

**BELGIUM***(2002)***1. Amendments and proposed amendments to competition law and policy****1.1 Summary of new developments in competition law and related fields**

1. During the reference year, there were no amendments to the Act on the Protection of Economic Competition (LPCE), co-ordinated on 1 July 1999 [published in the *Moniteur Belge* (Belgian Official Gazette) of 1 September 1999].

**1.1.1 Co-operation with the regulatory authorities in the electricity and gas sector**

2. The aforementioned Act on the Protection of Economic Competition (LPCE) stipulates that co-operation between the competition and regulatory authorities shall be governed by Royal Decree (Article 25).

3. Accordingly, a Royal Decree of 20 September 2002 (published in the *Moniteur Belge* of 8 October 2002) governs co-operation between the Corps of Rapporteurs, the Competition Service and the CREG (Commission de Régulation de l'Électricité et du Gaz)—the regulatory body in the electricity and gas sector.

4. *Inter alia*, the Royal Decree governs advice and mutual assistance, as well as the sharing of information between the various authorities.

**1.1.2 Opening of the postal sector to competition**

5. The Royal Decree of 7 September 2002 (published in the *Moniteur Belge* of 25 October 2002) transposes Articles 1.1 and 1.2 of Directive 2002/39/EC of the European Parliament and of the Council with regard to the further opening to competition of Community postal services.

6. Article 1 of the above Directive imposes additional pricing principles on universal service providers (transparency, non-discrimination, equality, prohibition of cross-subsidisation, etc.). It also sets the weight and price limits applicable to services that may be reserved to universal service providers.

**1.2 Other measures****1.2.1 Simplified procedure for dealing with certain concentration operations**

7. The Competition Council and the Corps of Rapporteurs published a joint communiqué outlining a simplified procedure for dealing with concentration operations that raise no competition issues. The communiqué was published in the *Moniteur Belge* of 11 December 2002.

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8. The joint communiqué sets forth the simplified procedure and the conditions that concentration operations must meet in order to qualify for it.

9. The simplified procedure may apply in the following cases:

- If two or more enterprises acquire joint control of a another firm that does, or plans to do, no more than a token amount of business in Belgium.
- If two or more enterprises merge, or if a number of enterprises acquire exclusive or joint control of another enterprise, provided that none of the parties to the concentration does business in the same product and/or geographic market or in a product market that is upstream or downstream from a product market in which another party to the concentration does business. If this condition is not met, the simplified procedure may still be applied if the parties' combined market share is less than 25%.
- If the notifying parties are active in a small market.

10. If the Corps of Rapporteurs considers that a concentration qualifies for the simplified notification procedure, only certain information stated in the communiqué should be reported. The rapporteur will prepare a simplified report, and the Council will theoretically make an expedited decision (within 25 days from the date of notification) in a form that is also simplified.

### *1.3 Amendments to competition law and policy proposed by the authorities*

#### *1.3.1 Telecoms sector*

11. In September 2002, the Council of Ministers approved a bill designed to ensure full independence for the regulatory authority (IBPT – Institut Belge des Postes et Télécommunications). The main purpose of the reform was to separate policymaking and enforcement functions.

## **2. Implementation of competition law and policy**

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

#### *A. Summary of activities*

##### 1. Competition Service and Corps of Rapporteurs

Only two rapporteurs are currently serving.

It will be recalled that the rapporteurs' function is to direct and organise investigations and to present investigative reports to the Competition Council.

The Competition Service investigates and reviews competitive practices, which includes reviewing concentration operations.

For several years now, the Service has been chronically short-staffed. In 2002, it was confronted with more departures. The total establishment of 38.5 at the beginning of 2002 was reduced by 7.5 units over the reference period (see table under §4.1.1 below). However, recruiting examinations were held recently, and as a result new hires can be expected at some point in 2003.

Despite the shortage of personnel, the Corps of Rapporteurs submitted 77 reports to the Competition Council, 53 of which concerned concentration operations<sup>1</sup>.

## 2. Competition Council

Despite a virtually complete staff (except for a non-permanent member who died on 27 June 2002 and has not yet been replaced), the Competition Council also had to cope with an excessive workload.

