ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN FRANCE

-- 1999 --

This annual report is submitted by the French Delegation to the Committee on Competition Law and Policy for CONSIDERATION at its forthcoming on 24 - 25 October 2000.
ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN FRANCE
(1999)

Changes or proposed changes to competition laws and policies

Summary of new legal provisions

1. There were no changes to the laws or regulations governing competition in 1999.

Other relevant measures, including instructions or guidelines

2. None.

Government-proposed changes to competition law or policy

Draft legislation on new economic regulations

3. This bill includes provisions that would amend competition law with regard to merger review and measures to counter anticompetitive practices.

Countering anticompetitive practices more effectively:

- Making penalties more dissuasive: The basis for fines will be extended to include global turnover, and perhaps also consolidated group turnover, in order to thwart practices whereby firms shift turnover to their subsidiaries, and the ceiling rate will be doubled (from 5 to 10 %). Repeat offences will also incur stiffer penalties.

- A clemency mechanism is planned to encourage firms belonging to cartels to help establish proof of the incriminated practices. Such a system, which would be an innovation in French law, has been implemented successfully by the European Commission and in certain foreign countries, including the United States; it is expected to lead to better detection of cartels.

- Procedural reorganisation for cases brought before the Competition Council: This involves a clearer separation between the investigative and judicial functions in order to provide better protection for the rights of defendants, in line with recent case law and Article 6 of the European Convention on Human Rights. Other measures seek to ensure that all cases will be dealt with thoroughly and as expeditiously as possible, but also to preclude situations in which firms can escape justified penalties on procedural grounds.
− *Reinforcing* and updating investigative powers and resources.

More systematic and more transparent merger review

4. The proposed system would harmonise national procedures with those in force at the Community level.

5. A systematic and transparent mandatory prior notification procedure, with review thresholds expressed in turnover volume, is planned. For single transactions, the review deadline will be shortened to five weeks, from nine today. For more complex transactions, or those entailing decisions that will have a binding effect on the companies involved, the (longer) procedure will continue to include referral to the Competition Council, with substantial guarantees for operators.

6. *Transparency will be enhanced* through systematic disclosure of transactions and consultation of the market, while respecting the legitimate right of firms to preserve their business secrets.

7. The proposed law on new economic regulations was adopted on its first reading by the National Assembly on 28 April 2000, and by the Senate on 17 October 2000.

*Opening up monopolies and public enterprises to competition*

Deregulation of monopolies

*Electricity*

8. In 1999, the French Government continued to work on legislation to implement the Community Directive of 19 December 1996.

9. These efforts culminated in the adoption of the Act of 10 February 2000 on the modernisation and development of public service in the realm of electric power.

   a) French law creates a framework for effective competition. It comprises the following mechanisms:

   – Stipulation of the conditions of market entry for producers, with a compulsory authorisation mechanism and an optional bidding mechanism;

   – Stipulation of eligibility rules for electricity consumers, with transparent disclosure regarding the list of those eligible;

   – Pricing principles for activities remaining under monopoly control;

   – Technical and environmental regulations enabling any operator to enter the market in a transparent manner and suffer no discrimination;

   – For integrated electric companies, an obligation to keep separate books for its generation, transmission and distribution activities, as well as for any diversified lines of business;
− Rules to ensure the independence of the grid manager, notwithstanding the fact that the manager remains a part of the integrated electric company EDF;

− Enumeration of public service obligations;

− For grid access, a system for settling disputes between operators by the regulatory authority, the Commission de Régulation de l’Électricité (CRE).

b) This French legislation has instituted a regulatory mechanism tailored to the opening of the electricity market.

10. The regulation in place calls for the intervention of a number of parties, whose complementary actions ensure that the full range of issues raised by this initial phase of electricity market liberalisation is covered.

11. The CRE’s authority is centred essentially on problems of grid access and does not extend to all of the sector’s activities. Apart from the aforementioned dispute settlement mechanism, the CRE proposes grid access charges and ensures that integrated electric companies separate their bookkeeping by activity. In contrast, it is the Minister for Energy who is empowered to license electric power plants. Ultimate responsibility for controlling the prices of activities still under monopoly control lies jointly with the Minister for Energy and the Minister for Economic Affairs, after taking advice from the CRE.

12. Moreover, the transmission over power grids of electricity generated by independent suppliers may, like any economic activity, give rise to disputes of a purely commercial nature. It is to settle such routine disputes, which involve individual interests and do not affect the workings of the market, that the CRE was invested with dispute settlement jurisdiction. The CRE will enforce the regulations on grid access and stipulate the applicable technical and financial conditions in decisions that state grounds and are notified to the parties.

13. The CRE’s decisions may be appealed to the Paris Court of Appeal, which was already the appellate jurisdiction for rulings by the Competition Council. This ensures coherency between the electric power-related decisions of the regulatory authority and those of the Council. Naturally, any dispute involving competition issues will be referred to the Competition Council.

14. The law spells out exactly how the sectoral powers of the CRE and the Competition Council are to be apportioned. The Chair of the CRE shall refer to the Competition Council any abuses of dominant position and anticompetitive practices of which (s)he is aware in the electricity sector. The Council may also be petitioned for its opinion regarding any other issue in its area of authority.

15. In exercising its traditional responsibilities, the Competition Council may seek the CRE’s technical expertise, consulting the Commission in respect of competition disputes that involve grid access, or about any other issue involving the electric power industry.

16. Lastly, civil and commercial disputes involving electric power operators may be examined by the relevant courts of law, without prejudice to the jurisdiction of administrative tribunals in certain cases.
Gas

17. The drafting of legislation to implement the Single Market Directive of 22 June 1998 was the highlight of 1999. The DGCCRF helped prepare a “White Paper” that was distributed in June 1999, and which led to extensive consultations and co-operation with the industry.

18. In the gas sector, in which competition issues differ from those in the electricity sector, the Competition Council, at the request of the Minister for Economic Affairs, on 5 October 1999 handed down an opinion on the opening of the gas market.

19. The Council was concerned about the threshold effect resulting from the fact that high-volume customers alone were free to choose their own gas suppliers. This drawback could be lessened by differentiating the thresholds by sector to take account of the degree of dependency on gas.

20. In respect of gas transport, the Council recommended a licensing system that would ensure freedom of establishment. It advocated regulated third-party access to existing networks. It noted that distance-based transport pricing was economically logical, this constituting a difference between gas and electricity. It called for the separation, within integrated gas utilities, of transport and supply services.

21. With regard to storage, the Council found that it would be inappropriate to grant third parties systematic right of access: insofar as the primary purpose of gas storage was to ensure security and continuity of supply, there was very little capacity that was usable for commercial purposes. But the Council reserved the right to discipline any abuse of dominant position.

22. The Council deemed that gas distribution was a local public service. It recommended that the missions of this public service be delineated very strictly, since they constituted the legal basis for maintaining exclusive rights and could justify special funding for operators.

23. Lastly, the Council envisioned the creation of a specialised regulatory agency but did not express a formal preference between an authority specific to gas and one that would cover a variety of energy sources. It did, however, specify the powers to be given the authority: settlement of disputes involving third-party network access, and powers involving regulation, penalties and notification. The Council reiterated the conditions for proper co-operation between such a regulatory body and itself.

Postal services

24. An article inserted into the Act of 25 June 1999 amended Articles L1 and L2 of the Post and Telecommunications Code. It included amongst universal service all national and international postal dispatches weighing no more than 2 kg and all parcels weighing no more than 20 kg. It attributed universal service to La Poste, giving it exclusive rights for domestic and cross-border dispatches weighing less than 350 grams and costing less than five times the rate for the fastest category of mail.

