Paris and Groupe Air France firms for having discriminated against other companies.

89. The Council ruled on practices in the market for ground services and in that of the provision of space for essential airline activities by Aéroports de Paris (ADP) at Orly Airport.

90. Referring to two decisions by the European Commission, the Council made a distinction, in respect of ADP's assigned tasks, between the monitoring and regulation of traffic, police and security matters, on the one hand, and economic services provided for a fee, *inter alia* to airlines. Accordingly, ADP's provision, for a fee, of space and airport infrastructure was deemed a service activity under Article 53 of the Ordinance.

91. The Council noted that ADP had refused to allow the firm TAT to operate new services from Orly Airport's West Terminal, whereas at that same time Air France, Air Inter and AOM had all been allowed to do so. In addition, ADP had forced TAT to make exclusive use of ADP staff for operating gangways following the airline's transfer to Orly South, whereas TAT had its own staff, and that the same requirement had not been imposed on Air France when it was operating from Orly South. ADP's discriminatory behaviour vis-à-vis TAT was deemed to constitute an abuse of dominant position.

92. In the same case, the Council also reviewed the circumstances surrounding the consolidation of Groupe Air France's operations at Orly West Terminal and the transfer of a number of companies to Orly South.

93. It was deemed lawful for an airport operator and a given airline to examine jointly how operating conditions could be improved in order to optimise resource allocation, based in particular on customer needs, but only if airport facilities were made available to all companies on an equal competitive basis. In this case, however, the consolidation of Groupe Air France companies at Orly West gave those airlines an unfair competitive advantage and therefore artificially restrained the development of other companies. The Council found that Compagnie Nationale Air France's collusion with ADP on behalf of all Groupe Air France companies was anticompetitive.

94. The Council imposed fines of FF 10 million (€1.52 million) on ADP and Air France (Decision 98-D-34 of 2 June 1998).

95. In a case involving the measurement of media audiences and advertising reach, the Council found that the firms Médiamétrie and Secodip, acting in a concerted manner within the GIE Audipub consortium, had adopted a business policy that lacked transparency and involved stalling tactics. As a result, the Vérimédia company had been unable to obtain the audience data and the products needed to expand its

business. Such collusive practices, restricting access to the market for expert media intelligence, were sanctioned.

*iv)* Boycotts

96. The Council also looked at exclusion practices by **trade organisations**. It sanctioned the boycotts organised by trade associations of biologist-physicians against the manufacturers of reactants used in biological analyses. In a case involving fencing contests, the organising committee of the National Federation of University Sport, after initially allowing a supplier of fencing shoes to operate a trade stand at a fencing contest, had withdrawn its authorisation at the request of Prieur Sports, a firm that had demanded that its exclusivity be maintained. Lastly, the Council noted that the pharmacists' union of the department of Essonne had organised to put pressure on a pharmacist who wanted to open her business at hours not corresponding to those generally prevailing in her particular sector.

*v)* Vertical agreements

97. In a number of cases that it examined in 1998, the Council ruled on **relations between a supplier and its distributors**, in connection with distribution agreements and trade co-operation agreements as well.

98. Reviews of two exclusive distribution contracts—one involving medical equipment, the other in the special leaded glass sector—gave the Council an opportunity to reiterate that a supplier using exclusive distributors cannot prohibit those distributors from responding to solicitations from customers outside their exclusive geographical area, provided that they engage in no active marketing activities outside that area.

99. Based on principles laid down in previous years, the Council sanctioned Société Gaston Jaunet Diffusion for discrimination in the application of its criteria for selecting retail outlets.

100. In its decision regarding competitive conditions in the record industry, the Council looked at the trade co-operation agreements set up by producers of sound recordings. This case warrants elaboration, because the practices in question took place in an industry with global players.

101. One of the clauses in these agreements made the granting and retention of the benefits of trade co-operation conditional upon compliance with intellectual property rights. The Council found that such a clause constituted expression of a right and was not anticompetitive *per se*, but that this was not the case when such a clause was not used for the intended purpose, but rather to institute anticompetitive practices under threat of contract termination.

102. Citing this principle, the Council exempted the corresponding clauses in the contracts of BMG France, EMI France, Groupe Virgin Disques, Warner Music France and East West France. However, it sanctioned Polygram, whose contract combined a lawful reminder of intellectual property rights with an unlawful prohibition against procuring Polygram products from any supplier other than Polygram. Given the nation-wide geographic scope of Polygram's territorial exclusivity, the provision would dissuade distributors from purchasing elsewhere within the European Union.

103. The Council also disallowed the contract clauses by which Polygram, BMG and Groupe Virgin Disques made the return of unsold goods conditional upon exclusive supply arrangements. It rejected the publishers' arguments that the right of return constituted an extremely important economic advantage for the retailer, and that the sole purpose of the clause was to address the practical difficulty of checking that the products they took back had in fact been sold by them in the first place. The Council judged that these legitimate concerns of the publishers could not justify an exclusive supply requirement covering the entire

range, since such a requirement would dissuade distributors from buying in another Member State of the European Union.

104. Lastly, the Council struck down the exclusive supply clauses in contracts of the firms Sony Music and EMI France. It considered that the publishers' legitimate concern with combating counterfeit recordings could not justify the implementation of anticompetitive practices when there existed appropriate legal remedies—remedies that were in fact being used by the firms in question. A number of the letters produced during the investigation showed that the publishers had repeatedly pressured retailers not to make purchases in other European Union Member States, where prices were frequently more favourable, so that they could lower their selling prices in France.

105. The Council imposed fines of FF 2 million on Polygram France, FF 1 million on Sony Music Entertainment (France), FF 500 000 (€76 224) on EMI France and FF 300 000 (€45 734) on Groupe Virgin Disques and on BMG France (Decision 98-D-76 of 9 December 1998).

