

RÉPUBLIQUE FRANÇAISE



# **CONSEIL DE LA CONCURRENCE**

*(French Competition Authority)*

## **2000 ACTIVITY REPORT**

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## EDITORIAL

### THE *CONSEIL* ACTIVITY REPORT IS CHANGING

This year, the report on the *Conseil's* annual activities takes on a new format.

Consisting principally of the text of the decisions and opinions handed down by the *Conseil*, in previous years it was preceded by a presentation giving a report of the institution's activity and case law in an almost unvarying order. It therefore served as a remarkable working tool for professionals and academics alike.

Today, however, competition law occupies a much more important place in France's economic landscape. Increasingly, it concerns not just companies but also consumers. Altogether, it forms an integral part of our daily life.

Consequently, the *Conseil* had a duty to report on its activities in the most synthetic, accessible and concrete terms possible. Good communication is another of the missions of a competition authority.

For this reason, this latest report also contains an overview of the main events that have marked the year 2000.

As we shall see, news has been particularly rich in 2000 : markets continue to open up, such as that of electricity; legislation continues to evolve, with new reforms introduced by the New Economic Regulations Act; finally, EC and international activities are developing rapidly, underlining the increasing need for co-operation felt by national competition authorities faced with the global economy.

In 2000, a number of particularly significant subjects came to the attention of the *Conseil* : some are already well-known, such as the problems posed by hardcore cartels, whilst some are fast gathering importance, such as the law applicable to vertical restrictions or the practices implemented by public monopolies. Finally, other are totally new, such as the Internet. The variety of subjects dealt with is testament to the extreme diversity of the files submitted to the *Conseil*. These theme-based and synthetic presentations are an effort to show how, beyond this diversity, the *Conseil* can rely on its past case law to approach these issues and guide its thinking.

It is my hope that you, the reader, will find this new-look report to be interesting and absorbing.

Marie-Dominique Hagelsteen  
Chairwoman of the *Conseil de la concurrence*

## Section I – News

### A – MARKET NEWS

As in previous years, the *Conseil* has examined facts and events that took place at very different times, depending on the age of the cases it has handled; moreover, the institution does not normally choose the files referred to it. Consequently, on the basis of opinions and decisions handed down in 2000, it is difficult to draw any synthetic conclusions on the way French markets have operated this year. However, the *Conseil* is able to take a certain number of lessons from its activity: on the one hand, urgent cases and opinions provide information on economic news; on the other hand, substantive cases, one they have been put into the context of the time of the facts, provide an overview of major trends.

#### 1. MARKET NEWS IN 2000

The opinions and decisions handed down as part of emergency proceedings often concerned formerly monopolistic sectors that had recently been opened to competition. They led the *Conseil* to observe the existence of numerous obstacles to the opening of such markets.

In the telecommunications sector, the main problems brought to the attention of the *Conseil* are concerned with the lack of competition in access to the local loop, i.e. the line linking the subscriber's telephone to the network itself. The incumbent operator holds a crucial advantage in this respect, which tends to have a disrupting effect on other markets that are completely open to competition. Some are telecommunications markets, others are markets that are more or less closely linked to them, such as the Internet access market. In all cases, the historical operator is present in these other markets, either directly or via a subsidiary. There have been tariff scissor effects, and advantages for France Télécom as the only company able to carry out certain tests on the use of the local loop or provide global offers, covering both activities that are open to competition and others that are less open. These are the sorts of problems that give rise to the most frequent complaints. Under these circumstances, it would seem that the opening of the local loop to competition is nothing short of an essential requirement.

In the electricity sector, the *Conseil* was asked to examine the opening of the market to competition, as part of its consultative function. In particular, it found that the process according to which EDF's transmission and generation activities are separated, represents one of the major aspects of this transitory period.

Elsewhere, the *Conseil's* work concerned the “*net economy*”, which it had previously only encountered via technical litigation linked to Internet or network access. In 2000, it gave rise to cases concerned more directly with the economic activities undertaken on Internet. In the same way as the European Commission or the German Bundeskartellamt, competition authorities implement a procedure requiring that any agreements between companies must be officially declared. The fact that they have already dealt with a considerable number of cases in this domain is an indication that many initiatives in this sector take the form of co-operative action between companies. The *Conseil de la concurrence* may only intervene in response to requests

for opinion or to repress anticompetitive practices. In its detailed commentary of certain decisions, the *Conseil* deemed it useful to include some general developments likely to be of interest to businesses and practitioners. Furthermore, the very low number of litigious cases recorded to date may reflect the fact that, in practice, the workings of the new economy are not yet raising any acute competition problems.

The *Conseil's* ruling on the case of the UGC subscription was an opportunity to observe certain significant aspects of the contemporary economy: increasingly, the offers made to consumers are offers of access, made at a price that cannot easily be compared with the cost of a product or a precise service. The quest for customer loyalty and the possibility of gaining indirect remuneration, via advertising or connected consumption, make these types of offers rather different from those traditionally found on the market.

Two requests for opinion, filed by parliamentary committees concerning the water and road fuel markets, demonstrate a shared concern: are the high price levels seen in some sectors not the result of oligopolistic markets? This question is likely to arise with increasing frequency. Horizontal mergers are often accepted by competition authorities, due to the positive economic effects they bring, yet they mechanically reduce the number of companies operating in each market. Oligopolistic markets may encourage agreements, but they can also lead to high price policies that do not require operators to reach agreements, as each is able to anticipate the reactions of the others in a rational manner. Consequently, competition authorities are faced with a dual problem: distinguishing illegal practices from those that are permitted; and, if necessary, finding the means to combat this non-cooperative behaviour, which given the current state of the law may only be achieved by monitoring mergers with greater vigilance.

Concentration in the large-scale retail sector is also raising this type of problem, including at the local level: the opinion issued by the *Conseil* regarding the Carrefour/Promodès merger shows the high number of instances where there are very few hypermarkets operating in a given locality.

Generally speaking, the *Conseil* observes that the degree of concentration in certain markets is accelerating, particularly on the international stage. Where the concentration is only national, the existence of potential overseas-based competitors is a reassuring element. This is particularly true, since the progress of European construction and the internationalisation of the economy tend to promote future entry to the French market.

Where oligopolistic structures become global, it becomes more difficult to consider such solutions.

Other underlying trends are not worrying in themselves, but they do lead competition authorities to deepen their thinking: the development of fixed price unlimited offers, which contain an inherent risk that the companies practising them could end up selling at a loss; the development of offers combining the sale of a product with the sale of services, and which thus affect several markets that would normally remain separate; or the increasing share in sector-based production, where fixed costs are very high and marginal costs very low.

## 2. THE MAJOR MARKET TRENDS

An analysis of the *Conseil's* decisions on the merits of cases filed at different times confirms the observation made repeatedly in previous annual reports: the persistence of market sharing agreements between companies bidding at public calls for tender, or the disruption caused to many competitive markets by the behaviour of firms with a public monopoly, or even by administrative bodies acting as companies.

On the first point, the *Conseil* has often drawn the government's attention to the negative effects of public purchasing policies that are too transparent, particularly where they give rise to repeated calls for tender to the same limited group of companies. Nevertheless, the companies remain primarily responsible for this situation. The *Conseil's* policy on penalties, which will be simplified by the new legal provisions planned by the New Economic Regulations Act, as well as an active policy for referral to the state prosecutor by the DGCCRF (French Department of Competition, Consumption and the Repression of Fraud), should help combat a practice that is

costly for public finances and which deprives the French economy of incentives to increase productivity in a certain number of sectors.