25. The conditions for licensing new operators, and those for supervising the universal operator, had still to be transposed into French law. It was expected that this would be done in 2001, although it should be noted that a new European directive is under preparation.
Reform of the government procurement code

Legislative developments

26. The DGCCRF took active part in work to reform the laws governing government procurement.

27. Reform of the government procurement code, which was initially to have been undertaken by legislative means, would in fact be carried out essentially through regulatory channels because of timing considerations. The ongoing reform has pursued the following objectives:

− Make government procurement more open to small and medium-sized businesses (SMEs)—a dynamic, job-creating sector—through heightened competition;

− Enhance procedural transparency and legal security for purchasers, thanks to a reinforcement of competition and joint decision-making, but also to clarification and simplification of the rules;

− Clarify the scope of application of renovated and simplified government procurement, and better delineate the boundaries with other types of intervention (e.g., delegation of public services);

− Improve the efficiency of government procurement and ordering procedures via increased use of new information and communication technologies.

28. Aggregate purchases of goods and services by general government has been estimated at FF 740 billion (112.81 billion) per year, or about 9% of GDP. The justification for such a reform lies first in the volume of government procurement, and second in the complexity of the laws comprising the code. This complexity is a source of obscurity, likely to facilitate practices which, whether voluntarily or not, lie outside the law. This is why it was deemed necessary to conduct a thorough overhaul of government procurement, so as to guarantee the basic principles thereof—namely: free access to government contracts, equal treatment for all bidders, and supervision of how public funds are spent.

Enforcement of competition laws and policies

Action against anticompetitive practices, including cartels and abuse of dominant position

Summary of the activities of the competition authorities

Summary of the activities of the DGCCRF

Government procurement

Preventive role

29. The DGCCRF supervises government procurement and public service concessions via the presence of DGCCRF officials on contract boards, and through checks on legality. Compliance with the
rules of competition when government contracts are awarded leads, *inter alia*, to improved public procurement.

30. A precise definition of community needs, suitable advertising, sufficient time for firms to submit bids, and contracts that are short enough to preserve the government’s flexibility over procurement policy and tailor it to changing economic and social trends, are the main ways to maximise value for money. The DGCCRF advises government purchasing agents so that they exploit competition to the fullest possible extent, in the public interest.

Enforcement role

31. Pursuant to its mission to ensure fair competition in access to government contracts, the DGCCRF wields powers based on the Order of 1 December 1986, which authorises it to look out for and note anticompetitive practices on the part of bidders.

32. To this end, the agency’s staff, in their capacity as representatives of the Minister for competition affairs, sit on contract boards and then, by virtue of the powers invested in them by Articles 45 to 48 and 51 of the 1986 Order, conduct extensive investigations of selected contracts.

<table>
<thead>
<tr>
<th>Year</th>
<th>1996</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of seats on contract boards</td>
<td>20 092</td>
<td>21 422</td>
<td>23 523</td>
<td>24 603</td>
</tr>
</tbody>
</table>

33. In 1999, DGCCRF staff also reviewed 10 558 government procurement files that had been submitted to them by prefects for legality checks, and 985 public service concession files.

34. Evidence of anticompetitive practices detected during audits of government contracts and public service concessions was the basis for a substantial percentage of referrals to the Competition Council in 1999 (11 out of 22).

35. In addition, whenever an investigation uncovers a criminal violation of Article 17 of the Order of 1986, which prohibits natural persons from taking part personally and decisively in the design, organisation or execution of anticompetitive practices with intent to defraud, the case file is handed over to the State Prosecutor. Some twenty such referrals to prosecutors were made in 1999 on the basis of Article 17.

36. Apart from referrals to the Competition Council and submissions to prosecutors regarding violations of Article 17 of the Order of 1 December 1986, audits of government contracts and public service concessions gave rise in 1999 to a very large number of deficiency letters proposing referrals to the Administrative Tribunal. Lastly, prosecutors are advised when government procurement audits uncover evidence of wrongdoing.
Monitoring transparency and competition in the water and wastewater collection and treatment sectors

Context

37. These markets have long been characterised by sharply rising prices and a lack of competition between the companies at work via public service concessions and government contracts.

38. Between 1994 and 1999, the average water bill increased by 21%. However, the yearly rate of increase continued to decline (from 6.5% between 1994 and 1995 to 1.7% between 1998 and 1999). Over those last five years, the increase was much sharper for purification than for water, with rises of 27% in 1998 and 30% in 1999. The increase affected government-run services and concessions equally.

39. There are two explanations for this. First, a direct impact of rising capital investment in purification plants, with assistance from water agencies, was an increase in purification charges and water rates. Charges for “preserving water resources” and “pollution” jumped by 41.65% between 1994 and 1999. Moreover, competition was not very satisfactory: competition depends in part on the number of players, but in markets involving water and water purifi cation, the number is limited. Furthermore, the market is to a large extent frozen because of long-term public service concession contracts.

40. Even so, there are two factors that can improve competition:

− Act No. 93-122 of 29 January 1993 (the “Sapin Act”) now requires local government to advertise when awarding public service concessions, which can prompt submission of a number of competing offers. The Act should gradually stimulate competition as contracts come up for renewal.

− Local government can also improve the situation in this area by tightening supervision of water and purification concessions and government procurement. In some cases, it can also consider resuming direct service delivery, thus increasing the “competitive pressure” on firms facing no other potential competitors.

Actions taken

41. The actions taken involved improving transparency and monitoring the workings of water markets.

Improving transparency

42. Each year, the DGCCRF conducts a survey of water and water purification prices in 738 localities representing a population of more than 23 million. The information covers price levels—nationally, by region, by department and by type of operation. The survey was conducted again in 1999, for publication, as in earlier years.

43. In addition, efforts to improve consumer information were continued: after the adoption of Act No. 92-3 of 3 January 1992 on water, which laid down rules for the pricing of water distribution, inter alia taking actual consumption into account, measures were taken to make water bills more transparent. A decree of 10 July 1996 on invoices for water distribution and wastewater collection and treatment specified how invoices should be laid out. A circular of 14 December 1998 stipulated how the decree was to be implemented.
Monitoring the workings of water purification and distribution markets

44. These markets are supervised via the DGCCRF’s regular participation on contract and concession boards. In addition, surveys are taken regularly to check whether competition is effective. In 1999, a half dozen surveys were taken in respect of concession contracts and work in the water distribution and purification sectors.

Monitoring a sector recently opened up to competition: telecommunications

45. Three aspects of competition in this sector received special attention:

Prices

46. Most of France Télécom’s prices are currently subject to approval by the Minister for Economic Affairs, Finance and Industry, pursuant to the Post and Telecommunications Code (Art. L 36-7, paragraph 5) and the decree approving France Télécom’s mandate (Article 17 of Decree No. 96-1225 of 27 December 1996), which stipulate that the Minister for telecommunications (the Secretary of State for Industry) and the Minister for Economic Affairs shall approve two categories of rates: rates for universal service and rates for services for which there are no competitors. This gives rise to public opinions from the Telecommunications Regulatory Authority (ART). Out of 106 pricing proposals submitted by the operator in 1999, ART issued unfavourable opinions regarding only 22 of them. In three of those cases, the Ministers suspended the proposals in question and, after further work or new proposals on the part of France Télécom, the ART was able to issue a favourable opinion. In all cases, market players can appeal to the Competition Council. This dual mechanism ensures effectiveness and speed in protecting the interests of competitors in an area that is crucial to them.

Practices

47. The Telecommunications Regulation Act (LRT) confirms that conventional competition law is applicable to the telecommunications sector and requires the ART to refer all competition-related cases to the Competition Council. The LRT, which institutes a reciprocal consultation obligation between the two independent authorities, upholds the Competition Council’s advisory role in preparing regulatory provisions affecting competition. The Council has on numerous occasions had opportunities to comment on practices involving the telecommunications sector.

Consumer protection

48. In 1999, the National Consumer Council created a working group on the mobile and fixed-line telephone market, which began its work on consumer protection and, in an initial progress report, defined the terms commonly used in the sector.

Summary of the activities of the Competition Council

49. In 1999, 109 disputes were submitted to the Competition Council, along with 27 requests for opinions, giving a total of 136 new case referrals.
50. There was a sharp decline in submissions in 1999 (with 26 fewer than in 1998), bringing the volume back to the average of the early 1990s. The breakdown of the referrals was different, however, the number of cases submitted by Ministries being down significantly (with six fewer than in the previous year but 19 more than in 1993).