2.1.1.2.2 Abuses of dominant position

106. Out of the 14 cases reviewed in 1998, eight resulted in sanctions for anticompetitive abuse of dominant position. Two cases warrant particular emphasis: one concerning the supply of street furniture to local authorities; the other involving contracts for the pre-purchase of television broadcasting rights for original French-language films.

*i)* Contracts proposed to local authorities by the Decaux group

107. In one case in this sector, Decaux group companies began by challenging the Council's jurisdiction. They contended that their alleged practices could not exist independently of decisions by local authorities to commission Decaux to supply them with street furniture and stressed that to challenge the clauses of these contracts, which were of an administrative nature, would invalidate the decisions to approve the contracts, which were subject to administrative jurisdiction alone. The Council held that the activity engaged in by Decaux group companies, whether it be to supply street furniture to local authorities or to market advertising space on that same furniture, was a service activity as defined by Article 53 of the Ordinance of 1 December 1986, and that the fact that the activity was carried out in the public domain and involved the conclusion of administrative contracts with government authorities had no bearing on its commercial nature. The Council did, however, acknowledge that it had no authority to invalidate the agreements concluded by the Decaux group companies with the local authorities, as the referring organisation had requested.

108. With regards to the merits, the Council found that the cumulative effect of the clauses of the contracts offered by the Decaux group companies to local authorities wishing to procure street furniture enabled the companies to avoid facing competition and to retain an exclusive on installation of the main types of street furniture for periods of time far longer than those set in the initial contracts. Such practices artificially restrained competition. Furthermore, being implemented by an operator that occupied a dominant position in a substantial part of the common market, they could have prevented firms from other European Union countries from having access to the domestic market and were therefore prohibited under Article 86 of the Treaty of Rome.

109. Accordingly, the Council enjoined the Decaux group companies to cease proposing the clauses that the Council had found anticompetitive in its contracts with local authorities: the clause granting the contracting Decaux group company a right of priority for the installation of street furniture; the one stipulating that items installed while a contract was in progress would have a contractual duration different from that of the contract itself and, lastly, the tacit renewal clause (Decision 98-D-52 of 7 July 1998).

*ii)* Canal Plus's pre-purchase contracts

110. The firm Canal Plus is required by the laws and agreements that govern it to earmark 9% of its revenue to purchase television broadcasting rights for original French-language films.

111. To fulfil that obligation, the company pre-purchases television broadcasting rights from the producers of such films, and in return it gets priority and exclusivity on subscription TV broadcasting rights, from the time the contract is signed until two years after the film is released. Canal Plus does not exercise its broadcasting rights until a year after the film has been released in cinemas. But Canal Plus's contracts with the producers prevent films from being used for any other form of pay television, and in particular on a pay-per-view basis, over the life of the contract.

112. Since the advent of digital television, the pay TV market has expanded, in particular with the emergence of a new form of programme distribution—pay-per-view, with allows viewers to select the programmes they wish to watch and to pay for them and them alone. This form of distribution, which for the moment is available only to digital TV customers, is in competition with flat-rate subscriptions. In both cases, the success of pay TV depends on an adequate proportion of films that are as recent as possible, while at the same time audio-visual communication services are required to have original French-language works account for at least 40% of their programming.

113. The exclusivity and priority rights that Canal Plus secures for pay television broadcasting in general apply to 80% of the French films produced each year. And Canal Plus refuses to waive those rights whenever another broadcaster so requests. As a result, operators who would like to expand the pay-per-view market are in most cases denied access to the most recent films, which are nonetheless an essential key to their development.

114. The Competition Council considered that this practice, which did not stem directly from Canal Plus's obligations to help finance French cinematography, constituted an abuse of the company's dominant position in the pay TV market and the market for television broadcasting rights for recent French films.

115. The Competition Council enjoined Canal Plus to cease making the pre-purchase of exclusive broadcasting rights in respect of subscription television subject to the condition that the producer agree not to sell pay-per-view broadcasting rights to any other operator during the period for which Canal Plus enjoys exclusivity, and to amend its pre-purchase contracts accordingly. It imposed a fine of FF 10 million (€1.52 million) on Canal Plus (Decision 98-D-70 of 24 November 1998).

116. Other cases involved the entrance or preservation of an emerging competitor in a market. In the comté and emmental cheese-making sector, the firm Châlon-Mégard was founded on an exclusivity agreement with a manufacturer of patented Doryl-brand moulds, which agreed not to supply any of the firm's competitors. Similarly, in the funeral services sector, Pompes Funèbres du Sud-Est was sanctioned for having operated the mortuary in Tarascon in a way that misled families about the distinction between the mortuary's public services and the company's own commercial activity. Lastly, in the area of sport, the Fencing Federation's refusals to allow a manufacturer of fencing shoes to operate a stand at the events it organised and to post the supplier's details on its Minitel server were deemed to impede the supplier's access to the market for fencing shoes.

117. In addition, in a case involving airport infrastructure and ground services, as cited above, the discriminatory behaviour of Aéroports de Paris towards the airline TAT was found to be an abuse of dominant position. Similarly, in the street furniture advertising market, Groupe Decaux had engaged in practices aimed at shielding its companies from competition. In a case involving the marketing of lists of telephone subscribers, it was found that France Télécom had engaged in price discrimination in the

"downstream" market for market research files by charging competitors more than it charged itself for access to the information it administered. In the waste treatment industry, Société Routière de l'Est Parisien, a processor of household waste, had charged preferential rates, receiving nothing in return, to businesses in the same group to which it belonged. Such discriminatory practices were found to give group businesses an artificial advantage over their competitors. Lastly, the agricultural co-operative that held the legal monopoly on the artificial insemination of cattle in the department of Moselle had artificially tied a service for which it held a monopoly to a free-market service, thereby dissuading cattle farmers from contacting another semen supplier and comparing prices.