Only four members of the Competition Council—a Chair and a Vice-Chair (who are judges) and two other members—perform their duties on a full-time basis.

Examination of case files and hearings take up much of the Council's time, not to mention the writing of draft decisions by the presiding judges of the chambers constituted to render opinions on cases brought before the Council.

The Competition Council exercised the general advisory power vested in it by the Act of 5 August 1991 on the Protection of Economic Competition, handing down three opinions. Its first opinion dealt with the revision of notification thresholds (as stipulated by Article 11 of LPCE). A second opinion concerned the initial text of a bill to amend the Act of 5 August 1991 on the Protection of Economic Competition. Lastly, the third opinion was issued pursuant to Royal Decree No. 62 of 13 January 1935 authorising economic regulation of distribution and production. This final opinion was handed down after transport sector trade federations petitioned for an extension to the entire sector of the obligation to make road freight rates, including those in unwritten transport contracts, subject to a price review clause as from 1 January 2001.

The simplified procedure mentioned above (under §1.1.2) should enable the Competition Council to spend less time on low-profile concentration cases and to deal more effectively with practices in restraint of competition.

In 2002, the number of notifications<sup>2</sup> did not diminish, despite the substantial modification of notification thresholds in 1999. Because the new concentration thresholds refer solely to Belgian turnover figures, they are too low to have any real impact on the number of notifications.

Since 1 July 1999 and the entry into force of the new notification thresholds, 69% of notified concentrations fall below the 25% market share threshold. Concentrations controlling less than 25% of a market are supposed to be approved by the Council automatically under Article 33 §2.1. a) of LPCE.

In 2002, out of 84 new cases submitted to the Competition Council, 53 involved concentrations<sup>3</sup>. Most of the concentrations were approved after a Phase I decision. Seven

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1. See Annex 1, Tables 1 and 3.

2. See Annex 1, Table 4.

3. See Annex 1, Tables 1 and 3.

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cases involved Phase II decisions<sup>4</sup>. Most of these cases involved operations arising from the liberalisation of the electricity market (see below).

Eighteen new cases initiated as a result of complaints were passed on to the Competition Council after investigation by the Corps of Rapporteurs (versus 13 in 2001). No fewer than 24 decisions were rendered in 2002 regarding restrictive practices. In addition, nine decisions involving interim measures were taken by the Council's Chair or Vice-Chair<sup>5</sup>.

It can also be seen that the overall number of cases submitted to the Competition Council, and of decisions rendered by that jurisdiction, is clearly higher, which shows indubitably that the Belgian Competition Council is once again in a position to perform its missions. Indeed, no fewer than 95 decisions were handed down by the Council in 2002 (versus 66 in 2001)<sup>6</sup>.

Notwithstanding, it should be borne in mind that three out of four full-time members (including the Chair and Vice-Chair) were appointed by Royal Decree on 17 July 2001.

Unfortunately, in view of the reduced complement of full-time members of the Competition Council and its many tasks, foremost of which being to rule on the cases submitted to it, it is scarcely possible for the Council to participate as actively as it would like in international meetings (meetings of the Competition DG and the OECD, meetings organised by other authorities, etc.).

### **Tables summarising cases submitted to the Competition Council and decisions rendered by the Council in 2002:**

#### *Cases*

<b>Type</b>	<b>Total</b>
<b>Concentrations</b>	53
<b>Complaints</b>	18
<b>Interim measures</b>	6
<b>Notifications of cartels</b>	3
<b>Investigations at the Council's initiative</b>	4
<b>Total</b>	<b>84</b>

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4. See Annex 1, Tables 5 and 6.

5. See Annex 1, Table 1.

6. See Annex 1, Tables 1-3.

*Decisions*

<b>Type</b>	<b>Total</b>
<b>Phase I concentrations</b>	51
<b>Phase II concentrations</b>	7
<b>Complaints</b>	24
<b>Interim measures</b>	9
<b>Notifications of cartels</b>	4
<b>Investigations at the Council's initiative</b>	0
<b>Total</b>	<b>95</b>

3. Brussels Court of Appeal and the Cour de Cassation

No ruling in the realm of economic competition was handed down by the Cour de Cassation in 2002.