51. Two new elements warrant emphasis:

- An increase in the number of automatic referrals, which rose from three in 1998 to seven in 1999;

- For the first time, two return referrals by order of the Court of Appeal, following the Court’s rulings that the cases in question were in fact admissible, overruling the Council’s prior decisions to the contrary.

52. In 1999, the number of requests for interim protective measures was down on the previous year. It can be noted, however, that over the medium term, parties have been resorting to this procedure more and more often.

53. The Council handed down 22 opinions: four involving mergers and acquisitions; three concerning draft decrees; 11 on general competition issues; two pursuant to Article 26, which empowers investigative and judicial jurisdictions to question the Council; and two pursuant to the provisions of the Telecommunications Regulation Act, at the request of the Telecommunications Regulatory Authority (ART).

54. Of the 22 opinions handed down in 1999, 16 were published.

55. The Council may be consulted:

- In respect of any issue involving competition;

- In respect of any draft regulatory provision instituting a new regime, a direct effect of which would be to submit the exercise of a profession or access to a market to quantitative restrictions, establish exclusive rights in certain areas or impose uniform practices in the realm of pricing or terms of sale;

- In respect of any actual or proposed merger or acquisition that could jeopardise competition, in particular if it would create or strengthen a dominant position;

- At the request of the Telecommunications Regulatory Authority;

- By jurisdictions in respect of anticompetitive practices noted in cases brought before them.

56. The following table shows the number of cases submitted for opinion or decision since 1990.
Table 1.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjudicative</td>
<td>103</td>
<td>117</td>
<td>109</td>
<td>103</td>
<td>113</td>
<td>128</td>
<td>115</td>
<td>93</td>
<td>135</td>
<td>109</td>
</tr>
<tr>
<td>Advisory</td>
<td>22</td>
<td>12</td>
<td>12</td>
<td>24</td>
<td>27</td>
<td>27</td>
<td>27</td>
<td>27</td>
<td>29</td>
<td>27</td>
</tr>
<tr>
<td>Total</td>
<td>125</td>
<td>129</td>
<td>121</td>
<td>127</td>
<td>140</td>
<td>147</td>
<td>142</td>
<td>120</td>
<td>164</td>
<td>136</td>
</tr>
</tbody>
</table>

57. The Council held 83 sessions in 1999, during which 131 cases were examined: 109 adjudicative decisions were handed down (see Table 1), with 14 of them resulting in penalties or injunctions.

58. Penalties were imposed on 58 firms, and fines totalled FF 60 million (9 146 941.03). In addition, eight trade associations were disciplined, and the fines imposed on them totalled FF 637 000 (97 110.02).

59. The highly diversified activities of the sectors concerned by the Competition Council’s decisions in 1999 reflect the general and horizontal nature of competition law, which is intended to be applied to each economic activity using the same analyses and the same concepts, regardless of the specifics involved.

60. The most traditional sectors (e.g., porcelain, stationery, construction and public works) were to be found alongside the most modern activities (e.g., audio-visual production, telecommunications, high-speed Internet); activities developed in a public service context (e.g., school bussing, public transportation, distribution of gas and electricity, departmental infrastructure resources) were examined along with activities of a purely private nature.

61. Review of the areas dealt with by the Council shows the extent to which many aspects of the consumer’s most ordinary everyday life are affected by its decisions: whether it be in the toy sector, or that of medical evacuation of injured skiers, retail sales or coal or home heating oil, carbonated beverages or telephones, Minitel or the Internet, the Council relentlessly upholds consumers’ interests in terms of price levels and diversity of supply. Defending those interests is the ultimate objective of competition law.

Cartels

Cartels involving public or private bidding

62. In 1999, the Council examined seven cases in which parties responding to public or private calls for bids exchanged information or colluded before submitting bids in order to determine together the firm that would bid lowest and thus get the contract, and to organise the cover bidding by other firms in order to thwart the workings of competition. These cases prompted the Council to reaffirm the legal precedents it had established in this area in years past.

63. Regarding the nature of the collusion or exchange of information between firms submitting bids, the Council stipulated the conditions under which such practices fell within the scope of Article 7 of the Order of 1 December 1986. It pointed out, with respect to public or private contracts, that it was established that firms had concluded an anticompetitive agreement if it were proven that they either agreed to co-ordinate their offers or exchanged information prior to the date on which the result of the bidding was, or could be, known, whether that information concerned the existence of competitors, their names,
their size, their availability in terms of staff and materials, their interest or lack of interest in the contract in question or the bids they intended to submit.

64. For instance, in a case involving practices in connection with two contracts for the refurbishment of a hospital in Manosque, the companies contended that the fact that information had been communicated to a competing firm constituted merely a presumption of collusion. The Council deemed that it had been established that a copy of one of the firms’ bids had been sent to the other firm, and that this other firm had prepared its own bid on that basis. One of the companies had advanced the argument that its bids were mere expressions of courtesy, i.e., offers intended to demonstrate the firm’s commercial presence and not its desire to obtain the contract. The Council refuted that argument, reiterating its consistent rulings that a firm’s submission of a “courtesy offer” in response to a call for bids did not justify an exchange of information between it and other bidders prior to the close of bidding.

Cartels involving prices or margins

65. The Council had occasion to discipline horizontal agreements between firms operating in the same market with the intention of co-ordinating their efforts to set the prices charged to consumers.

66. In a number of cases, price cartels had effectively been set up, one such example being the “central price series” formulated by the Architecture Academy. This practice had been quite long-standing, since it had been in effect continuously since 1883. As frequently happens in such cases, it was contended that the figures provided were only suggestions, which architects were not obligated to apply, and from which they could diverge, depending on their own management constraints. The Council then undertook a painstaking analysis of the central price series, at the conclusion of which it determined that the figures provided were not market prices, such as could be found on market price surveys, but genuine proposals for how to compute prices. It rejected the argument that the existence of such price scales could be conducive to competition by supplying benchmarks to small and medium-sized enterprises.

67. It also happens that trade associations set prices in collusion with other market players. In a case involving medical evacuation of injured skiers, the National Union of Mountain Ambulances had established a price list for such services that exceeded the amounts reimbursable under the French national medical insurance scheme, in collusion with the insurance companies and a firm called CNAS, which acted as an intermediary between the main insurers and the ambulance companies that transported victims of skiing accidents.

Barriers to market access and eviction practices

68. There were a number of cases that revealed concerted practices intended to slow or to prevent the arrival of new competitors. The Council reproved television network TF1, which required its partners to sign a clause in its co-production contracts (for series and documentaries) granting a TF1 subsidiary exclusive rights to produce video cassettes.

69. Apart from the fact that producers received no assurance that their programmes would be marketed as video recordings, they were deprived of the chance to benefit from competition between the TF1 subsidiary’s rivals, which were denied access to the market.

70. In a case involving the distribution of medical equipment, the Council found that while it was not illegal per se for independent distributors to get together to negotiate product listing agreements, the fact that a franchisees’ central listing body would organise a members’ boycott of a supplier whose products it no longer carried was likely to limit artificially that supplier’s access to the market.
Vertical agreements

71. In a number of cases examined in 1999, the Council spoke out about dealings between suppliers and their distributors, in connection with distribution agreements and commercial co-operation agreements.

72. Review of cases involving dealings between suppliers and their distributors prompted the Council to rule on the legality, vis-à-vis the rules of competition, of clauses limiting distributors’ commercial freedom, and on the criteria that suppliers used to select their distributors.

73. The main issue at stake in the Yves Rocher franchising case was whether the franchiser could require franchisees to purchase display and management materials that it had selected for them. It has been a constant of case law that a franchising contract may limit the commercial freedom of franchisees only to the extent necessary to protect the franchiser’s industrial or intellectual property rights, or to uphold the common identity or reputation of the franchised network.