Regarding the second point, later on we will see how the *Conseil* has specified its case law relating to certain price practices by public administrations and companies.

Furthermore, case law from the year 2000 reveals that anticompetitive practices, notably concerning prices, are certainly not restricted to the “usual” sectors, such as those which operate on the basis of public calls for tender. During the year, a serious horizontal price agreement was uncovered, involving most of the biggest French credit establishments. It showed that large, high-profile companies with correspondingly substantial resources can engage in prohibited practices. This same decision revealed the extent of the damage that can be caused to the economy as a result of such practices.

## **B – COMPETITION LAW NEWS**

### **1. CODIFICATION OF NATIONAL COMPETITION LAW**

During the year 2000, the Ordinance of 1<sup>st</sup> December 1986 was incorporated into the French Code of Commercial Law. Since 21<sup>st</sup> September 2000, the provisions of the Ordinance have been included under Book IV of the Code. This codification effectively modified the legal provisions in force, which are now presented as follows: general provisions (Title I), anti-competitive practices (Title II), economic concentration (Title III), transparency, restrictive competitive practices and other prohibited practices (Title IV), powers of inquiry (Title V), *Conseil de la concurrence* (Title VI) and sundry provisions (Title VII).

Although in principle it is carried out on the basis of existing rules, the process of codification resulted in a number of modifications to some of the provisions transposed into French law. Firstly, the fourth paragraph of Article 25 of the Ordinance stipulates that case officers may be present at deliberations, although they have no right of discussion and vote at such proceedings. This paragraph was modified to take account of Supreme Court of appeal case law, which considered that this provision ran contrary to the prescriptions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, Article L. 463-7, which repeats its contents, now states that case officers may not be present at deliberations where the *Conseil de la concurrence* rules on litigious proceedings. Secondly, Article 50 of the Ordinance stipulated that requests for inquiry should be sent by the Chairperson of the *Conseil*, to the Director General of competition, consumption and the repression of fraud. This Article was transposed into Article L. 450-6 of the Code with a modification, under which the request for inquiry is in fact transmitted by the case officer. Finally, Article 22 of the Ordinance of 1<sup>st</sup> December 1986, which concerns simplified procedure and a ceiling on penalties applicable in this context, was split between Articles L. 463-3 (simplified procedure decision) and Article L. 464-5, which states that the standing committee may not hand down penalties of more than 500,000 FF. Consequently, the standing committee, even when ruling on a case which has not been handled through simplified procedure, may no longer impose fines exceeding 500,000 F. All of these points raise practical problems that led the government to modify them, in the context of the New Economic Regulations Act.

## 2. CHANGES TO THE *CONSEIL*'S PROCEDURAL PRACTICES

The *Conseil* was careful to ensure complete respect for the principles governing the right to a fair trial, as stipulated by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and also by Article 14 of the International Covenant on Civil and Political Rights.

In particular, the *Conseil* decided to introduce more strict incompatibility rules, concerning the composition of the various bodies that rule on litigious referrals:

- On 28<sup>th</sup> March 2000, it repealed Article 8 of its internal regulations, which stipulated that in cases where the *Conseil* assumes jurisdiction on its own initiative, the decision is handed down either in plenary session (where all members sit), or by the standing committee (where all chairpersons generally sit); in doing so, it was able to decide that the people ruling on such cases would no longer sit in the body ruling on the merits concerning the practices in question;
- Similarly, it was decided that, except where it should prove impossible, members and chairpersons who have ruled on a request for interim measures will no longer sit in the body which is required to rule on the merits;
- Finally, a similar rule is applied where members of the *Conseil* have issued opinions leading them to rule on practices that are identical to those which are the subject of litigious proceedings.

The *Conseil* acknowledged repeated protests from certain parties, who claimed that since its decision bore the date of the day of the session, it could be assumed that the decision had not been the subject of a real hearing. Consequently, with effect from 1<sup>st</sup> January 2000, the *Conseil* fixed a time limit on deliberations, within which the ruling body is required to hand down its decision. From now on, decisions bear the date on which they are handed down and are made available to the parties. They are numbered according to the order in which they are heard in session.

On several occasions, and often on its own initiative, the *Conseil* also applied the case law of the Paris Court of Appeal, according to which investigators are subject to the principle of fairness when researching evidence. It thus set aside certain case file reports, since they contained no explicit reference and no extrinsic or intrinsic elements proving that the investigators had made the object of their investigation clear to the people making declarations or submitting documents. This formality ensures that the principle of non-self-incrimination is upheld. However, the *Conseil* was careful only to apply this rule to hearings of people working for the companies accused, and not to those of people employed by plaintiff or third party companies, for which the principle of non-self-incrimination does not apply.

The relatively high number of decisions of this type is due to the time difference between the *Conseil*'s ruling and the inquiry itself. Given its stock of cases, the *Conseil* is required to rule on cases for which the inquiries were actually carried out prior to 1997. That was the year when the Court of Appeal began setting down more strict case law concerning the investigators' obligation to ensure that the people being heard or submitting documents are aware of the object of the inquiry, both in terms of the legal justification for the investigators' actions, and in terms of the economic sector concerned.

In its "Bec Frères" decision dated 30<sup>th</sup> November 1999, the commercial chamber of the Supreme Court of appeal made a substantial change to checks on the legality of search and seizure operations carried out in application of Article 48 of the Ordinance of 1<sup>st</sup> December 1986 (L. 450-4 of the Code of Commercial Law). Previously, paragraph 3 of this Article had been interpreted as giving jurisdiction to the judge who had authorised the search and seizure operation, to check that such operations are properly conducted, and to hand down penalties where necessary. This is done under the control of the Supreme Court of Appeal.

The *Bec Frères* decision involves a new interpretation of this text, indicating that the judge's mission "ends with the operations, where the copy of the report and the inventory are handed to the occupant of the premises, and whereas he may not subsequently be called upon to rule on any irregularity that may affect these operations. In fact, such an objection forms part of the litigious procedure that may be referred to the decision-making authorities called upon to rule on proceedings opened on the grounds of the documents thus apprehended".

In application of this decision, checks on the legality of search and seizure operations are therefore the task of the *Conseil de la concurrence* and the Paris Court of Appeal.

The *Conseil* was called upon to carry out such checks in one case (00-D-68)<sup>1</sup>.

In this respect, it should be emphasised that the New Economic Regulations Act again modified the applicable rule, on the one hand by fixing a deadline for contesting the legality of search and seizure operations, and on the other hand by once more removing the *Conseil's* power to rule on their legality.

Finally, the *Conseil* sought to provide more explicit justification for the penalties it handed down. It is concerned that there should be clarity in the criteria it uses to fix the level of penalties, in terms of the rights of the defence, to enable the Court of Appeal to appreciate the way it has applied the provisions of Article 13 of the Ordinance of 1<sup>st</sup> December 1986 (L. 464-2 of the Code of Commercial Law) and the principle of proportionality.

The seriousness of practices and the individual situation of companies is often judged on the basis of considerable data, which are relatively straightforward to collate and analyse. The same cannot necessarily be said for damage to the economy. This factor is deduced from simple reasoning, and where possible from a quantitative analysis of the economic effects of the practices in question (reduction of collective surplus) and the extra profits made by the companies accused. For this, the *Conseil* does not always have access to all the elements it would like.

For example, in the decisions it handed down during 2000, the *Conseil* took into account the following factors: the duration of the practices, temporary elements such as artificially high price levels (00-D-10); price comparisons resulting from the practices and the prices in their absence (00-D-68 and 00-D-85<sup>2</sup>), or the evaluation of the turnover realised as a result of the practice (00-D-54)<sup>3</sup>; structural elements such as the creation of entry barriers (00-D-84 and 00-D-79) or restrictions on the development of competing companies (00-D-75)<sup>4</sup>; and finally, the characteristics of the market itself, which often serve to aggravate (00-D-67) or limit the extent of the damage (00-D-50)<sup>5</sup>.