2.1.1.2.3 Predatory pricing

118. Out of the six cases reviewed in 1998, four looked for the first time at promotional offers involving compact disks.

119. On four occasions, the Minister referred cases of disk promotions to the Council: three involving hypermarkets on the outskirts of Le Havre, and the fourth involving a Carrefour hypermarket in the department of Essonne.

120. After checking, pursuant to the methodology stipulated in the opinion of 8 July 1997, that the imbalance between the distributors that initiated the promotion (Espace Culturel E. Leclerc, Auchan, Mammouth and Carrefour) and the distributors likely to suffer the effects thereof (L'Audito in Le Havre and Madison in Essonne), and the length of time involved, warranted a review of the promotional prices, the Council undertook a three-stage analysis: it first ascertained the relevant variable costs, it then determined total average costs, and lastly it examined whether the pricing involved could be considered predatory.

121. Out of all of the checks carried out, it was found that a majority of the disks had been sold at prices greater than the purchase price, and that the others had been sold at cost. The Council concluded that the disks had been sold at a level that covered their purchase price.

122. The price checks also showed that a number of disks had been offered for sale at prices lower than average total costs. However, in the absence of factual information and accounting data that established that the pricing involved was intentionally or effectively predatory, the Council ruled, in the four cases reviewed, that the prices in question had not been such as to drive L'Audito and Madison out of the market.

2.1.1.2.4 Protective measures

123. In 1998, the Council handed down five decisions regarding protective measures, including one involving the conditions for Internet access that France Télécom had offered schools.

*i)* Conditions for ordering protective measures

124. The circumstances under which the Competition Council may order protective measures are stipulated by Article 12 of the Ordinance and by Articles 5 and 12 of the Decree of 29 December 1986.

125. Under Article 12 of the Ordinance, the Council may, after hearing the parties involved and the Government Commissioner, take the protective measures sought by the Minister of the Economy, persons cited in Article 5, paragraph 2 of the Ordinance or by the companies. Such measures may be imposed only if the incriminated practices inflict serious and immediate harm on the general economy, the industry involved, consumers or the petitioning firm. They may include suspension of the practice in question, along with an injunction for the parties to return to the prior state. They must be limited strictly to a

necessary emergency response. A request for protective measures is admissible only if submitted in conjunction with a referral on the merits of the case.

126. In order for the Council to review a petition for protective measures, the referral on merits to which the petition is an adjunct must not be inadmissible under Article 19 of the Ordinance. Under the Article, the Competition Council may rule, stating the grounds for its decision, that a referral is inadmissible if it considers that the facts cited do not fall within its jurisdiction or are not sufficiently supported. In this case, the Council, in the same decision, declares the referral inadmissible and denies the petition for protective measures. In 1998, the Council made five such decisions. If the Council considers, pending investigation as to the merits, that the alleged practices are apt to fall within the scope of Articles 7, 8 or 10-1 of the Ordinance, it then examines the petition for protective measures. There were 17 such cases in 1998.

*ii)* The conditions for Internet access offered to schools by France Télécom

127. The French Association of Private Telecommunications Operators (AFOTP), whose member operators include Cégétel Entreprises and Bouygues Télécom, denounced the practices of France Télécom, which in their opinion prevented the members of the Association from competing with France Télécom on Internet access for schools, thereby excluding them from the market. For AFOTP, this exclusion resulted, first, from the fact that to compete with France Télécom private operators had to offer a package that for the vast majority of schools comprised interconnection with France Télécom's local telephone network, long-distance data transmission and Internet access, and, second, from the fact that France Télécom's charges for interconnection with the local network were higher than what the firm had offered the Government for all Internet access services for schools on a flat-rate basis of 1 900 hours of connection per year and per school.

128. The Council, noting that the Telecommunications Regulatory Authority had itself issued an unfavourable opinion on France Télécom's offer, found AFOPT's referral admissible and stated that it could not be ruled out that France Télécom's package, as outlined above, might constitute an abuse of dominant position in local telephony covered by the 1986 Ordinance on freedom of pricing and competition and the Treaty of Rome.

129. In addition, the Council held that the existence—if established—of practices apt to eliminate all competition in providing schools with Internet access would be a particularly serious matter. It also noted that the Minister of the Economy, Finance and Industry, and the Secretary of State for Industry had wanted there to be competition. In light of the fact that the Government's Programme of Action called for the initiation of a dialogue at school board meetings before the summer of 1998, the Council deemed that the situation was an emergency requiring the adoption of temporary measures.

130. The Council therefore enjoined France Télécom to suspend the application of its proposed pricing until it offered long-distance telephone operators specific and non-discriminatory conditions for interconnection with its local telecommunications network for Internet access for schools.

131. Since then, the various operators have arrived at a solution (Decision 98-MC-03 of 19 May 1998).

### *2.1.2 Court decisions*

#### 2.1.2.1 Summary of decisions by the Paris Court of Appeal

132. In 1998, the Paris Court of Appeal, which has appellate jurisdiction over decisions of the Competition Council, rendered 36 orders in respect of appeals against the Council's decisions.

133. Of the 36 orders, one was a committal order following an invalidation ruling by the Cour de Cassation (the supreme French jurisdiction for appeals on points of law). Most of these orders (26) confirmed the Council's decisions. Only three invalidated them, and six struck down particular elements. Of the 35 orders, it should also be noted that 12 are being appealed to the Cour de Cassation on points of law.