74. The Yves Rocher franchising contract included a clause that stipulated the materials and equipment needed to outfit stores. The usefulness for the chain of a coherent policy in this area was not in dispute, and the clause seemed consistent with the exigencies of case law, inasmuch as it provided that if Yves Rocher furnished its franchisees with a list of suppliers, a franchisee would still be allowed to have its store decorated by other firms, provided that it complied with Yves Rocher’s plans, standards and specifications. The Council did consider, however, that the wording of the clause was ambiguous, and that the practice, and in particular the information given to franchisees at conventions, did not dispel that ambiguity.

75. A case involving Limoges china prompted examination of the criteria for selecting distributors. Reference to the notion of “traditional trade in luxury goods”, as well as conditions stipulating that shops had to be located directly on a shopping street and possess a window at least three meters wide looking out onto that street were deemed anticompetitive because they resulted in certain modern forms of distribution being excluded. However, other stipulations concerning the selection of distributors were considered legitimate, such as the obligation for stores to have a minimum surface area of 50 square meters, in view of the display requirements of this type of business.

Abuse of dominant position

Discriminatory practices of historical operators

76. Amongst the cases dealt with in 1999 were two that involved historical operators that had adopted discriminatory forms of behaviour.

77. Télédiffusion de France (TDF) was disciplined for having impeded implementation of the Act of 30 September 1986 on freedom of communication, which partially opened the conventional broadcasting sector to competition.

78. In a variety of instances, TDF had opposed the installation by local authorities, at sites operated by TDF, of equipment for the reception of private television networks unless TDF was designated as the lead contractor for the choice of the equipment, and unless TDF was chosen to maintain it. TDF also applied a pricing policy coupling supervision and maintenance, under which it offered two different prices to communities wishing to provide new channels, depending on whether or not the community hired TDF for supervision and maintenance services. Lastly, when TDF provided maintenance at a given site, it demanded the replacement of any re-broadcasting equipment that it had not approved. It emerged,
however, that the choice of equipment imposed by TDF was dictated neither by network requirements nor by the equipment’s conformity to a standard, but by compliance with specifications that TDF itself had drawn up.

79. In conjunction with various construction projects in greater Paris, EDF and GDF had granted subsidies to encourage investment in equipment to produce heating or cooling from electricity or gas. These subsidies were made conditional on long-term commitments to purchase electricity and gas from EDF and GDF. For this reason, project managers had disregarded certain suppliers of heating and cooling networks. This case, concerning the thermal applications of energy, gave the Council an opportunity to define the conditions under which the commercial aid granted by a firm occupying a dominant position might be deemed anticompetitive.

80. Such is the case if prices, once any aid granted is deducted, are predatory, if the aid is granted in a discriminatory manner or if, more generally, the terms for granting the aid establish the anticompetitive purpose or effect thereof.

81. In a decision regarding thermal applications of energy, the question arose as to the material and geographic definitions of the markets. Materially, the Council’s analysis focused on the process underlying the demand for heating and the demand for cooling.

82. The inputs include both the supply of energy and the choice of a particular technical system, the combination of which produces the required heating or cooling. In this particular framework, the first meeting of supply and demand is when the customer chooses between a number of different technological options which determine, in a more or less rigid manner, the type of energy that will then be used. It is at the stage when equipment is being chosen that the vital decision is taken, and that the various available energy sources are in competition. At this stage in the reasoning process, the Council deduced that the supply of energy corresponded to a specific demand for which a market existed, and that there existed a market for the supply of energy intended to heat buildings and a market for energy intended for air conditioning.

TF1’s practices in the market for video recordings

83. With regard to the audio-visual sector, the Council condemned an abuse of dominant position in a case involving Télévision Française (TF1), which it also condemned on the basis of Article 7 on anticompetitive agreements. TF1’s advertising department, enjoying a dominant position in the market for the advertising of video recordings, engaged in discriminatory pricing practices between companies in the group and other customers.

84. In this case, the focus was on the firm’s practices in the production, publishing and advertising of video recordings.

85. TF1 contended, first, that the relevant market was not that of television advertising, but rather of advertising in all media combined; and second, that the relevant demand was that of all advertisers and not that of video publishers alone. To support its reasoning, it submitted the results of an econometric study showing, on the basis of the results of cross-elasticity tests carried out for the period 1993 to 1996, that advertising space was substitutable from one medium to another.

86. The Council refuted that argument, reiterating that partial competition per se was not enough to establish the existence of a single market, due inter alia to the particular characteristics of each medium, as it had stated in its aforementioned ruling No. 96-D-44, and to the existence of price differences between
the advertising space available in each medium. In addition, television advertising featured a special regime reserved exclusively for producers of video and sound recordings, whereby advertising fees were proportional to sales, subject to a stipulated minimum charge. Thus, unlike other service providers, publishers of video and sound recordings could choose amongst conventional advertising, a floating system and a system in which the cost would depend on sales volume.

87. The characteristics of advertising investments by video publishers were another reason for considering them as a distinct group. For example, multimedia advertising investments by video publishers rose by more than 57% between 1994 and 1996, while over the same period multimedia investments by all advertisers increased by only 14.2%. At the same time, about 80% of the advertising outlays of video publishers were for television, whereas the multimedia spending (for radio, television and print media) by all advertisers combined was divided between television (about 40%), print media (about 46%) and radio (about 14%).

88. The Council’s analysis was also based on the differentials between the prices paid by video publishers to purchase advertising space and those paid by advertisers as a group: between 1994 and 1996, the prices paid by video publishers were 26 to 43% lower for television and 23 to 27% lower for radio than those paid by all advertisers combined. These price differentials illustrate the favourable pricing arrangements accorded to the video and audio publishing sector. Conversely, in the print media, the prices paid by video publishers were 14 to 18% higher than those paid by all advertisers combined—a differential that can be explained by the higher cost of the formats chosen by video advertisers.

89. Lastly, the Council questioned the value of the econometric study produced by TF1. It held that the data used did not constitute a sufficient statistical basis from which to deduce meaningful results, and that the study displayed methodological inaccuracies insofar as it measured cross-elasticities between investment outlays and unit prices of advertising space, whereas it should have looked at cross-elasticities between the volumes of advertising space and their unit prices, taking care to check first that the changes noted could not be attributable to any other factor.

90. Based on these various elements, the Council concluded that there was in fact a distinct market for television advertising of video recordings. Given the existence of natural barriers to entry into conventional broadcasting, which occupied a predominant position in France, as well the importance of language and consumer preferences, this market had a nation-wide dimension. The Council also found two other markets in this case: that of copyright management for audio-visual works and that of video publishing.

Prices imposed by the Mattel company

91. In addition, the Competition Council reproved the Mattel company, maker of the “Barbie” doll. In this case, the distribution agreements between Mattel and its retail outlets (essentially large chain stores) included price control clauses that in practice led to imposed consumer prices. This case provided an opportunity for an in-depth exploration of the definition of relevant markets.

92. The Mattel case also gave rise to a debate over the methodology for ascertaining relevant markets.

93. Mattel, which manufactures the Barbie doll, challenged the method of analysis that had led the rapporteur to note the existence of a market for fashion dolls. It claimed, *inter alia*, that there was no distinct market for fashion dolls, but rather a market that encompassed at least fashion dolls, baby dolls, art
games and fluffy animals. It based its claim on an econometric study that it had commissioned, stressing that cross-elasticity tests were the only relevant method for delineating a market.

94. The Council reiterated, at the time, that the contours of a market had to be delineated by looking successively at the various indicators gathered during the investigation, combining them in the event of a conflict. The upshot of this was that a cross-elasticity test, such as the one put forward by the Mattel company, could in fact be taken into account, but not exclusively—as long as the case contained other elements on which to base a decision.

95. Having laid down those principles, the Council looked at the various criteria that might help delineate the market.

96. First, it found that the product had unique characteristics, and in particular the typical appearance of fashion dolls as compared with other anthropomorphic toys. Then it considered the average price differential between fashion dolls and baby dolls, as computed using Nielsen reports. The Council also used child behaviour studies that showed that fashion dolls and baby dolls did not have the same recreational and psychological potentialities, because they did not trigger the same imaginative faculties in children.

97. Mattel challenged the fact that sociological and psychological studies had been taken into account to define the relevant market.