In this respect, the reports often contain clearly marked details of the elements likely to be taken into account for the purposes of fixing the level of penalties.

### 3. THE NEW ECONOMIC REGULATIONS ACT

Law n° 2001-420 of 15<sup>th</sup> May 2001 relative to new economic regulations was definitively adopted on 2<sup>nd</sup> May 2001. In particular, the text includes a number of provisions concerning competition law. It reformed the Ordinance of 1<sup>st</sup> December 1986, which had recently been integrated into Book IV of the Code of Commercial Law, to better respect the requirements of equality of arms, strengthen measures designed to combat anticompetitive practices and adapt merger control to meet the requirements of European law and market developments. It also stipulates the need for international co-operation, to combat breaches of competition law.

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<sup>1</sup> Decision against which an appeal was lodged

<sup>2</sup> Decision against which an appeal was lodged

<sup>3</sup> Decision against which an appeal was lodged

<sup>4</sup> Decision against which an appeal was lodged

<sup>5</sup> Decision against which an appeal was lodged

### Respect for the equality of arms principle

The new law provides for better separation between the functions of inquiry and judgment; actions carried out prior to the hearing itself (appointment of case officers, transmission of requests for inquiry to the Minister of Economy, the statement of objections to the parties) will be entrusted to the executive case officer of the *Conseil*.

### Strengthening measures designed to combat anticompetitive practices

Fines will be strengthened: they may be as high as 10% of the highest global pre-tax turnover posted in one of the financial years that ended during the period when the practices were implemented. This measure will thwart any practice carried out during the proceedings, aimed at reducing the turnover of the legal entity accused.

The search for evidence will be simplified: Article L. 450-4 of the Code of Commercial Law has been modernised; the inquiry resources now encompass the search for evidence or proof of an electronic nature; furthermore, the *Conseil's* executive officer may now receive extra investigators to conduct specific inquiries and call upon experts at his request or at the request of the parties.

Another particularly important step forward has been made, following the successful example of EC and US law. Leniency and transaction procedures are now set to be introduced for companies which expose agreements, help establish the evidence required to qualify practices and undertake to improve their behaviour.

### Mergers will be controlled more systematically and more transparently

The parliamentary bill aims to harmonise French legislation with the EC system, by bringing the definition of merger more into line with that set down in Community law.

From now on, any merger operation concerning a total turnover above a clearly defined level will be notified to the Minister of Economy. Failure to provide such notification will result in the parties concerned incurring heavy fines. Merger operations thus notified will be made public, as will the decisions taken regarding them, but the legitimate interests of the companies in terms of business secrets, will be maintained.

The *Conseil de la concurrence* will be advised of the operation as soon as it is notified. If it is consulted, it may then hear third parties to the operation in the absence of the parties themselves and the works councils of the companies concerned.

### Improved international co-operation

Finally, the law takes account of the need for co-operation between competition authorities, since it will now be possible for the *Conseil* to disclose information and documents it holds or has gathered to both the European Commission and foreign competition authorities. Furthermore, the *Conseil* will be empowered to conduct inquiries at the request of these authorities, or alternatively to ask the Minister of Economy to conduct them.

## C – INTERNATIONAL NEWS

### 1. EUROPEAN COMMUNITY NEWS

A notable feature of 2000 was the entry into force on 1<sup>st</sup> June of the new exemption Regulation on vertical restrictions. The main aspects of this new Regulation were detailed in the *Conseil de la concurrence* annual report for 1999. This report contains a number of references to its initial effects as observed by the *Conseil*.

The same year also saw the completion of work aimed at revising the two exemption Regulations per category of horizontal restrictions, which concern research and development agreements and specialisation agreements respectively; guidelines were also drawn up for the vast majority of horizontal agreements.

These last texts came into force on 1<sup>st</sup> January of this year.

The texts reflect a desire to place greater importance on the economic analysis of agreements: the “*black clauses*” approach, which involves listing normally prohibited practices, replaces the so-called “*white clauses*” approach, whereby authorised practices are listed and, below a given market share threshold, it is assumed that clauses other than those qualified as “*black*” are exempt. However, unlike the solution adopted for vertical restrictions, national competition authorities may not withdraw a block exemption, since that would require a Regulation from the *Conseil*, whereas this field is covered by Commission Regulations.

In particular, the year 2000 was marked by an acceleration in work to modernise Regulation 17. This piece of legislation, which organises the practical implementation of EC competition law (except in the field of mergers), is founded on two “pillars” that the Commission proposes to review:

- The Commission must be notified of any agreements between companies which are likely to be anticompetitive, but which will probably be exempted under the terms of Article 81-3 of the Treaty (on the grounds of “*economic progress*”); if no such notification is received, individual exemption may not be claimed during subsequent litigious proceedings;
- The Commission has a monopoly over individual exemption, which may therefore not be granted by national competition authorities or by courts.

The Commission plans to replace the mandatory notification system by a legal exception system with decentralised application.

In this new context, companies will take the initiative to implement their agreements, but in the event of litigious proceedings, they can always go before national authorities and courts or the Commission itself to request individual exemption.

The *Conseil de la concurrence* approves of this reform, which will bring EC law more into line with French law. The French Government, whilst debating certain technical aspects, has actively supported the Commission’s plans.

On 27<sup>th</sup> September 2000, the Commission adopted a proposal which it then presented to the Council of Industry Ministers on 5<sup>th</sup> December 2000; this text raises a number of objections from Member States, and discussions are being actively pursued within a working group created at the level of the presidency of the Council of Ministers.

Finally, it should be noted that both Member States and the Commission continue to express their reservations concerning merger regulations. Here, we will restrict ourselves to mentioning the issues of jurisdictional thresholds and the referral of cases to the authority best placed to handle them. However, no agenda has yet been set for dealing with these issues.

For more than ten years now, the *Conseil* has regularly participated in Community work, whether by taking part in meetings of directors general of competition (three in 2000), in advisory committees set up with the Commission for handling antitrust and merger cases (21 in 2000, including hearings) or taking part in various experts committees (oil product distribution, deregulation in the telecommunications sector, automobile distribution).

Finally, the Commission has stated its desire to see the EC acquire a network of authorities, bringing together both the Commission itself and national competition authorities. In response, the national competition authorities recently decided to set up an informal organisation, designed to study the common problems they encounter. This light structure will have a rotating presidency. The *Conseil* has also become involved in this new initiative.

## 2. BILATERAL RELATIONS

Over the course of the year 2000, the *Conseil de la concurrence* engaged in a number of bilateral contacts. The most regular relations were with Asian organisations (16<sup>th</sup> annual bilateral meetings with Japan and 8<sup>th</sup> with South Korea, a meeting with large Taiwanese and Chinese delegations). However, the countries of Eastern Europe are also increasingly present (Poland, Estonia, Latvia, Romania, etc.). The *Conseil* played host to delegations from numerous countries, and in turn the Chairwoman, Vice-Chairmen, executive case officer and case officers responded to invitations from competition authorities in Tunisia, Morocco, Costa Rica, Thailand, India and South Africa. The *Conseil* took part in celebrations to mark the tenth anniversary of the creation of the Italian and Russian competition authorities. In addition, a technical delegation travelled to the USA, where it visited the headquarters of the FTC and the antitrust division of the Justice Department, to study case handling methods. Finally, a support mission was sent to the Caribbean Common Market.