The main sectors concerned by Court of Appeal rulings were:

- network industries: electricity and telecommunications;
- service providers: pharmacists, lawyers.

134. In addition, the Minister received confirmation of some important decisions that had been made by the Competition Council in 1997 after ministerial referrals: in the temporary employment sector, in the departments of Isère and Savoie, in connection with work carried out in preparation for the 1992 Winter Olympics in Albertville; and in the ready-mix concrete industry in the Provence-Alpes-Côte d'Azur region, because of market sharing and pricing agreements designed to eliminate competitors or limit the access of new players. Lastly, three orders of the Court of Appeal dealt with the funeral services sector.

135. In response to a referral by Compagnie Générale de Chauffe, the Competition Council had ruled on 10 December 1996 that Électricité de France (EDF) had abused its dominant position, in violation of Article 8 of the Ordinance of 1986.

136. In support of an action to void before the Paris Court of Appeal, the public utility contended that the Council had improperly assumed the right to judge the legality of administrative acts when it failed to acknowledge its lack of jurisdiction, that there was no competitive electricity market and that the practices in question had contributed to economic progress.

137. In a ruling of 27 January 1998, the Paris Court of Appeal upheld the jurisdiction of the Competition Council and essentially confirmed the Council's decision.

138. It pointed out that the generation of electric power for purchase by EDF, not as final buyer but as an intermediary, in order to market it to users in the industrial, service and household sectors, was an economic activity falling within the scope of the Ordinance. The Court noted that there was competition between EDF and independent producers, notwithstanding the public utility's monopoly on the purchase of private production, which necessarily had an effect on the final cost of energy, reflecting the competitiveness of the various generating methods and the capital investment that EDF did not need to make as a result.

139. The Court found that EDF had acted improperly, and outside all regulatory limits, in order to protect its dominant position in electric power generation. It confirmed that the intent and the effect of the incriminated practices had been to restrain competition in the market in question, by restricting competition from technical resources that could help to lower prices by restructuring rates.

140. However, the Court held that publication of the decision in the form of excerpts in EDF's annual report, rather than the complete publication sought by the Council, was sufficient.

141. Following a referral by British Telecom-France, the Competition Council had on 1 July 1997 imposed fines of FF 20 million (€3.04 million) on France Télécom and FF 10 million (€1.52 million) on its data transmission subsidiary, Transpac, under Articles 85 and 86 of the Treaty of Rome and Articles 7 and 8 of the Ordinance of 1 December 1986. France Télécom and Transpac appealed.

142. In a ruling of 19 May 1998, the Paris Court of Appeal rejected all of the appellants' claims, confirming the Competition Council's decision in full. Furthermore, it stiffened the fines for France Télécom and Transpac by ordering them to pay FF 100 000 (€15 244) to British Telecom-France under Article 700 of the NCPC.

143. Suez-Lyonnaise des Eaux (SLE), in a dominant position and with essential resources for the production of drinking water in three communes in the department of Essonne, had refused to disclose its wholesale selling price for water, which was indispensable for access to the distribution market. By so doing, it prevented its competitors from participating normally in competitive bidding for drinking water distribution organised by the communes.

144. The Minister of the Economy had made a referral to the Competition Council for abuse of dominant position. He petitioned for protective measures to enjoin SLE to disclose its wholesale selling price for drinking water, established in an objective and non-discriminatory manner, upon request to any third party wishing to take part in competitive bidding procedures.

145. In addition, the Minister asked the Council to enjoin SLE to continue to distribute drinking water in the said communes under the conditions stipulated in the riders currently in force until such time as a new concessionaire was selected on the basis of competitive bidding or, failing that, until the Council ruled on the merits of the case.

146. The Competition Council had declared the referral admissible, finding that it could not be ruled out that SLE's refusal to disclose its terms for wholesale drinking water sales to its competitors, and its price level to a number of communities, might constitute an abuse of dominant position which was prohibited under Article 8 of the Ordinance. However, it ruled that the practices in question were not sufficiently serious to warrant protective measures.

147. In a ruling of 29 June 1998, the Paris Court of Appeal[1] reversed the Competition Council's decision denying the petition for protective measures under Article 12 of the Ordinance of 1 December 1986. It enjoined SLE to establish a wholesale price for drinking water based solely on its production costs and to disclose it upon request to any third party wishing to take part in the competitive bidding organised by the communes in question.

148. LES POMPES FUNÈBRES GÉNÉRALES (PFG) Ile-de-France were the licensees for funeral arrangements (other than religious services) for almost all the communes of the department of La Seine-Saint-Denis. As such they launched an advertising campaign in 1994 with the slogan "*stop aux mensonges*" (stop the lies) designed to convince the public that only their establishments were able to offer a high-quality service at moderate cost.

149. On 29 April 1997 the Competition Council imposed a fine of FF 200 000 (€30 489) on PFG Ile-de France for practices prohibited by Article 8 of the Ordinance of 1 December 1986 (abuse of dominant position).

150. The Paris Court of Appeal[2] confirmed the Council's decision, finding that this behaviour constituted a disparagement of competitors such as to distort competition.

151. The facts of this case are that the National Council of the Order of Pharmacists issued warnings to dispensing pharmacists against firms undertaking home delivery of medicines. Certain regional councils passed on these warnings to their members and to firms providing this service, and dispensing pharmacists refused to supply home-delivery firms with medicines.

152. In a ruling dated 10 February 1998, with an amendment dated 3 March, the Paris Court of Appeal[3] pointed out that home delivery of medicines is not an activity solely reserved for pharmacists: it is consonant with the provisions of Article L.589-2 of the Public Health Code and may be freely practised, subject to the conditions specified by the Code, by persons other than dispensing pharmacists.