98. On this occasion, the Council observed that the parallelism established by Mattel between the patient/doctor relationship, for medicine, and the child/parent relationship, for toys, needed to be put in perspective because of the very nature of the products and their purpose. Indeed, while patients might be the end-users, they at no point were the ones able to decide what medicines should be prescribed for them, since to make that determination required the specialised expertise possessed by their doctors. The situation was different for children, who, while not the ones who paid for their toys, nevertheless frequently made the choices or swayed the purchasers’ decision to their liking. Moreover, the investigation showed that Mattel’s marketing strategy was aimed at young girls.

99. After reiterating its theoretical stance on the relevance of cross-elasticity tests to market analysis at the outset of its deliberation, and after reviewing the relevant technical, economic and behavioural factors, the Council addressed the substance of the findings of Mattel’s econometric study.

100. In particular, the study had contended that sales would decrease by 15.4% if the price of Barbie dolls rose by 10%, and that a rise of 5% in Barbie doll prices would cause Mattel’s corporate profits to decline.

101. The Council observed that these findings, in and of themselves, were insufficient for defining the contours of the market, insofar as they would be just as consistent with a situation in which Barbie dolls were in competition with other dolls or games (as the Mattel company claimed), as with one in which Mattel had a monopoly, in which case Barbie dolls would constitute products that could not be substituted for any other doll or toy. In the latter case, and if Mattel set its price to maximise profits, any increase in that price would necessarily cause its profits to decline. Moreover, it is always in a monopoly’s interest to set prices at such a level that the price elasticity of demand for its product is greater than 1 in absolute value. On the basis of all these elements, the Council determined that the relevant market was the one for fashion dolls.

Interim protective measures
102. In 1999, six interim protective measures were ordered by the Council, which was a sharp increase from the previous year. Clearly this reflected ever-increasing demand on the part of businesses, but also, for certain sectors, such as audio-visual production or telecommunications, it would probably suggest that the procedure was well suited to their economic timeframe, which is particularly rapid. It should also be stressed that in these cases the Council, when ordering interim protective measures, endeavoured to determine those that would provide the best solution to the emergency situation at hand, without prejudging the merits of the case. The measures ordered in the Grolier case, which were intended solely to narrow the gap between France Télécom and its competitors in the ability to provide high-speed Internet services, are an especially enlightening example of this.

103. In the case involving a petition for interim protective relief filed by the firm Grolier Interactive Europe/Online Group, a particular difficulty arose, since the Council was asked to suspend the ADSL Internet access plan that France Télécom and France Télécom Interactive were preparing to put on the market. But high-speed Internet access was in great demand from consumers, and the competition authorities were loathe to delay the release of new technologies. However, the Council deemed, first, that “while France Télécom’s plan is to market an innovation that would constitute progress for consumers, the risks of long-lasting distortion of competition in the market for Internet-based services justify a suspension”; in other words, the short-term inconvenience that the measure imposed on consumers was weighed against the long-term benefit to consumers of keener competition. A further justification was that the suspension would be for a short period. Accordingly, the Council ordered France Télécom Interactive to “suspend the marketing of any ADSL-based high-speed Internet access plan for a period of fifteen weeks after the equipment is ready for use... This suspension shall be interrupted if an ISP other than France Télécom Interactive markets an ADSL-based Internet access plan prior to the expiration of this period.”

Court decisions

Summary of decisions by the Paris Court of Appeal

104. In 1999, the Paris Court of Appeal, which has appellate jurisdiction over decisions of the Competition Council, handed down 31 rulings in respect of appeals against the Council’s decisions.

105. Some of those rulings (17 of them) confirmed the Competition Council’s decisions. The Court of Appeal sent three cases back to the Council and re-opened the debate on two others. In one case, it held that it did not have jurisdiction. It reversed four decisions. It quashed two decisions and stayed proceedings in two cases due to jurisdictional conflicts, and it deemed in one case that there were no grounds on which to rule on a challenge to its jurisdiction. Of these 31 rulings, 15 were in turn appealed to the Court of Cassation.

106. The main sectors covered by these rulings were network industries, electricity, telecommunications, and construction and public works.

Telecommunications

107. In the decision under appeal (98-D-60), the Competition Council had found that France Télécom had abused its dominant position in the market for telephone subscriber lists by instituting price discrimination in the downstream market for telemarketing files, insofar as it charged lower access fees to its subsidiary than it invoiced to its competitors.
108. Finding that this practice was prohibited by virtue of Article 8 of the Order of 1 December 1986 and under Article 86 of the Treaty of Rome, the Council had levied a fine on France Télécom. It ordered the company to provide a consolidated list providing information contained in the universal directory, and to propose a service whereby nominative data files would be made compatible with the “orange list” of telephone subscribers not wishing their numbers released for commercial purposes. These services had to be offered on non-discriminatory terms at prices shaped by the costs of the technical operations needed to meet demand.

109. The Court of Appeal quashed this decision because of the rapporteur’s presence at the Council’s deliberations, which it deemed contrary to Article 6§1 of the European Convention on Human Rights, and to Article 18 of the Order of 1986. It issued new rulings on the practices that had been brought before the Council and reaffirmed the same penalties and the same order.

110. To confirm the existence of a market for the telephone subscriber list, the Court observed that, for operators in the market for telemarketing files, the list constituted a resource for which no other database could be substituted—because it was exhaustive and updated continuously, and because it indicated subscribers who wished not to be contacted by telemarketers.

111. The Court also held that the fact that a firm holding a dominant position in a market for goods or services that were used in a related market in which that firm was also present, sold those products at higher prices than it charged itself for their use could effectively prevent its competitors from entering or remaining in that related market.

Audio-visual production

112. The Council (in Decision 98-D-70) had found the firm Canal Plus guilty of abuse of dominant position for having inserting clauses into its contracts to pre-purchase exclusive rights to broadcast recent French films, that prohibited producers from selling other operators the rights to broadcast those films on pay-per-view channels prior to and during the period of exclusivity for broadcast to subscribers.

113. Canal Plus argued that the Council had infringed the rules of due process by allowing the rapporteur and the rapporteur general to be present at the court’s deliberations. The claimant also contested the Council’s determination of the relevant markets and the abusive nature of its contractual practice. Failing that, it demanded relief under Article 10 of the Order of 1986, in respect of its contribution to the funding of French cinematography. Lastly, it denounced the excessive nature of the FF 10 million fine imposed by the Council, and of its injunctions, which prohibited the company from including the incriminated clauses in its pre-purchase contracts for the duration of the period in question.

114. The Court of Appeal quashed the Council’s decision on grounds of procedural error, but with regard to the substance of the case it ruled the same way as the Council.

Construction and public works contracts

115. In the contested decision (98-D-26), the Competition Council had ruled that the firms Laurent Bouillet Entreprise SA and Crystal SA had violated Article 7 of the Order of 1986 by colluding with competitors prior to the award of a contract for the renovation of heating facilities at the Luminy science park in Marseilles.
116. In support of their petition to have that decision quashed, the claimants alleged, *inter alia*, repeated violations of the rules of fairness in the establishment of proof of their participation in the illicit agreement.

117. The Court of Appea...
Suspension of statutory limitation periods

SA Concurrence

127. In the disputed decision (98-D-51), the Competition Council had dismissed the case brought before it in application of Article 20 of the Order of 1 December 1986, deeming that more than three years had elapsed since the notification of grievances without any action that could be deemed to suspend the statutory limitation period.

128. In support of its petition for a reversal of that decision, the firm SA Concurrence claimed that it lacked any means of obliging the Council rapporteur to investigate its complaint, and it then invoked the suspension of the period of limitation provided for by Article 27 of the 1986 Order, with effect from the date of petition to the Council, or at least from the notification of grievances.

129. The Court of Appeal upheld this argument, affirming that the period of limitation applicable to the firm that had petitioned the Council pursuant to Article 11 of the aforementioned Order had been suspended when the petitioner became unable to take suspensive action.