## 3. MULTILATERAL ACTIVITIES

In 2000, international activity in the field of competition policy and law was developed and extended considerably: this trend reflected the competition authorities' desire to tighten the network built up in each country, in an effort to respond to the challenges of globalisation, as well as the technological and regulatory changes imposed by the arrival of the information society.

### ➤ Co-operation with international institutions

As part of large-scale operations, *Conseil* representatives participated in activities by the main international organisations that deal with issues raised by the existence and application of competition policy and law. In 2000, three international bodies organised complementary meetings on the major themes of competition law: the Organisation for Economic Co-operation and Development (OECD), the United Nations Organisation (UNO), and the World Trade Organisation (WTO).

At the OECD, an organisation bringing together all the most developed countries, the Competition Law and Policy Committee is chaired by Mr Frédéric Jenny, Vice-Chairman of the *Conseil*. It serves both as a forum for exchanging information on developments in the competition policies practised by OECD Member States, and also as a sort of laboratory for researching and debating the application of these policies. Meanwhile, the Joint Group on international trade and competition policies is responsible for promoting convergence between these two policies and preparing thorough deliberations on certain subjects raised at the WTO. In 2000, it adopted a series of reports dedicated respectively to "*options for consistency in trade and competition policies*", "*the effects of abuses of dominant positions on international trade and competition*" and "*compensation offered to parties disadvantaged as a result of the application*

of competition law". Furthermore, the Joint Group undertook studies looking at the impact of competition law on development, with particular emphasis on the issues of intellectual property laws and deregulation. The Competition Law and Policy Committee, as well as its working groups on regulation and international co-operation, also held a number of round table meetings concerning the application of competition law in the fields of financial services, joint subsidiaries, natural gas, pharmaceutical products and household waste processing.

The year 2000 was a particularly busy one for the UN, since the X<sup>th</sup> Conference on Co-operation and Development was held in Bangkok in February. It was followed in September by the IV<sup>th</sup> Conference to review competition rules stipulated by the UN, which was held in Geneva under the auspices of UNCTAD. The *Conseil* was represented at the Bangkok conference by a case officer, who co-ordinates the OECD countries at UNCTAD and who was also elected Chairman of the IV<sup>th</sup> Review Conference. During these two UN conferences, high-profile personalities from developing countries demonstrated their interest in the potential role of competition policy in promoting the development and economic integration of emerging countries, or those which are least well developed. In particular, they indicated that competition policy can help to avoid structural crises like those encountered by the Asian economies in 1997-1998. The developing countries also highlighted their desire to see UNCTAD play a leading role in moves to set up competition institutions, in accordance with principles consistently supported by France and other EU countries over the last decade. The X<sup>th</sup> UNCTAD ended with an explicit demand from developing countries to see the conference extend its activity in the field of competition policy, whilst the IV<sup>th</sup> Review Conference expressed this demand in concrete terms: in the next five years, the work of UNCTAD's Intergovernmental Group of Experts on Competition, which meets once a year in Geneva, should modernise the "Model law" recommended by the UN in the field of competition, by developing its prescriptions in terms of merger control and relations between competition law and regulation.

Within the WTO, the working group on the interaction between international trade and competition policy, which is also chaired by Mr Jenny, Vice-Chairman of the *Conseil de la concurrence*, held three formal meetings in 2000. At these meetings, the group continued its work to establish the relevance for competition policy of core WTO principles such as national handling, transparency and most-favoured nation status, as well as means of promoting co-operation between member countries of this organisation, whether or not they have their own competition authorities. Altogether, around twenty notices were presented by delegations taking part in this group, taking the total number of notices presented since its creation to 160. This figure appears particularly high when compared with the contributions from other working groups on investment or environmental issues.

➤ *The main unifying themes of competition law and policy on the international stage*

The activities of these various organisations highlight several unifying themes which structured international debates on the subject of competition.

**The contribution of competition law and policy to establishing proper control over globalisation**

Both the OECD and the UN indicated their belief that if national economies at any stage of development were to achieve proper growth, it was essential to adopt a competition law and create active competition authorities for implementing it. But they also maintained that these measures were important instruments for protecting the economic freedoms of operators and consumers alike. From this viewpoint, the practice that is unanimously deemed to be the most damaging is without doubt that of "hard core cartels", which are economically unjustified.

At the OECD, the work of the Competition Law and Policy Committee has led to intensified exchanges between competition authorities in member states, aimed at implementing a 1998 recommendation on combating international cartels. The objectives of the cartels in question are to bring about joint price increases, restrict the supply of goods and services to make them more costly, or even simply to prohibit their sale to others, and also to share the markets for public or private calls for tender. In 2000, the work focused on five areas of particular concern

for competition authorities: the level of undue income received by cartels and the other damage they can cause to the economy; the legal restrictions on international co-operation between competition authorities; the conditions for optimum co-operation between these same authorities; the best inquiry instruments and the most effective penalties for ensuring that companies adhere to competition law.

At the UN, and more specifically under the auspices of UNCTAD, the efforts of competition authorities in OECD member states, co-ordinated by a case officer from the *Conseil de la concurrence*, led to the adoption of a new chapter on merger control in the "Model law" advocated by this body. This chapter reflects a balanced approach to the merger control system in force within the EU, notably in terms of the economic and competitive outlook. Similarly, UNCTAD experts have extended the thinking and methods of analysing abuses of a dominant position in the "Model law", basing their approach closely on the principles adopted within the EU.

### **Conditions in which competition authorities can be more effective in the fight against globalised companies' attacks on economic freedoms**

The efforts undertaken by international bodies, in particular the WTO, have one fundamental aim: to strengthen international law and the national sovereignty of States in relation to globalised economic operators, which are less and less bound by territorial limits. Thus, the work of the WTO is based on the idea that powerful national competition authorities are essential if competition laws are to be successfully introduced. For example, according to the initial results of work carried out by the working group on trade and competition, the mechanism used to settle disputes should be limited to obliging Member States to acquire a national competition law based on shared principles that are largely inspired by European law. Thus, to fully guarantee the effects of the liberalisation of global economic exchanges that has taken place over the last decade, competition law will provide a means of reducing the market power of globalised companies, although without opposing national legislative systems designed to promote social or environmental objectives.

### **Deliberations on the most suitable framework for maintaining and extending international co-operation between competition authorities throughout the world**

Examples of transnational merger-acquisition operations appear in the news almost daily, whereas the global economy has become the playing field of globalised companies. Similarly, markets with a global geographical dimension are always the object of more or less significant breaches of economic freedom, caused by anticompetitive behaviour. Consequently, there is a need to gain a better understanding of the behaviour of globalised operators, and to co-ordinate the conditions for implementing competition law in States. In certain extreme cases, companies can seize upon the opportunity of globalisation, not just to increase and concentrate their turnover, but also to avoid the rigours of competition to the detriment of consumers, whose demand is always fragmented. To counter the resulting damage caused to consumer welfare, the European Union and its Member States have suggested drawing up a framework of competition rules at the WTO. Following four years of activity, the working group set up to look at this subject has revealed that developing countries are increasingly showing interest in shared competition law principles, based on non-discrimination and transparency. These principles could be accompanied by commitments from Member States, who undertake to adopt competition institutions guaranteeing the rights of the defence. Measures aimed at prohibiting cartels and economically unjustifiable agreements could be incorporated into all national laws, and these practices could be made the subject of an internationally acknowledged ban.