The Brussels Court of Appeal handed down seven decisions (in addition to various orders imposing case preparation deadlines), all of which related to Dutch-speaking litigants.

In five cases, the Court of Appeal ruled in its capacity as an appellate jurisdiction for decisions of the Competition Council. In two decisions, the Court ruled pursuant to Article 42 of LPCE as a jurisdiction empowered to rule on prejudicial issues involving questions as to whether a given competitive practice was lawful.

The Brussels Court of Appeal, ruling on a decision to impose interim measures, deemed that the citation was groundless and therefore reversed the decision rendered by the Chair of the Competition Council (NV Rendac/BVBA Incine, ruling of 12 November 2002).

In another ruling, the Court of Appeal also partially reversed the Chair of the Competition Council's imposition of interim measures, deeming that in spite of prima facie evidence of a violation of the Act of 5 August 1991 on the Protection of Economic Competition, the existence of a serious, imminent and irreversible prejudice had not been sufficiently demonstrated in law (SABAM/VZW Radio Turen, ruling of 21 January 2002).

In another case, and before ruling on the merits, the Brussels Court of Appeal quashed a fine imposed by the Competition Council, on the grounds that the fine was not justified (BIAC/AOC-BAR and RESTAIR/AOC-BAR, ruling of 25 February 2002).

The Brussels Court of Appeal also found that an ASBL organising championship automobile competitions could not be deemed an enterprise within the meaning of the Act of 5 August

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1991 on the Protection of Economic Competition, and it also ruled that the case had become moot. This ruling is surprising, however, and may be appealed to the Cour de Cassation because of the precedent it might set and the repercussions it might generate (BUBA Racing/VAS, ruling of 28 June 2002).

Lastly, the Brussels Court of Appeal also upheld a decision by the Competition Council (VT4/Vlaamsmedia Maatschappij, ruling of 25 June 2002).

### *B. Important cases*

#### Interim measures

12. Nine decisions were taken, including an important ruling in the gas sector. Here, there was found to be prima facie evidence of an apparent cartel between the gas sector and the supervisory authorities, in respect of the prices charged for inspections of new indoor natural gas installations (or parts thereof). An Accreditation Council, without legal personality and made up of members of installers' trade associations and gas industry representatives, had been set up in order to accredit plumbers, at their own request, after they completed a special training course. Installations not performed by these accredited plumbers had to be inspected by a supervisory body licensed by the Accreditation Council. A price range had been established for these inspections (ARGB, decision by the Chair of the Competition Council of 20 December 2002).

### **2.2 Mergers and acquisitions**

#### *A. Statistical data*

13. For a quantitative summary of the competition authorities' activity in the realm of mergers and acquisitions, see Annex 1, Tables 3 to 6.

#### *B. Important cases*

14. Following the liberalisation of the electricity market instituted at the EU level by Directive EC/96/92 of 19 December 1996, the Competition Council's opinion was solicited in a large number of concentration cases involving the electricity sector.

15. The historical operator, SA Electrabel, had in 1996 joined forces with a number of intercommunal companies for the distribution of electric power. As a result, Electrabel is present, either directly or through subsidiaries, in all electricity markets, from generation to distribution.

16. The terms of energy liberalisation in Belgium are governed by a federal regulation in respect of aspects involving generation, transmission and rates, and by regional regulations in respect of distribution and supply.

17. Since then, an agreement was reached in 2001 between Electrabel and the intercommunal companies to adhere to the requirements of the law, under which an Electrabel subsidiary would supply electricity to eligible customers by default unless those customers elected to sign a contract with another supplier. For their part, the communes and intercommunal companies were to manage the distribution networks.

18. To date, apart from a concentration that was authorised subject to conditions, all of the other notified concentrations were denied. These decisions have all been appealed. The Court of Appeal has not

yet ruled on them, however, insofar as the notifying parties subsequently formulated various new proposals for undertakings that require substantial additional investigation.