130. The Court deduced that in the absence of actions cited in the aforementioned Article 27, emanating from the rapporteur of the Competition Council, the period of limitation was necessarily suspended for the petitioner, who had been unable to take action in the procedure before the Competition Council.

131. Consequently, the Court reversed the challenged decision and referred the case back to the Council for investigation.

Artwork appraisals

132. The Competition Council (in Decision 98-D-81) had disciplined four national artwork appraisers’ organisations for practices (conditions of entry) that limited access to the appraisal market and impeded competition between their members (distribution of price lists, limitation of the number of specialities per appraiser). The Court of Appeal quashed the decision because the rapporteur and rapporteur general had been present at the Council’s deliberations. It held that the statutory period of limitation had been suspended, even with regard to the Minister, who had been unable to take any suspensive action. However, it fully confirmed the Council’s judgement as to the anticompetitive nature of the practices. It reduced the amounts of the fines.

Summary of decisions by the Court of Cassation

133. In 1999, the Court of Cassation handed down seven rulings in respect of appeals against Paris Court of Appeal decisions on challenges to findings of the Competition Council. It dismissed five appeals and reversed two rulings of the Court of Appeal.

134. In the Normandy Bridge case, the Court of Cassation held, as had the Paris Court of Appeal, that the mere presence of the rapporteur and rapporteur general at the Council’s deliberations constituted a breach of Article 6 of the European Convention on Human Rights, insofar as it infringed the principle of separation of the functions of investigation and judgement, and that of equal protection for the parties.
Summary of decisions by criminal, civil and commercial jurisdictions

Criminal action taken in respect of business practices

135. Cases focused essentially on compliance with invoicing rules (Article 31), transparency (Article 33) and payment deadlines (Article 35).

136. On the basis of Title IV of the Order of 1 December 1986, over 40 000 audits were conducted in 1999, resulting in nearly 750 referrals to the public prosecutor’s office.

137. Over the same period, the criminal courts handed down 320 decisions condemning violations of Articles 28 and 31 to 37 of the aforementioned Order.

138. With regard to invoicing, audits focused more particularly on business co-operation services rendered by distributors to suppliers. The precise nature of these services was not always specified on invoices, which could be conducive to billing for fictitious services. Moreover, distributors did not always draw up the business co-operation contracts that they were required to establish under Article 33 paragraph 5.

139. It was this that prompted the High Court of Strasbourg, on 16 March 1999, to impose a FF 280 000 fine and publication of the ruling on a distributor who had deducted compensation for business co-operation from his suppliers’ invoices without their consent.

140. It should also be noted that the decree issued on 10 March 1999 by the Criminal Chamber of the Court of Cassation stipulated that the precise description of products and services rendered should encompass an indication not only of the nature of the product or service, but also of its characteristics by which the transparency of pricing could be assured.

141. Lastly, on 25 May 1999 the Amiens Court of Appeal handed down a decision condemning a practice whereby products were over-billed during non-promotional periods to build up a credit balance to be applied towards purchases for promotions, but with no indication on the invoices of the price reductions effectively granted, on the grounds that this practice constituted a violation of Article 31 of the Order of 1 December 1986.

Civil action taken in respect of business practices

142. SMEs and SMIs have denounced certain practices engaged in by large chain stores, and which are in violation of Article 36 of the Order of 1 December 1986. In particular, they have complained about unfair solicitation of benefits that are discriminatory and disproportionate to what is offered in return, and about sudden decisions to discontinue stocking their products with no written advance notice. Firms are sometimes forced, under the threat of such decisions, to consent to ever-increasing financial concessions extracted on margin bonuses and business co-operation charges. But what is received in exchange for these concessions, whether it be vague or non-existent, is in violation of Article 36 of the Order of 1 December 1986.

143. The action provided for in the penultimate paragraph of Article 36 was taken twice in 1999 by the Minister for Economic Affairs. These actions involved discriminatory practices, which the Minister went to court to have stopped. In addition, the Minister intervened in a large number of civil suits filed by victims of practices defined in Article 36, and more particularly of sudden cessations of business relationships without written notice (Article 36-5). The Minister filed briefs in 14 cases in 1999. In these
cases, the commercial courts awarded significant damages and interest to the companies that had been victimised. For example, the Commercial Court of Avignon made the Verachtert company pay compensation of FF 10 million to the Haladjian firm, with whom it had ceased to do business (25 June 1999). Similarly, in a decision of 2 April 1999, the Commercial Court of Paris ordered Galeries Lafayette to pay FF 1.5 million in compensation to the Esmar company for breaking off their business relationship without advance written notice.

144. Lastly, it should be noted that the decisions of the Paris Court of Appeal have narrowed the options of the Minister, who has been denied the possibility of requesting the invalidation of unlawful clauses and the subsequent relief needed to repair damage to the public economic order (Decree of 9 June 1998). The proposed legislation on new economic regulations, which includes provisions that strengthen the Minister’s powers to act on the basis of Article 36, ought to restore the full effectiveness of this mechanism.

Mergers and acquisitions

Cases dealt with by the DGCCRF: statistics on the number, size and types of mergers notified or submitted for review

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of operations</td>
<td>472</td>
<td>478</td>
<td>505</td>
<td>369</td>
</tr>
<tr>
<td>Notifications received</td>
<td>27</td>
<td>28</td>
<td>28</td>
<td>27</td>
</tr>
<tr>
<td>Referrals to the Council</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sectors of activity involved in mergers in 1999</th>
<th>Number of operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agri-food</td>
<td>43</td>
</tr>
<tr>
<td>Building - Construction materials</td>
<td>10</td>
</tr>
<tr>
<td>Retailing</td>
<td>37</td>
</tr>
<tr>
<td>Communication</td>
<td>30</td>
</tr>
<tr>
<td>Mining and manufacturing</td>
<td>179</td>
</tr>
<tr>
<td>Services</td>
<td>38</td>
</tr>
<tr>
<td>Services to government</td>
<td>2</td>
</tr>
<tr>
<td>Transport</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td>369</td>
</tr>
</tbody>
</table>
The year 1999 saw a continuation of the wave of corporate mergers, closer co-operation between the French authorities and the European Commission, and the emergence of an administrative dispute regarding competition.

In 1999, 369 mergers and acquisitions were examined, including 237 that involved French companies. Sixty-seven of them were examined in depth; of those, 27 gave rise to formal notification. Two notifications were declared ineligible on the grounds that they did not constitute mergers or acquisitions as defined in the Order of 1 December 1986.

The Minister petitioned the Competition Council for its opinions on six operations. As a result, one merger (Coca Cola / Orangina) was prohibited, and another was authorised subject to divestment of certain assets in the brick production sector. Another operation was abandoned subsequent to the referral. The other three operations were still under review by the Competition Council at the end of the year.

Seven operations were authorised on the condition that the parties thereto make certain commitments so as to restore effective competition to the markets concerned. Those commitments were in general structural, supplemented in certain cases by other pledges regarding behaviour. Structural commitments involved divestment of assets (factories, hoardings, brands, etc.). Other commitments involved alteration of the shareholder base of the new entity, to eliminate all structural ties between businesses and their customers, for example. Behavioural commitments included pledges by the merging firms not to pool or bundle their products or services, limitations on advertising expenditures, commitments to open storage depots or safety stocks to competitors. Such commitments, undertaken during the initial phase of a merger review, are especially useful because they preserve competition while at the same time allowing companies to obtain authorisations within a very short (two-month) period.

Three operations were referred back to the French authorities by the European Commission, on the basis of Article 9 of Council Regulation 4064/89, in respect of their local aspects. These operations were authorised, subject to the fulfilment of certain commitments by the parties.

Lastly, the Council of State ruled on two merger-related decisions by the Minister. It confirmed the legality of one decision (Coca Cola / Orangina) and blocked the other because affected third parties had not been given an opportunity to make their views known. These two cases enabled the Council of State to specify the bounds of its jurisdiction over mergers. Among the conclusions of the Government Commissioner was that, while the Council of State exercised limited authority over the Minister’s decision not to refer a case to the Competition Council, and thus to authorise an operation, with or without commitments by the parties thereto, it did exercise full proportionality control over the Minister’s decisions to block an operation or to approve it subject to conditions, insofar as such decisions restricted freedom of commerce and industry for the sake of preserving effective competition in the markets involved. The Minister’s decisions in this area were treated like economic policy measures, the legality of which was subject to proportionality.