153. The Court accordingly confirmed the decision of the Competition Council and the amount of the penalties (FF 300 000 or €45 734) imposed by the latter on the National Council of the Order of Pharmacists, and ordered that the decision be published in the pharmacists' journal "Quotidien du Pharmacien".

154. The facts of this case are that the Association of Pharmacists of Aveyron refused the request of an inter-trade mutual insurance body, Société Mutualiste Interprofessionnelle (SMIP), to subscribe to a third party payment covenant entered into by the aforementioned association, the state health insurance office and back-up health insurance bodies. SMIP members were thus unable to benefit from third-party payment of medical costs.

155. On 17 March 1998 the Paris Court of Appeal upheld the decision of the Competition Council ordering the Association of Pharmacists of Aveyron to cease all discrimination between supplementary health insurance bodies and imposing a fine of FF 25 000 (€3 811). The Court also ordered the Association to pay FF 12 000 (€1 829) in compensation to SMIP pursuant to Article 700 NCPC.

156. As in 1997, when it upheld the decision delivered by the Competition Council against the practices of the Orders of Lawyers of Tarascon and Quimper in drawing up and circulating fee schedules, the Paris Court of Appeal[4] stated in a ruling dated 10 November 1998 that such practices infringe the provisions of Article 7 of the Ordinance. It found that the document in the present case,

189. This principle is applied very strictly in the case of public procurement: the rules established by the Ordinance may in no event be infringed, even if infringement would result in a profit for the public entity concerned, notably in the case of a bid lower than the cut-off price set by the authorities.

190. A relevant decision in this regard was taken by the Nice administrative court on 9 November 1998, which disallowed a contract between a local authority and an association of eight firms, since the clauses of the contract had the effect of placing the eight contracting parties in a situation of unlawful collusion (in violation of Article 7 of the Ordinance of 1 December 1986).

191. For the first time an administrative court laid down the principle of the right to compensation for procurement agencies injured by anti-competitive practices on the part of enterprises already fined by the Competition Council. This was the case in two judgements by the Paris administrative court on 15 December 1998 concerning the SNCF (French national railways).

192. In the first of these judgements the court ordered the enterprises guilty of anti-competitive practices to return to the SNCF the difference between the excessive price paid and the price that would have been determined by free competition. The SNCF thus received FF 425 million (€64.79 million).

193. In its second judgement, however, the court disallowed the French railways' request for compensation, since the SNCF had known about the investigations into the existence of a cartel and had not taken steps to avoid an anti-competitive practice which, although not yet proven, could be surmised to exist on the strength of precise corroborative evidence.

194. For the first time, the Conseil d'État examined an appeal against a decision to prohibit a concentration transaction (see 2.2.1.2. below, COCA-COLA/ORANGINA).

## *2.2. Mergers and acquisitions*

### *2.2.1. Operations dealt with by the DGCCRF*

#### *2.2.1.1 Number, size and type of mergers reported or subject to review*

***Mergers and acquisitions in France***
***Annual data***

| | 1995 | 1996 | 1997 | 1998 |
|---|---|---|---|---|
| Number of operations | 536 | 472 | 478 | 505 |
| Applications filed | 20 | 27 | 28 | 28 |
| Referrals to the Council | 6 | 6 | 6 | 6 |

***Sectors of activity affected by concentrations in 1998***
***Statistics***

| Sector of activity | Number of operations |
|---|---|
| Food processing | 77 |
| Building and civil engineering - construction materials | 13 |
| Commerce | 70 |
| Communications | 50 |
| Manufacturing industry | 218 |
| Services | 46 |
| Community services | 1 |
| Transport | 30 |
| Total | 505 |

195. Merger and acquisition activity in 1998 showed a further increase in concentrations, some of which concerned large companies that joined forces in highly publicised mega-mergers.

196. Twenty-eight mergers were reported in 1998.

197. Of these, two were reported late (more than three months after the operation had taken place) and one was not reviewable since it did not reach the quantitative thresholds set by the Ordinance.

198. Of the 25 remaining operations, 14 received unconditional authorisation, three were authorised subject to commitments such as to restore effective competition (these undertakings being made pursuant to Article 40, *i.e.* during the initial two-month phase of review) and four were referred to the Competition Council. There were two additional referrals, one for an application filed in 1997 and one for an operation not reported.

199. As regards the three operations authorised subject to commitments, the undertakings made were to sell off assets, refrain from pooling or coupling the bids of the merging companies and to maintain the quotas allocated to their competitors (in a regulated market). These commitments were undeniably useful in that they made the mergers consistent with the rules of competition. By eliminating any ill effects on competition, they have strengthened the economy and made otherwise problematical mergers beneficial.

200. Of the six concentration operations referred to the Competition Council in 1998, one was abandoned and two were still under review at the end of the year. Of the other three, two were cleared (CASINO/FRANPRIX LEADER PRICE and CGE/HAVAS) and one was disallowed (COCA-COLA/ORANGINA).

201. In the case of CASINO/FRANPRIX LEADER PRICE, the Council believed that the position of the new group would not interfere with the supply and distribution markets. For GCE/HAVAS, it thought that integration of the different communications activities in this case did not impair competition. The Minister accordingly authorised these two operations.

202. On the other hand, the Minister prohibited the projected take-over of ORANGINA by COCA-COLA (see 2.2.1.2. below) in light of the opinion delivered by the Competition Council.

203. A seventh referral to the Council concerned non-fulfilment of an undertaking made at the time of the AUCHAN/DOCK DE FRANCE merger. This was the first application of Article 44-3 of the Ordinance providing for financial penalties. The undertaking was finally fulfilled after the Council had so ruled.