19. A number of cases have revealed the constraints on the Brussels Court of Appeal when dealing with such cases in its capacity as a (judicial) appellate body for the Competition Council (an administrative jurisdiction). *Inter alia*, the Act of 5 August 1991 on the Protection of Economic Competition does not empower the Court, in conjunction with its appellate jurisdiction, to invite the Corps of Rapporteurs or the Competition Service to conduct further investigations or to survey the market to ascertain the impact of the proposed undertakings.

### 3. The role of the competition authorities in formulating and implementing other policies

(Not applicable)

### 4. Resources of the competition authorities

#### 4.1 Aggregate resources

##### 4.1.1 Competition Service

##### A. Annual budget

20. The Competition Service does not have its own budget. The Service is part of the Federal Public Service (FPS) for the Economy, SMEs, Self-employed and Energy (Directorate-General for Market Regulation and Organisation).

##### B. Establishment (at 31 December)

	2001	2002
<b>Economists</b>	12	8
<b>Lawyers</b>	13	11
<b>Others</b>	3	2
<b>Support</b>	8	7.5
<b>Total</b>	36	28.5

##### 4.1.2 Competition Council

##### A. Annual budget

21. The Competition Council has an annual budget of approximately €168 000.

##### B. Establishment

22. The Competition Council is made up of 20 members (even if a member who died in 2002 has not yet been officially replaced). Four members perform their duties on a full-time basis—the Chair and Vice-Chair (who are judges) and two other members. The other members do not serve on a full-time basis. They sit in chambers and take part in the Council's functions, including its General Assemblies. It should

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also be noted that chambers are always made up of four members, and that case assignments must take account of a member's language community, not to mention any potential conflicts of interest.

23. The Competition Council is assisted by a secretary and a deputy secretary, both of whom are lawyers, who serve as clerk of the court at hearings and head the secretariat. The secretary and deputy secretary are both seconded from the Competition Service<sup>7</sup> (see table under §4.2 below). The administrative staff comprises four persons.

### 4.2 *Human resource assignments of the Competition Service (2002)*

	Antitrust and mergers	Corps of Rapporteurs	Council Secretariat	Service Secretariat	Corps of Rapporteurs Secretariat	Other	Total
<b>Economists</b>	7					1	8
<b>Lawyers</b>	6	1	2			2	11
<b>Others</b>	1	1					2
<b>Support</b>				3.5	2	2	7.5
<b>Total</b>	14	2	2	3.5	2	5	28.5

### 5. **Summaries of new reports and studies on issues involving competition policy (or bibliography)**

(None)

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7. Article 14 of LPCE stipulates that "The FPS for the Economy shall provide the secretariat for the Council and the Corps of Rapporteurs."

## ANNEX 1

## 1. Anticompetitive practices

Table 1 (2002)

	Notifications	Reports	Decisions
Agreements	3	5	4
Complaints*	22	10	24
Interim measures	6	9	9

<b>Total</b>	31	24	37
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\*including investigations undertaken at the investigators' own initiative.

Table 2 (Summary 1994-2002)

	Notifications	Reports	Decisions
Agreements	61	25	12
Complaints	182	68	42
Interim measures	52	55	40
<b>Total</b>	295	148	94

## 2. Concentrations

Table 3 (2002)

	Notifications	Reports	Decisions
Concentrations	53	53	58

Table 4 (Notifications / Summary 1994 – 2002)

	1994	1995	1996	1997	1998	1999	2000	2001	2002
Notifications	39	48	46	60	52	35	43	48	53

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**Table 5 (Decisions/2002)**

<b>Approvals (Phase I)</b>	37
<b>Decisions to launch Phase II</b>	7
<b>Approvals (Phase II)</b>	3
<b>Denials</b>	3
<b>Tacit approvals</b>	-
<b>Other</b>	8
<b>Total</b>	58

**Table 6 (Decisions/Summary 1994-2002)**

	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
<b>Approvals (Phase I or II)</b>	41	45	27	22	15	5	35	49	40	279
<b>Phase II*</b>	3	1	1	4	3	1	1	2	7	23
<b>Denials</b>	1	-	1	1	1	1	-	-	3	8
<b>Tacit approvals</b>	-	3	17	36	39	30	5	-	-	130
<b>Other</b>	-	-	-	-	-	-	2	-	8	10

\* Decisions to launch Phase II.