Three appeals were lodged in 1999 against the Minister’s decisions regarding mergers and acquisitions. At year-end, those appeals were being investigated by the Council of State.

Major cases

Article 9 of the Community Regulations was invoked in respect of the following mergers: Total/Fina, EMC/CSME/Rock and TotalFina/Elf (still under investigation).

The EMC/CSME/Rock merger involved the creation, by the Compagnie des Salins du Midi et des Salines de l’Est (CSME) and Entreprise Minière et Chimique (EMC), of a joint venture active in local
French markets for snow-clearing salt, in response to EMC’s diminished capacity following the planned closure of its potash mines. The operation was authorised on 1 September by the Minister for Economic Affairs, Finance and Industry following substantial commitments by the parties: divestment of a large number of deposits, a halt to the marketing of a particular brand in one of the market segments and, in order to foster market entry, safety stocks would be made available to enable third parties to cut their costs when responding to calls for bids.

In the Total/Fina merger, the local market for petroleum product storage in the Pont-la-Nouvelle area had been referred to the French authorities. The Minister authorised the merger in view of the commitments proposed by the companies: divestment of a depot, proposed contractualisation of spot clients and partial opening of the closed depot in Sète.

Regarding controlled operations in France, 1999 saw a refusal to authorise the acquisition of Orangina by Coca-Cola, which had submitted a new proposal accompanied by commitments addressing the competition problems that had been raised in connection with a prior denial in 1998. In essence, Coca-Cola proposed granting an independent third party an exclusive ten-year licence to market Orangina in the “non-home” market. But the Minister for Economic Affairs, with the consent of the Competition Council, deemed that such a system would lead to a co-ordination of behaviour—which was necessary for Orangina’s development in the “non-home” market, and thus for the preservation of effective competition in that market, but was at the same time detrimental to free competition. Given the impossibility of reconciling those conflicting goals, the Minister decided to prohibit the merger. This case shows the difficulty of sharing the ownership or exploitation of a brand within the same country, and it constituted the first direct application in French law of the concept of a collective dominant position.

**Cases in which the Competition Council’s opinion was sought**

In 1999, the Council handed down four opinions regarding mergers and acquisitions, at the request of the Minister for Economic Affairs. These four opinions were published in the *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes*, along with the decisions taken by the Minister.

The following table shows the number of merger-related opinions handed down by the Council, at Ministerial request, between 1993 and 1999:

**Table 2.**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>9</td>
<td>15</td>
<td>5</td>
<td>5</td>
<td>7</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

In respect of two of the four cases submitted to it in 1999, the Council issued opinions stating that the proposed mergers would probably be detrimental to competition. One involved a player in a regional tile and brick market, and the other involved players in the globalised market for carbonated beverages.

The tile and brick market in Alsace
159. In the case involving the tile and brick sector in Alsace, the proposed operation would have created a monopoly in the market in question. Moreover, it was noted that customers were not prepared to replace traditional products with products made of concrete, and it was unlikely that a new competitor (from Germany, for example) would enter the market. The new group would therefore have been in a position to charge high prices, to the detriment of consumers.

The acquisition of Orangina by the Coca-Cola Company

160. The second case involved the Coca-Cola Company’s plans to acquire Orangina. The high profile and international dimensions of the case warrant a precise explanation of the Council’s reasoning.

161. First, the Council deemed that the fact that the Coca-Cola Company had embarked upon an acquisition of global dimensions by acquiring the beverage brands of Cadbury Schweppes in a large number of countries was irrelevant to the case put before it.

162. Clearly, the initial agreement between Coca-Cola and Cadbury Schweppes contained a clause whereby the Cadbury Schweppes group would refrain from selling brands or assets to any of Coca-Cola’s major competitors. That clause could effectively have prevented the PepsiCo group—the Coca-Cola group’s main competitor—from acquiring Cadbury Schweppes group beverage brands in countries not involved in the operation, including France.

163. However, the agreement between Coca-Cola and Cadbury Schweppes had been altered by an amendment under which Coca-Cola would not acquire any of the Cadbury Schweppes group’s brands, activities or assets in the European Union (except for the United Kingdom, Ireland and Greece), Norway or Switzerland.

164. While it was likely that brand management and the technical development of products would entail co-ordination at a global level between the Coca-Cola Company and Cadbury Schweppes, in particular as concerned brand promotion, the existence of such co-ordination, in and of itself, could not be used to conclude that the French subsidiary of Cadbury Schweppes was not independent vis-à-vis Coca-Cola but could, on the contrary, reinforce that subsidiary’s competitiveness in the French market.

165. On the contrary, the Council found that the operation could be harmful to competition in the market for carbonated soft drinks (CSDs), other than colas, for consumption outside the home.

166. To make this determination, and in addition to the group’s very substantial market shares, the Council considered distributors’ space constraints—constraints which usually prompted them to select only one brand for each variety of CSD, giving their preference in each case to a very well-known brand that enjoyed strong spontaneous demand on the part of consumers. The result of this is that the position of first-rate brands is more solidly established in this market than in that of CSDs for home consumption. Orangina accounted for more than 33.5% of volume sales of non-cola CSDs for out-of-home consumption, while Coca-Cola accounted for nearly 91% of cola sales for out-of-home consumption.

167. In addition, it is in the interests of makers of CSDs, bolstered by spontaneous demand for their best-known brands, to focus the efforts of their marketing force on their least-known brands and those that are most directly in competition with other groups’ brands; ownership of a brand that is considered a “must” enables CSD sellers to prompt their customers to round out their range by purchasing other group beverages positioned in other segments of the market, which gives rises to active competition by virtue of the fact that each of the groups present in the sector possesses a brand that is considered a “must”.

25
168. Naturally, the Coca-Cola Company had made a variety of commitments in connection with its new acquisition proposal.

169. First, Coca-Cola pledged not to market Orangina beverages in the out-of-home market for a ten-year period, and to give an “independent third party” an exclusive licence to market and distribute those products during that time.

170. The Coca-Cola Company also made commitments regarding the price of supplying the licensee with concentrate for the duration of the licence, and for Orangina promotion and advertising for at least ten years.

171. The Pernod Ricard company proposed that the “independent third party” assigned to distribute Orangina products be its CSR Pampryl subsidiary, which was already marketing fruit juices, cider, calvados and children’s beverages.

172. The Coca-Cola Company also confirmed that it would apply, with regard to its business in France, the pledge made in 1989 by the Coca-Cola Export Corporation to the Commission of the European Communities, whereby the Coca-Cola Group would not require its customers to purchase Orangina products in order to buy Coca-Cola products, nor that they purchase Coca-Cola products in order to buy Orangina products, nor that they purchase any beverage bearing one of the Company’s brand names in order to obtain Orangina and/or Coca-Cola products.

173. However, these commitments, in respect of which the Coca-Cola Company agreed to submit to oversight by the Ministry for Economic Affairs, were not, in and of themselves, likely to dispel the disadvantages that the Council had noted in its previous opinion.

174. The proposed licensing agreement was not in fact limited to providing—legitimately—that the Coca-Cola Company would exercise the exclusive supervisory rights needed to ensure that the licensee did not impair the distinctive nature, strength or goodwill of the Orangina brand. In addition, it called for the creation of a steering committee for marketing policies and decisions, which would oversee sales promotions and the market positioning of the Orangina brand and its products. As a member of this committee, the Coca-Cola Company would have played a role in managing the Orangina brand in the out-of-home market. The information provided by the third-party licensee could have led the Coca-Cola Company to adopt a marketing policy for the Sprite and Fanta brands that was correlated with the licensee’s policy for Orangina. Under the circumstances, the proposed scheme did not ensure the preservation of two truly independent competitors in the market in question.