204. Companies made more use of prior consultation with the authorities in order to determine the need for formal notification. The DGCCRF was thus apprised of some 80 operations completed or planned, most of which necessitated no formal notification because of their small impact on competition.

205. At EU level, the KALI UND SALZ decision was overruled in 1998 following France's complaint to the European Court of Justice. In a judgement dated 31 May 1998 the Court acknowledged that the notion of joint dominance could apply to concentration, but it concluded that in this case the evidence (notably the existence of structural links between the parties) was insufficient.

2.2.1.2. Major cases

Principal cases before the DGCCRF

COCA-COLA/ORANGINA

206. The projected take-over of ORANGINA by the COCA-COLA group was referred to the Competition Council by the Minister of the Economy, Finance and Industry for its opinion.

207. The Council reached the conclusion that the planned operation posed serious problems of competition in the market for consumption outside the home, and that the expected economic gains would not offset the harmful effects on competition.

208. Discussions on possible compensating commitments failed to produce a solution, and the Minister finally had to prohibit the operation by order dated 17 September 1998.

209. The Coca-Cola Company lodged an appeal with the Conseil d'État, claiming that the order constituted action *ultra vires*. The Conseil d'État, which was dealing for the first time with an appeal concerning concentration since the Ordinance of 1986 came into force, took the view that the Minister's authority in the matter could be regarded as a power of economic policing and that the legality of the steps taken was subordinate to the need for them. The Conseil d'État in this instance found it appropriate to exercise full oversight of the definition of relevant markets—inasmuch as this determines the initiation of review procedures—and of the proportionality of the Minister's decision to the adverse implications for competition. This judgement also validates the procedures followed since the Ordinance entered into force.

210. The Conseil d'État ascertained the proportionality of the Minister's decision and validated, point by point, the different stages in the reasoning of the Competition Council and the DGCCRF. It concurred with their definition of the relevant markets that would be affected by the operation, identifying a market for carbonated non-cola beverages and a specific market for cola beverages. It also made use of scope and portfolio theories to assess the implications of the operation for competition in the cola drinks and related markets. Finally, it held that consumption outside the home constituted a different market from consumption at home and that the adverse implications for competition in that market justified the prohibiting of COCA-COLA from acquiring ORANGINA, in the absence of commitments on the part of COCA-COLA such as would correct the distortions.

2.2.2. Mergers and acquisitions referred to the Competition Council for opinion

211. In 1998 the Council delivered four opinions on company concentration operations, all of which were published:

- projected acquisition of INGEFIGO companies by SWEITZER-MAUDUIT ENTREPRISE SA;
- acquisition of HAVAS by VIVENDI;
- acquisition by CASINO-GUICHARD of TLC BÉATRICE HOLDING FRANCE SA;
- projected acquisition by THE COCA-COLA COMPANY of the assets of the PERNOD RICARD group.

212. Two opinions were particularly significant. The first, concerning the merger-acquisition of HAVAS by the COMPAGNIE GÉNÉRALE DES EAUX-VIVENDI, gave rise to much debate in the markets liable to be affected by the operation. The second, concerning the acquisition of ORANGINA by the COCA-COLA group, was the only case in which the Council considered that the operation would be harmful to competition; in addition, one of the operators is global.

*i)* Merger by acquisition of Havas by the Compagnie Générale des Eaux

213. At the request of the Minister of the Economy, the Council examined the plan for the merger-acquisition of HAVAS by the COMPAGNIE GÉNÉRALE DES EAUX.

214. This operation gave rise to debate in the markets liable to be affected by it. The VIVENDI Company took issue with the fact that the Council was examining the implications for communications markets and notably those in which CANAL PLUS operates. It argued that it did not have any controlling influence over CANAL PLUS since it held only 34% of the latter's share capital and was bound by an internal agreement with the RICHEMONT group, and that CANAL PLUS lay outside the scope of the operation submitted to the Council for review.

215. In answer to this argument, the Council pointed out that the markets liable to be affected by a concentration were not necessarily just the markets in which the parties to the concentration operated directly. In the case under review, even if the CGE/HAVAS merger did not constitute a concentration between CANAL PLUS and VIVENDI, this could not prevent the Council from ascertaining whether the strategy that the VIVENDI group intended to develop in the communications sector could affect competition in the markets in which CANAL PLUS operated.

216. The Council dismissed the argument that television broadcasting and creation of TV channels, but also purchasing of audio-visual broadcasting and production rights, were communications activities lying solely within the jurisdiction of the broadcasting authority *Le Conseil Supérieur de l'Audiovisuel* and hence outside the scope of concentration control as specified in Title V of the Ordinance. The Council stated that trading in motion picture rights and in broadcasting rights for audio-visual productions and sporting events, as well as production of motion pictures and television commercials, constituted activities distinct from television services, and that since access to the Internet was a telecommunications activity it was for the Council to assess the effects of the operation concerned on those markets.

217. Turning to the horizontal effects of the operation, the Council concluded that the concentration had no adverse implications, since the market shares held by the VIVENDI group were identical to those held formerly by each of the CGE and HAVAS groups in the markets concerned, with the exception of the markets for Internet access and services. In this connection the Council stated that the European Commission, in a decision dated 4 August 1998, had ruled that there was no cause to oppose the creation of a joint affiliate between the companies CEGETEL, CANAL PLUS, AOL and BERTELSMANN.

218. The Council also concluded that the pooling of resources and the development of synergies among the communications firms concerned should permit the creation of new services. It held that the group's reorganisation would enable VIVENDI, through its communications holdings, to be present over the whole high-value range of broadcasting material and systems production, as well as access to pay television. Given the rapid evolution of computer-generated and audio-visual techniques—which is causing markets to be in a constant state of flux and making the position of operators insecure—together with the presence of powerful actors in the different markets concerned, the Council found that the concentration would not be harmful to competition (Opinion 98-A-14 of 31 August 1998).