## Section II – Overview of activities

### I – THE ACTIVITY OF THE *CONSEIL* IN 2000

**Notice:** the method used to date decisions changed in 2000. Whereas previously, decisions were dated the day of the session at which the *Conseil* had examined the case, now they are dated the day they are signed. However, all decisions examined in sessions during 2000 bear the number “00”, even if they were signed in 2001, and are therefore dated with that year. Their order also reflects the session during which they were examined. In this way, the statistics of decisions and opinions bearing the number “00” are equivalent to those of previous years and can be compared with them.

#### A. LITIGIOUS REFERRALS AND REQUESTS FOR OPINION

In 2000, the *Conseil* recorded 109 litigious referrals and 25 requests for opinion, for a total of 144 incoming cases.

The approximate number of referrals has remained the same since the creation of the *Conseil* (131 incoming referrals in 1987), with figures subject to annual fluctuations. From this point of view, the year 2000 was characterised by a moderate number of litigious referrals, but the *Conseil* did receive a record number of requests for opinion: 35, compared with 27 in 1999. The previous record was 29 requests for opinion, in 1998. While there is nothing to suggest that this variation reflects a trend, it still has considerable consequences for the *Conseil's* work: if requests for opinion are not dealt with swiftly, they risk becoming devoid of interest. The more requests received, therefore, the more time it takes to handle litigious cases. Similarly, the high number of requests for interim measures demands considerable resources, to the detriment of litigious cases on the merits.

The table below shows developments in the number of litigious referrals and requests for opinion since 1991.

Referrals or requests	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Litigious	117	109	103	113	128	115	93	135	109	109
For opinion	12	12	24	27	19	27	27	29	27	35
Total	129	121	127	140	147	142	120	164	136	144

## 1. Litigious requests and referrals

### a) Referrals on the merits

The table below shows the number and source of litigious referrals to the *Conseil* made on the grounds of Article 11 of the Ordinance of 1<sup>st</sup> December 1986, which has since become Article L. 462-5 of the Code of Commercial Law.

SOURCE OF REFERRALS	1994	1995	1996	1997	1998	1999	2000
Minister of Economy	27	41	35	26	30	24	20
Directly referrals from:	51	61	58	51	74	57	61
- Companies	45	51	45	38	61	44	43
- Professional organisations	6	10	10	11	11	11	11
- Chambers of Commerce	0	0	0	0	0	0	0
- Chambers of Craft Trades	0	0	0	0	0	0	0
- Consumer associations	0	0	2	1	1	1	3
- Local administrations	0	0	1	1	1	1	4
The Conseil itself (assuming jurisdiction on its own initiative)	1	2	4	4	3	7	5
Referrals from the Court of Appeal							
<b>TOTAL</b>	<b>79</b>	<b>104</b>	<b>97</b>	<b>81</b>	<b>107</b>	<b>88</b>	<b>86</b>

### b) Requests for interim measures

In 2000, the *Conseil* recorded some 23 requests for interim measures, an increase of six compared with 1999, when just 17 requests were recorded. It can be seen that in the medium-term, parties are turning to this option more and more often.

## 2. Requests for opinion

The *Conseil* received thirty-five requests for opinion:

- Three on the grounds of Article L. 410-2 of the Code of Commercial Law, according to which: "(...) in sectors or zones where price competition is limited, whether as a result of monopoly situations, enduring supply difficulties, or legal or regulatory provisions, a decree by the *Conseil d'Etat* (Administrative Supreme Court) can regulate prices, following consultation with the Conseil de la concurrence".
- Fourteen based on the provisions of Article L. 462-1 of the Code of Commercial Law, according to which: "The Conseil may be consulted by parliamentary committees concerning parliamentary bills and any other competition-related issues. It gives its opinion on any competition issue at the request of the government. It may also provide its opinion on the same issues at the request of local administrations, professional or trade union organisations, approved consumer organisations, chambers of agriculture, craft trades or commerce and industry, with regard to the interests they serve". Of these fourteen requests, four came from the Minister of Economy, ten from professional organisations and one from a local administration.

- Five on the grounds of Article L. 462-2 of the Code of Commercial Law. The provisions of this text state that: “The Conseil must be consulted concerning any draft regulation that would introduce a new regime with the direct effect of:
  - *Subjecting the exercising of a profession or access to a market to quantitative restrictions;*
  - *Establishing exclusive rights in certain zones;*
  - *Imposing uniform practices in terms of prices or conditions of sale”.*
- Four on the grounds of Article L. 462-3 of the Code of Commercial Law, which enables courts to consult the *Conseil* regarding anticompetitive practices, as defined in Article L. 420 paragraphs 1 and 2 of the Code of Commercial Law, which are identified in the cases they are called upon to examine.
- Six on the grounds of Article L. 430-1 of the Code of Commercial Law, according to which: “*any plan to conduct a merger or any merger likely to damage competition, notably by creating or strengthening a dominant position, may be submitted by the Minister for Economy for the opinion of the Conseil de la concurrence*”.
- Two requests on the grounds of Articles L. 36-7 (7°) and L. 36-10 of the Code of Posts and Telecommunications, submitted by the *Autorité de régulation des télécommunications* (Telecommunications Regulation Authority).
- One request for opinion was presented by the *Commission de régulation de l’électricité* (Energy Regulation Commission).

## B. THE DELIBERATIONS OF THE *CONSEIL*

The table below shows the number of sessions held by the *Conseil* in its various forms, and the number of cases on which it has ruled over the last ten years.

Years	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Sessions	64	66	68	94	100	94	101	89	83	109
Cases ruled upon:	94	90	105	121	143	124	141	139	131	142
- by a decision	83	78	85	89	123	106	115	114	109	112
- by an opinion	11	12	20	32	20	18	26	25	22	31

The table reveals that the *Conseil's* activity has been maintained at a steady rhythm. The number of cases examined is one of the highest of the last decade.

The litigious decisions handed down by the *Conseil* break down as follows :

Decisions	1994	1995	1996	1997	1998	1999	2000
Inadmissibility	13	12	7	7	7	25	19
Discontinuance	3	12	13	15	21	17	15
Non-suit	7	12	15	30	26	22	17
Adjournment of proceedings	4	5	4	3	3	6	7
Stated objections upheld	35	48	49	50	34	27	36
Relative to requests for interim measures	13	17	9	8	17	12	18

#### **a) Inadmissibility decisions**

Article L. 462-8 of the Code of Commercial Law states that “by a grounded decision, the Conseil de la concurrence may declare a referral to be inadmissible, if it believes that the facts invoked do not come within its field of jurisdiction or are not supported by sufficient evidence”.

Nine referrals were ruled inadmissible on the grounds that the issues brought before the *Conseil de la concurrence* did not come within its field of jurisdiction, whilst nine others were ruled inadmissible due to lack of evidence.

One inadmissibility decision was peculiar in that was declared for both of the above reasons.

#### **b) Discontinuance decisions**

The fifteen discontinuance decisions handed down in 2000 came as referrals were withdrawn. In such cases, the *Conseil* systematically gives formal acknowledgment of the withdrawal, although this does not preclude it from assuming jurisdiction on its own initiative, with the intention of ruling on the same practices.

#### **c) Non-suit decisions**

The 17 non-suit decisions handed down fall into one of two categories: either the case officer had proposed non-suit and was followed in this by the *Conseil*, or the statement of objections had been notified, but the *Conseil* took the view that they were not grounded and, consequently, the practices denounced were not reprehensible.

#### **d) Adjournment of proceedings**

In six cases where proceedings were adjourned, the *Conseil* considered that it lacked information in light of the case file. Having heard the representatives of the parties and the public prosecutor, it took the view that there were grounds for carrying out a complementary inquiry. One case led to an adjournment of proceedings concerning one of the two objections stated. The complaint in question related to a distribution contract clause, for which a procedure was already under way with the European Commission to have its exemption renewed.