The role of the competition authorities in formulating and implementing other measures, e.g. participation in the legislative process and trade or industrial policies

The role of the DGCCRF

175. In addition to paying special attention to the conditions under which sectors being deregulated, such as electricity and gas, were being opened up to competitive forces, and within the framework of inter-ministerial co-ordination, the competition authorities made their contribution to the government’s review of regulatory developments.
The role of the Competition Council

176. The Competition Council handed down 21 opinions in 1999, breaking down as follows: four involved price control decrees, pursuant to both Article 1 and Article 5; 11 involved general competition issues, under Article 5; two involved draft legislation or regulations, under Article 6; two were under Article 26, which allows investigative or judicial authorities to interrogate the Council; and, lastly, two were issued pursuant to the Telecommunications Regulation Act, at the request of the Telecommunications Regulatory Authority.

Table 3. Number of opinions handed down over the past seven years

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Draft price control decree (Art. 1)</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>Draft proposal instituting a regime restricting competition (Art. 6)</td>
<td>-</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>4</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Competition issues (Art. 5)</td>
<td>4</td>
<td>5</td>
<td>9</td>
<td>6</td>
<td>11</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td>Compliance with commitments (Art. 44)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Draft exemption decree</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Practices noted in connection with judicial procedures (Art. 26)</td>
<td>6</td>
<td>6</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Others (ART)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
<td>17</td>
<td>14</td>
<td>13</td>
<td>19</td>
<td>21</td>
<td>21</td>
</tr>
</tbody>
</table>

177. The Council responded to competition-related questions that arose in a wide variety of sectors, at the Minister’s request or at that of trade associations. It also handed down two advisory opinions to the Telecommunications Regulatory Authority.

178. Consulted by the Minister for Economic Affairs regarding the organisation and financing of the market for the disposal of used accumulators, the Council observed that the creation and management by the manufacturers and importers of batteries and accumulators of a sole collection body would be apt to impede new manufacturers and importers from entering the market. It made recommendations designed to ensure the emergence of new operators. The Council also stressed the risk that a joint body would be used by its members to co-ordinate their marketing policies. Called upon to express its opinion as to whether industry players could set their “environmental contributions” in a concerted manner, the Council reiterated that the rules of competition did not prevent producers, within the framework of their business relationships with customers, from seeking to pass on the costs of meeting their environmental obligations. Nevertheless, each operator had to preserve its commercial freedom. There could be no collusion regarding the principle or scope of any pass-through or non-pass-through of costs.

179. Also at the Minister’s request, the Council was prompted to take another look at France Télécom’s “Moderate subscription” pricing option, so as to incorporate the new elements that had intervened since its previous opinion (No. 96-A-18). It held that, in a competitive voice telephony market...
in which the historical operator still enjoyed a quasi-monopoly for local calls and was extremely dominant for long-distance ones, the “moderate subscription” pricing option, coupled with a clause giving France Télécom exclusivity over routing, which had no technical justification, would artificially restrict competition between operators. However, the Council was not opposed to the renewal of the “moderate subscription” pricing option as long as it did not contain any clause prohibiting selection of the carrier.

180. Also in the realm of telecommunications, the Council was asked by the ART for its opinion, as it is every year, so that the Authority could establish its list of operators exerting a significant influence on the telecommunications market. The Council analysed the situation in the mobile telephony and interconnection markets, and it responded to ART’s request for an opinion regarding creation of a “Voice Portal” service by France Télécom.

181. Four opinions were handed down at the request of trade associations. The Council was petitioned by the French Federation of Independent Oil Companies (FFPI), which had criticised certain aspects of the system for constituting strategic stocks of petroleum products, as it emerged from a set of legislative and regulatory provisions.

182. The Road Hauliers’ Guild of Isère questioned the Council about the behaviour of the Dauphiné Railway Authority, and in particular about the consequences of the yearly operating subsidies that a transport authority was able to receive. The Council stipulated that payment of a subsidy could be anticompetitive under certain circumstances. The use of a balancing subsidy to finance marketing activities in order to charge low prices could in fact be detrimental to competitors. Such a practice would be considered anticompetitive if, for example, the authority occupied a dominant position on one or more markets, and if the prices charged in the private transport market were predatory, i.e. likely to keep competitors from entering the market or to drive them out of it. The Council recommended that the transport authorities adopt a cost accounting system that would indicate the profitability of their various activities, and the share of subsidies attributed to each.

183. At the request of the French Opticians’ Union, the Council examined the possibilities for differential optical reimbursements and the issue of disclosure of agreements between mutual insurers and opticians. In particular, the analysis focused on the application of competition law to mutual optical centres and certain possibilities for differentiated reimbursement. It emphasised that the relationship between a mutual optical centre and the mutual society that managed it could not be categorised as anticompetitive insofar as the centre had no legal personality distinct from the insurer. The situation would be different if a centre or a commercial company distributing spectacles and other optical products were created by several mutual insurers or by a grouping of mutual societies. Regarding the practice of differentiated reimbursements, the Council deemed that it could be considered anticompetitive if it were demonstrated, for example, that the agreement between mutual societies was reached with a view to eliminating one or more competitors from the optical market in general or from the mutual optical market in particular.

184. The Association of French Road Hauliers’ Unions questioned the Council regarding the involvement of departmental fleets in the emulsified asphalt production and roadworks sector. The fleets belonged to the Departmental Equipment Directorates (DDEs), which maintained the fleets used by the departmental authorities and performed road maintenance work. Citing European case law, the Council held that equal opportunity ceased to exist between public and private operators if the former were both competitors and judges in the same area. Regarding the prices charged by the fleets, it was found that while the fleets enjoyed certain cost advantages on a number of items, such as labour, insurance and the cost of capital, they also bore additional costs that private firms did not, due in particular to the fact that they could not adjust their workforces as flexibly, and that they had to make bigger investments in order to be prepared for emergency situations. The Council recommended establishing a cost accounting system, which was the only way to ensure transparency with regard to costs and the calculation of rates and fees.
185. In response to a referral by the Federal Union of Retail Co-operatives about the possibility for retailers belonging to co-operative groupings to organise a temporary advertising campaign under a single trade name and to charge a single promotional price, the Council acknowledged that such campaigns, which tended to reduce sales margins, could help revitalise a market and intensify competition. However, the reference price being advertised in such a campaign had in fact to be a maximum suggested price, and there had to be no direct or indirect pressure on distributors to impose it.

186. Members had to be free to participate or not to participate in joint campaigns, and, if they did take part, to charge prices lower than the ones advertised. Each network was free to decide how best to distribute the information to its members. With this limitation, the Council found that the absence of the words “suggested price” or “suggested maximum price” on the advertising medium did not constitute sufficient evidence of an imposed price.

187. The Council was also presented by the Conseil Général du Nord with a question regarding competition aspects of subcontracting and sub-delegation. The Council noted that collusion and exchange of information between businesses that took advantage of unsuccessful subcontracting projects in some cases had anticompetitive purposes, since subcontracting could constitute a way to implement a prior agreement. Similarly, sub-delegation must not be used as a way to thwart competition by reintroducing previously rejected businesses into a contract.

**Resources of the competition authorities**

**Resources overall (current numbers and change over previous year)**

**Annual budget (in your currency and in US dollars)**

188. For the DGCCRF and the Competition Council: FF 200 million ($26.5 million);

   For the Council: FF 80 million ($10.5 million)

**Number of employees:** 200

**Human resources applied to:**

- Combating anticompetitive practices: 175 persons;
- Merger review and enforcement: 15 persons;
- Pleading: 10 persons.

**Period covered by the above information**

189. The period covered by the above information is from 1 January to 31 December 1999.
New reports and studies on competition policy issues (or bibliographical references)

- Articles from the Revue de la Concurrence et de la Consommation:
  - No. 111: Sport et concurrence [“Sport and Competition”];
  - No. 110: Droit boursier et politique de la concurrence [“Securities Law and Competition Policy”];
  - No. 109: Les concentrations communautaires dans le secteur des télécommunications and La puissance d’achat [“Community Mergers and Acquisitions in the Telecommunications Sector” and “Purchasing Power”].