*ii)* Plan for acquisition of Orangina by Coca-Cola

219. At the request of the Minister of the Economy, the Council examined the agreement concluded on 17 December 1997 between THE COCA-COLA COMPANY (TCCC) and PERNOD RICARD SA, transferring to the first of these two companies all the industrial assets related to beverages of the "Orangina" brand, together with the intellectual and commercial property rights attaching to that brand.

220. The Council's assessment of competition in the market for non-cola carbonated soft drinks for consumption outside the home (*i.e.* the market in which ORANGINA operates) showed a risk of impairment of competition if the acquisition went through. The operation would have given the Coca-Cola group a market share of 61%. With the exception of CADBURY-SCHWEPPES which, with "Schweppes Indian Tonic", "Gini", "Canada Dry" and "Schweppes Orange", had 8.1% of the market and the PEPSI-COLA Company, which with "Pepsi-Cola" and "Seven Up" had a share of 2.4%, no other competitor occupied a significant position in this market. At the same time the COCA-COLA group had more than 89% of the market for colas for consumption outside the home, and the beverages sold for non-home consumption under the Coca-Cola brand alone outsold all other carbonates marketed for the same category of consumption.

221. Subsequent analysis of the behaviour and constraints of retailers of carbonated soft drinks for non-home consumption showed that although these outlets had to offer several varieties of carbonates, shortage of space forced them to pick just one brand for each variety. Thus most cafés, hotels and restaurants carry only one brand of the different kinds of carbonate (cola, orange-flavoured, lemon lime, tonic, ready-to-drink tea). The fast-food chains and cafeterias carry an even narrower range, generally confined to three categories of carbonates, (one cola, one orange-flavoured and one clear), one fruit juice and mineral water. All establishments of one group carry exactly the same range of products and brands.

222. Access to the market for carbonated soft drinks for non-home consumption is crucial to competition in the carbonates sector as a whole. It is in non-home consumption that the habits will be formed that will determine purchases for home consumption. Consequently, by acquiring the "Orangina" brand the COCA-COLA group, which already has the leading brand in the market for colas for non-home consumption, would also have a top brand in the non-cola carbonates market, in addition to the "Fanta" brand.

## 3. Role of the competition authorities in the formulation and implementation of other policies, e.g. participation in the legislative process and in commercial and industrial policies

### *3.1. Role of the DGCCRF*

223. Besides giving close attention to the conditions under which sectors were being deregulated, such as telecommunications and electricity (see Section I above), and as part of the government co-ordination programme, the competition authorities advised the authorities on legislative developments.

224. The proposed legislation on the audio-visual sector occasioned intensive cross-ministry work in 1998, with a very significant input from the DGCCRF.

225. In its present form, the amended law of 30 September 1986 on freedom of communication states that the audio-visual sector is expressly excluded from the scope of Title V of the Ordinance concerning anti-monopoly legislation.

226. As a result, the companies authorised to operate an audio-visual service are not subject to ordinary anti-monopoly measures but to special rules laid down by that law. The rules specify, *inter alia*, the equity stakes and number of authorisations that can be held by audio-visual communication companies. However, this does not prevent concentration operations in the related markets from being reviewed by the Minister of the Economy, after referral to the Competition Council[13] in some cases.

227. In light of technological change (development of digital systems), the tendency of increasingly hard-pressed operators to join forces, and a convergence of facilities such as to blur the traditional sector boundaries and necessitate a more global regulatory approach, it was judged necessary to review developments in competition structure.

228. The government accordingly proposed, in its draft legislation, to apply ordinary anti-monopoly law to the audio-visual sector and abolish the present exception, but make all reported operations automatically referable to the Competition Council. This is in line with Community law, since its anti-monopoly regulations are fully applicable to the audio-visual sector.

### *3.2 Consultative activities of the Competition Council*

229. In 1998 the Council played a major consultative role in dealing with **broad competition issues** affecting whole sectors of the economy. These included insurance, certain sectors about to become deregulated, like electricity, and others already engaged in this process, like telecommunications.

#### *i) Insurance*

230. The Council was consulted by the Senate Finance Committee on three questions having implications for competition in the **insurance sector**: the differences in legal status, tax treatment and principles of accountancy between the various insurance undertakings, the existence of several types of distribution networks for insurance products, and the different systems of taxation and regulation within the European Union in the context of changeover to the euro.

231. In answer to the first question the Council stated that there was no longer any doubt that the Community and domestic rules of competition applied to all undertakings engaged in insurance business, regardless of their status. It also stated that when an enterprise held a dominant position on a market and

performed both public interest activities and competitive activities, the two types of activities had to be clearly separated as to their treatment. The enterprise must not receive the same treatment for its competitive activities as that applying to public interest activities and thus be allowed to put its competitors at a disadvantage.

232. The question on distribution channels more specifically concerned the distribution of insurance products by the national postal service La Poste and by the Treasury. In the case of La Poste, the Council referred to the opinion it had delivered regarding the financial services of this operator (96-A-10). With respect to the Treasury, the Council took the view that it held a dominant position in the distribution of life insurance products owing, in particular, to its repute and its use of the logistic resources of government.

233. On the third question, the Council stated that the effects on competition of the differences in Member States' taxation, prudential and accounting regulations were difficult to gauge. Overall, it has not been established that French undertakings suffer a disadvantage in competition. Introduction of the euro should serve to simplify prudential control and asset management and to promote monetary transparency of offers by permitting better comparison of prices.