#### **e) Decisions where complaints were accepted**

The table below shows the main details of the penalties handed down by the *Conseil* over the last six years:

	1995	1996	1997	1998	1999	2000
Number of penalty decision including fines	38	41	36	32	13	28
Number of companies or corporate groups penalised	163	99	82	76	58	67
Amount of fines	478,105,500	105,044,849	161,900,500	90,073,000	60,734,210	96,018,000 <sup>6</sup> 1,240,018,000 <sup>7</sup>
Number of professional organisations fined	23	14	39	14	8	4
Amount of fines	3,077,000	1,272,000	2,522,500	3,002,000	670,000	400,000
Total amount of fines	481,182,500	106,316,849	164,423,000	93,075,000	61,404,210	1,240,418,000

The Minister of Economy, Finance and Industry is responsible for recovering fines and ensuring that injunctions issued by the Conseil are properly adhered to. The rate of recovery of fines imposed is highly satisfactory.

#### f) Decisions on requests for interim measures

During the year 2000, the *Conseil* received some 23 requests for interim measures. Five of these referrals were declared inadmissible. Of the remaining eighteen requests, sixteen were rejected, whilst measures were granted in two cases. This last figure should not be taken as a sign of developments in *Conseil* case law, as the institution can actually only hand down interim measures if certain legal conditions are met. The number of interim measures granted therefore depends on the nature of the cases submitted to the *Conseil*.

### C. CASES PENDING

Developments in the number of cases pending before the *Conseil*, all categories included, reflect a long-term upward trend, which is the result of an imbalance between incoming and outgoing cases. However, it can be seen that over the last few years, this trend has begun to stabilise: indeed, the year 2000 marked a shift, as the number of cases pending fell slightly. It should be pointed out that certain decisions can lead to several cases being removed “*from the stock*”, whilst on the contrary, other referrals ultimately lead to several new cases entering the stock. Consequently, it is important not to draw too simplistic a comparison between figures flow and stock figures.

The stabilisation observed this year must not divert attention from the worrying situation of litigious referrals. It is true that outgoing cases in this category have clearly exceeded incoming cases (112 compared with 100). However, the average age of cases that have not been ruled inadmissible, and which therefore concern situations fit for a full inquiry on the merits remains very high, at around five years.

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<sup>6</sup> Does not include the amount of fines imposed by decision 00-D-28 relative to the state of competition in the property loans sector.

<sup>7</sup> Includes fines imposed by decision 00-D-28 relative to the state of competition in the property loans sector.

Nevertheless, the time taken to handle cases is very variable. It can be seen as satisfactory for requests for opinion and interim measures, which are generally dealt with in under three months. For ordinary litigious cases, the time taken remains high.

By improving its organisation and working methods, introducing simplified procedures in line with the New Economic Regulations Act, and adapting its workforce, the *Conseil* should gradually be able to reduce the time taken to handle litigious cases.

## II – THE RESOURCES OF THE *CONSEIL DE LA CONCURRENCE*

### A. HUMAN RESOURCES

The number of case officers rose from 34 to 38. While the vast majority of them are still civil judges, inspectors from the DGCCRF and senior administrative executives, the *Conseil* has also recruited two economists, one engineer and a financial expert, in a move designed to improve its ability to handle complex economic and financial issues. The numbers of administrative staff, who are now managed by a secretary general, remained stable in 2000. A legal clerk has also been recruited, reflecting a desire to improve the way proceedings are monitored and recorded.

The services, which have an average of 110 employees and are managed by the executive case officer, were entirely made up of staff paid by the Ministry of Economy, Finance and Industry, on the basis of budgetary posts included in the budgets of various departments with the Ministry. A small number of these posts, despite being included in the Ministry's central administration budget, were identified by the finance law as being posts intended for the *Conseil*. The vast majority of these posts corresponded to employees from different departments, who were made available to the institution. This traditional situation proved rather incompatible with the *Conseil's* independence and raised serious management problems, since there was no budget document detailing the authority's human resources. The Minister of Economy, Finance and Industry decided to align management of the *Conseil's* human resources with that of the other independent authorities. A two year plan was set out, that will enable the *Conseil* to pay its employees out of its own budget appropriations. The first phase of the plan was put into action when preparing the finance law for 2001: in 2001, some 42 budgetary posts are included in chapter 37-05 of the budget for Economy, Finance and Industry, for which the Chairwoman of the *Conseil* is the main authorising officer.

### B. THE BUDGET

The *Conseil's* operating budget for 2000 amounted to 12,527,133 FF. This figure represents an increase of 0.75% compared with the 1999 budget, which came to 12,434,106 FF.

The budget was marked by a rise in documentation appropriations, and the opening of provisions required for installing network cable in buildings.

### III – APPEALS AGAINST DECISIONS HANDED DOWN BY THE

#### CONSEIL

#### A. DECISIONS HANDED DOWN BY THE PARIS COURT OF APPEAL

The table below contains details of the appeals lodged with the Paris Court of Appeal concerning decisions handed down by the *Conseil*, as of 31<sup>st</sup> December 2000 :

– Litigious decisions by the <i>Conseil</i> :	1 041 }	
	}	30%
– Decisions leading to appeal	312 }	
– Decisions on which the Court of Appeal ruled	298	
[ Excluding discontinuances in 1999: 17 ]		
Of which:		
– Simple confirmations	187 }	
– confirmations on the merits and alteration of penalties or injunctions	}	78.9%
	48	
	}	
– total or partial alterations	36	
– total or partial annulments	29	

During the course of 2000, the Paris Court of Appeal ruled on thirty-five appeals against decisions of the *Conseil* (in many cases several appeals are lodged against a single decision). Fourteen of these decisions involved penalties, five concerned interim measures, three declared the original referrals inadmissible and five were non-suit decisions.

Of the decisions handed down by the Court of Appeal, three ruled on cases referred back to it after they were set aside (4<sup>th</sup> January 2000, France Télécom; 12<sup>th</sup> December 2000, SA EMCC Entreprise Morillon; 12<sup>th</sup> December 2000, SNC Société Sogea Sud-Est) and one following a decision by the Arbitration court (*Tribunal des conflits*) (14<sup>th</sup> March 2000, ADP Aéroport de Paris); one decision ruled on a partial adjournment of proceedings accompanied by a non-suit (28<sup>th</sup> November 2000, Société centrale du prothésiste dentaire) and one ruled on a simple adjournment ruling (4<sup>th</sup> January 2000, Cabinet R. Duplouy); finally, two decisions ruled on the correction of a material error (14<sup>th</sup> March 2000, Aéroport de Paris; 21<sup>st</sup> March 2000, SA Entreprise Chaillan Frères).

**In 18 cases, the Court of Appeal upheld the verdicts reached by the *Conseil* and rejected the appeals lodged against its decisions.**

In a decision dated 4<sup>th</sup> January 2000, the Court of Appeal ruled on the case referred back from the Supreme Court of Appeal, concerning the launch of a new directory of professional companies by France Télécom. The Court took the view that France Télécom's decision to launch the new directory, at the same time as its competitor and in the same zone, did not in itself constitute abuse of a dominant position, despite the fact that FT held a dominant position in the market for publishing professional directories aimed at telephone subscribers in the Paris region.