*ii)* Electricity

234. Consulted by the Minister of the Economy on the principles to be observed so as to ensure that the **electricity market** functions competitively pursuant to the European directive for a progressive opening of power supply to competition, the Council maintained that the first need was to identify which utilities were assigned to public operators (Électricité de France-EDF, non-nationalised distributors) and to define their particular functions clearly. This prior identification is essential in order to be able to establish a system of utility financing that is transparent and non-discriminatory.

235. The fact that EDF combines monopolised activities (supply to captive customers, transmission, distribution) with competitive activities (eligible customers) is liable to facilitate cross-subsidisation practices that may keep potential competitors out of the market. For example, EDF could impose price increases on captive customers to finance artificial price cuts for its eligible customers. In the Council's opinion, it is essential that EDF have an accounting system that makes it possible to verify the absence of cross-subsidies and predatory pricing for the sale of electricity to eligible customers.

236. The Council also compared the two systems (authorisation and/or call for tenders) proposed by the European directive and designed to enable Member States to supervise power generation as part of their energy policies, and it defined the principles that should apply to the regulatory authority's establishment.

*iii)* Telecommunications

237. The Council delivered five opinions on the **telecommunications sector.** Three were given at the request of the telecommunications authority ART: opinion pursuant to Article L. 36-7 (7°) of the Post and Telecommunications Code, for the purpose of establishing a list of operators with a significant influence on a relevant market of the telecommunications sector; opinion on the problems raised by the marketing of long-distance telephone service by distributors; opinion on made-to-measure offers by France Telecom.

238. The other two opinions concerned action by local authorities in the telecommunications sector.

239. The Council was consulted by the association of outer Paris communes for electricity and communications networks (Sipperec), which wanted to know whether municipalities could form a joint

purchasing group for telecommunication services. In its opinion it stated that, subject to compliance with certain formal arrangements, small local authorities in the same geographic area should be encouraged to form a group, structuring their demand in such a way that competitors of the dominant operator could make bids.

240. At the request of the Minister of the Economy, the Council gave an opinion concerning a draft circular from the Ministry of the Interior on intervention by local authorities in the telecommunications sector and, more specifically, on the creation of infrastructures.

241. The Council first pointed out that the intervention in this case concerned a type of link—local loop facilities—that was of primary importance to the development of competition.

242. The Council next stated that local authorities could intervene in two capacities, as providers of networks for telecommunications operators and as managers of their public domain.

243. The Council stated that free competition in the sector depended on compliance with certain conditions. In particular, it drew attention to the disadvantages that would result from network pricing below cost. Such pricing could, in certain circumstances and depending on the size of the community concerned, constitute an aid within the meaning of Article 92-1 of the Treaty of Rome. The Council also pointed out that the network-owning authorities might be tempted to offer an incentive by setting a much lower price for the network segment open to third parties than the one charged for the segment used internally. The extra cost to the community's budget would be liable to distort competition between competing infrastructures. Finally, the Council stressed that the scale of network charges, if it were tiered, should specify the purpose of each tier and the conditions of scaling, so as to avoid any discrimination between operators and any opaqueness of pricing. As regards access to infrastructures, the Council stated that all operators should be able to use them, including the original operator where appropriate.

244. The Council stated that the establishment of passive infrastructures by local authorities must not occasion a monopoly on the installation of these facilities, nor prevention of telecommunications operators from having the "right of way" specified by Article L.45-1 of the Post and Telecommunications Code. Nor may local authorities appoint an infrastructure manager who is a telecommunications operator or has direct or indirect interests in one. Moreover, activities of this type, if they are not physically separated, should be subject to a system of accounting and costing designed to verify the absence of cross-subsidies between the different activities of local authorities, disclose any discrimination between operators, and reveal the bases of chargeback for the services previously performed by local authorities for themselves (Opinion 98-21 of 1 December 1998).

*iv)* Other sectors

245. The Council was also asked for an opinion on certain items of proposed legislation: decree relating to homeopathic medicines; two decrees amending the civil aviation code and incorporating into domestic law the provisions of the European directive on access to the market for stopover assistance in Community airports; decree concerning performance of the activity of forwarding agent.

## 4. Resources of the competition authorities

### *4.1. Total resources (current figures and change from previous year)*

a) Annual budget

246. DGCCRF: FF 200 million. Competition Council: FF 80 million.

b) Establishment (person-years)

247. DGCCRF plus Competition Council: 200

### *4.2. Human resources (person-years)*

a) anti-competitive practices: 175
b) mergers and enforcement: 15
c) competition advocacy: 10

## NOTES

1. The ruling is not final.

2. This ruling is not final.

3. This ruling is not final.

4. Paris Court of Appeal, 9 December 1997.

5. Paris Court of Appeal, 9 September 1997.

6. All courts: magistrates' courts (regional courts, commercial courts), Court of Appeal, Cour de Cassation.

7. Minister of the Economy vs. *Centrale d'achat des chirurgiens dentistes Alpha GACD et SA Promodentaire*.

8. Minister of the Economy vs. *SA Sodimont*.

9. Cour de Cassation, commercial section, 6 April 1999, *Novartis* vs. *Phytosevice*.

10. Conseil d'État "*Fédération Française des Sociétés d'Assurance*".

11. Conseil d'État "*Millon et Marais*" (see also C.E. "*Yvonne funéraire*"and C.E. "*société Intermarbres*", likewise dated 3 November 1997).

12. Conseil d'État "*Union hospitalière privée et Fédération intersyndicale des établissements d'hospitalisation privée*".

13. CLT/FUN/M40, CANAL+/NETHOLD, CANAL+/UGC-DA, CGE/HAVAS.