In a decision dated 15<sup>th</sup> February 2000 (SARL Ploermelaise de friction industrielle), the Court upheld a verdict reached by the *Conseil de la concurrence*. In this particular case, the *Conseil* had ruled that in the absence of direct proof of a concerted action, evidence that distributors adhered to an agreement practice initiated by a retailer-supplier supposed that there was a demonstrated desire to adhere to this practice in full awareness of the facts.

In a decision dated 22<sup>nd</sup> February 2000 (SARL Pompes funèbres du Tardenois), the Court of Appeal upheld the amount of fines imposed by the *Conseil* (50,000 FF) on the company Pompes funèbres du Tardenois, as a result of its critical role in the organisation of an agreement, the weak position of families in relation to suppliers, and finally the limited application of a price scale.

In a decision dated 28<sup>th</sup> March 2000 (Société Financière Granulats), the Court of Appeal applied the standard criteria for tacit agreements. Confirming the *Conseil's* analysis of the case in question, it ruled that the tacit agreement had not been established, insofar as no evidence of market sharing quotas had been submitted and it had not been demonstrated that “*the identity of the tariff rises (...) was not the result of a simple mutual alignment*”.

The Court upheld the non-suit decision handed down by the *Conseil*, considering that no evidence of an agreement between companies submitting bids had been submitted (26<sup>th</sup> September 2000, Société Entreprise Jean Lefebvre).

In a decision of 21<sup>st</sup> November 2000 (TF1), the Court found that TF1 had agreed to finance audiovisual productions, only on the condition that the producer agreed to grant one of TF1's subsidiaries exclusive rights to publish the work in the form of videograms, for a period of up to 10, or even 15 or 18 years. The Court ruled that by applying provisos of this type, TF1 had implemented an anticompetitive agreement that had affected the market for videogram publishing and, by granting its subsidiary unjustified tariff conditions for advertising the videograms on television, had abused its dominant position.

In a decision dated 5<sup>th</sup> December 2000, the Court repeated the analysis of the *Conseil* concerning grouped offers in the field of public markets. It indicated that, whilst such offers are not anticompetitive *per se*, they still had to be technically justified and must not have the aim of reducing competition; the anticompetitive effect is the result of the practice itself, with the low proportion of offers presented by the grouping (18/285) not depriving this practice of any effect that might serve to restrict competition.

The decisions of 23<sup>rd</sup> May 2000 (EDF-Climespace), 6<sup>th</sup> June 2000 (Société auxiliaire d'entreprise de l'Atlantique), 6<sup>th</sup> June 2000 (SARL 3MCE), 27<sup>th</sup> June 2000 (SA Vidal) and 12<sup>th</sup> December 2000 (Compagnie gazière de service et d'entretien) also repeat the verdicts reached by the *Conseil*.

## **Interim measures**

In two decisions dated 19<sup>th</sup> September 2000 (SA Forum Cartes et Collections) and 3<sup>rd</sup> October 2000 (SARL Phototelem), the Court of Appeal ruled on verdicts handed down by the *Conseil* concerning requests for interim measures. In its decisions, the Court upheld the *Conseil's* verdict of inadmissibility, considering that France Télécom's litigious tariff reorganisation was not anticompetitive.

In a decision dated 30<sup>th</sup> March (SA France Télécom), the Court stated the conditions for the validity of interim measures imposed by the *Conseil de la concurrence*. In order to be valid, the measures should be limited to what is strictly necessary, with clear and precise wording, they should not be subject to decisions by third party authorities, and should be “*feasible*”. According to the Court, “*serious and immediate damage*” is notably present where the restriction of competition in question takes place at the launch of a technological innovation.

In a decision dated 1<sup>st</sup> September 2000 (Scan Coupon), the Court followed the *Conseil* in rejecting the request for interim measures, considering that the condition of serious and immediate damage to a sector had not been met.

In a decision dated 14<sup>th</sup> November 2000 (SNC MK2 Tolbiac), the Court upheld a decision of inadmissibility handed down by the *Conseil*, on the grounds of insufficient evidence.

In another decision dated 14<sup>th</sup> November 2000 (*Syndicat des exploitants indépendants des réseaux d'eau et d'assainissement*, Union of independent water and sanitation network operators), the Court of Appeal stated that in the area of public service delegation, “*the beneficiary of the price offer that is claimed to be excessively low is not the consumer-user of*

*the service, but the local administration delegating*". Consequently, the Court found that the provisions of Article 10-1 of the Ordinance could not be applied.

**On four occasions, the Court upheld verdicts reached by the Conseil, either totally or only on the merits, with a reduction in the penalty imposed, after having followed its own case law from 1999 and penalised the presence of the case officer and the executive case officer and stated the case.**

In a decision entitled *Aéroport de Paris* dated 8<sup>th</sup> February 2000, the Court ruled that *Aéroport de Paris* (ADP), which held a dominant position on "*the market for airport installations intended to provide information for passengers*", had indeed committed an anticompetitive practice. The practice consisted of refusing to grant hotels in the area around the airport access to the airport signs, to the benefit of hotels within the airport complex itself; the seriousness of the abuse of a dominant position is characterised by the fact that access to airport signs is a crucial element for the activities of hotels in the zone. In addition, the majority of passengers at Roissy airport use one of the six hotels within the complex. The fine of 500,000 FF imposed by the *Conseil* was also upheld by the Court of Appeal.

In a decision dated 8<sup>th</sup> February 2000 (the *Académie d'architecture* association), the Court repeated the *Conseil's* view of the case involving the *Académie d'architecture* (Architecture Academy). The Court found that, despite being a non-profit-making association under the terms of the law of 1901, the *Académie* was nevertheless subject to competition rules, not because of its status but due to the economic nature of its activity as a service provider, the service in question being the preparation of the central price listing, which was likely to affect the economic activity of the building industry. The Court also upheld the 30,000 FF fine imposed by the *Conseil*.

The *Conseil's* verdicts were wholly confirmed in a decision dated 29<sup>th</sup> June 2000, concerning the *Ligue Nationale de Football* (National Football League) (97-D-71).

In a decision dated 18<sup>th</sup> January 2000, the Court of Appeal confirmed the *Conseil's* consistent case law, according to which damage to the economy is evaluated by taking into account the figures for the markets concerned. The Court rejected the argument put forward by the defence, who claimed that there had been no economic prejudice, since the two calls for tender which gave rise to an anticompetitive exchange of information were declared to be unsuccessful. However, it did take into account the economic situation of one of the companies, Chaillan, which was experiencing "*serious financial difficulties*", and reduced the fine imposed by the *Conseil* from 70,000 FF to 40,000 FF.

**On two occasions, the Court of Appeal upheld the Conseil's verdicts on the merits, but altered the penalties imposed.**

In a decision dated 19<sup>th</sup> September 2000 (*Syndicat des négociants détaillants en combustibles du Nord et du Pas-de-Calais* - Union of fuel retailer-traders in the Nord and Pas-de-Calais regions), the Court, in its preamble, defined the scope of action considered to be legally permitted under competition law, with regard to tariff schemes drawn up by professional organisations. The Court upheld the *Conseil's* ruling on the merits, but took into consideration the limited duration of the litigious practices and the limited number of price scales distributed. Consequently, it reduced the amount of the fine imposed from 500,000 FF to 50,000 FF.

In a decision dated 17<sup>th</sup> October 2000, the Court once again upheld the *Conseil's* verdict on the existence of an agreement contrary to Article 7 of the Ordinance. The agreement had been implemented by the *Syndicat national des ambulanciers de montagne* (National union of mountain ambulance services), which had established a single transport tariff with penalties for parties which failed to respect it, reserved secondary transport for member companies and shared this transport between them; however, the Court reduced the fine imposed from 65,000 FF to 30,000 FF, given the level of resources available to them.

**The Court handed down two inadmissibility decisions and one partial inadmissibility decision.**

In decisions dated 4<sup>th</sup> January and 21<sup>st</sup> March 2000 (SARL Boulouard Déménagements), the Court declared that two appeals lodged against decisions handed down by the *Conseil* were inadmissible, since they had been submitted by registered post with acknowledgement of receipt. The Court indicated that under the terms of Article 2 of Decree n° 87-849 dated 19<sup>th</sup>

October 1987, appeals must in all cases be formulated in a written declaration in three copies, and submitted to the Clerk's Office of the Court of Appeal. Appeals submitted in any other manner are automatically declared inadmissible.

The Court handed down one partial inadmissibility decision dated 28<sup>th</sup> November 2000, on an appeal by the *Société centrale du prothésiste dentaire* (Central society of dental technicians), against a decision by the *Conseil* to adjourn proceedings. Ruling on this appeal, the Court indicated that decisions to adjourn proceedings may not give rise to appeals, since they are internal measures that concern the inquiry into a case for which the *Conseil* has not declined jurisdiction.

**Finally, the Court of Appeal set aside six decisions of the *Conseil*.**

In a decision dated 29<sup>th</sup> February 2000 (*Syndicat général du livre* – Trade Union for Books), the Court of Appeal stated the principle according to which, in order to apply Article 7 of the Ordinance, it must be established “*whether at least one of the parties to the agreement may be considered as an economic actor with an activity on the market*”. The unions making up the *Comité intersyndical du livre parisien* (CILP, the Parisian Book Inter-Union Committee) had engaged in action designed to prevent the company “Les meilleures éditions” from using competing book printing services (not employing staff from the Paris daily press, who are placed exclusively by the CILP). The Court found that these actions had the sole aim of exerting pressure on the freedom of choice of a contracting party, and were the result of an agreement between CILP member unions. Having observed that the *Conseil* itself had ruled out the possibility that the unions had exercised an economic activity on either the market for placing workers or on the reference market, the Court took the view that there was no proof that “*at least one of the parties to the agreement could be considered as an economic actor with an activity in the market*”. Consequently, Article 7 of the Ordinance was not applicable.

A decision dated 14<sup>th</sup> March 2000 closed the Aéroports de Paris case, on which the *Conseil de la concurrence* had originally ruled in a decision dated 2<sup>nd</sup> June 1998. That decision was upheld by an initial ruling by the Court of Appeal on 23<sup>rd</sup> February 1999, which rejected the plea against jurisdiction submitted by Aéroports de Paris and Air France, as well as the objection raised by the *préfet*<sup>8</sup> of the Ile-de-France region.

In this case, TAT contested the conditions for grouping Air France's activities at Orly-ouest airport and also various measures taken by ADP. The *Conseil* had initially deemed itself competent to rule on the practices referred to it, on two grounds: firstly, they did not concern the director general of civil aviation's decision to approve the plan to group airline activities at Orly airport, but rather the concertation which took place prior to this decision, and which had been orchestrated between ADP and the companies of the Air France group; secondly, the practices denounced did not form part of ADP's public service mission (surveillance and regulation of air traffic, security and policing of infrastructures), but rather were services of an economic nature provided by the organisation in exchange for a fee.

The *Conseil* examined the grouping of Air France's activities at Orly-ouest airport and the transfer of several companies to Orly-sud airport, following a decision taken in injunction with Air France. It found that these moves effectively created an artificial competitive advantage for companies of the Air France and a disadvantage for their competitors, since in 1994 there was a considerable difference in the capacity and quality of facilities at the two airports. The *Conseil* indicated that such a practice was prohibited by the provisions of Article 7 of the Ordinance of 1<sup>st</sup> December 1986. Moreover, it qualified ADP's refusal to accede to TAT's request to open new links from Orly-ouest airport, and its decision to force TAT to use ADP's stopover services, as discriminatory behaviour, which constituted abuse of a dominant position.

In a decision dated 23<sup>rd</sup> February 1999, the Paris Court of Appeal had rejected the objection to jurisdiction filed by the *préfet* of Ile-de-France, and had adjourned proceedings until such time as the decision of the Arbitration Court had been received. The Court had upheld the verdict of the *Conseil*, indicating that “*ADP exercises a service activity of an economic nature, as referred to by Article 53 of the Ordinance of 1<sup>st</sup> December 1986, of little consequence in the light of this*

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<sup>8</sup> *préfet*: French government representative

*text, which expressly applies to production, distribution and service activities provided by public entities, whether the operator is endowed with public power prerogatives or operates a part of the public domain”.*

In a decision dated 18<sup>th</sup> October 1999, the Arbitration Court repeated its own Datasport case law. It found that the decisions to group Air France's activities at Orly-ouest airport and to refuse TAT's request to open new lines from this airport, attached to management of the public domain and constituting the use of public power prerogatives, came under the exclusive jurisdiction of administrative courts, which were competent to judge their legality and, where necessary, to rule on the responsibility incurred by the public entities concerned. The *Tribunal* ruled that the practices identified by the *Conseil* were indissociable from these decisions and thus fell outside the jurisdiction of civil courts. However, it did consider that ADP's practice, which forced TAT to use its stopover services, could be separated from the administrative act by which it took this decision.

In a decision dated 14<sup>th</sup> March 2000, the Paris Court of Appeal was called upon to examine a case that had been referred back to it. It observed that in its original ruling, the *Conseil de la concurrence* had made no distinction between the two practices of abuse of a dominant position of which ADP was accused, or between the penalties pertaining to each practice. The Court concluded that the Arbitration court's decision to set aside Articles 1 and 2 of the *Conseil's* ruling necessarily meant that the *Conseil's* ruling should in fact be set aside in its entirety, even in respect of the practice that escaped censure by the Arbitration Court. Furthermore, the Court of Appeal observed that the *Conseil's* procedure was wholly set aside by the Arbitration Court, which had not distinguished the case documents that remained from those that were set aside. “*Consequently, the decision of the Arbitration court prevents the Court from taking the place of the Conseil, to establish whether or not the decision to force TAT to use ADP's services (...) constitutes abuse of a dominant position*”.

In a decision dated 17<sup>th</sup> October 2000 (*Association syndicale coordination rurale Union départementale*, trade union association for rural co-ordination of the departmental union), the Court observed that the statement of objections was sent to an association, which had not been shown to assure the economic and legal continuity of the association named in the statement. It consequently set aside the statement.

In a decision dated 12<sup>th</sup> December 2000, in an official hearing, the Court of Appeal ruled on a decision it had originally handed down on 13<sup>th</sup> January 1998, and which had been referred back to it, having been quashed by the Supreme Court of Appeal. The Court altered decision 97-D-11 of the *Conseil*, which had penalised the company EMCC Entreprise Morillon for entering into an agreement. The Court set aside the report on the hearing of the general manager of this company, on the grounds that the principle of fairness had not been respected in the search for evidence. The report in question contained no indication that the object of the inquiry had been communicated to the person heard. Since more than twenty months had elapsed since a search and seizure procedure on the grounds of Article 48 of the Ordinance, and since the party concerned had been questioned regarding numerous documents and markets, the Court took the view that the person may have misunderstood the scope of his declarations.

In a second decision dated 12<sup>th</sup> December 2000 (SNC Société Sogea Sud–Est), again ruling on a decision which had been quashed and referred back to it, the Court altered the penalties imposed by the *Conseil de la concurrence*, taking into account the financial difficulties encountered by the companies in question.

Finally, in a provisional decision dated 9<sup>th</sup> May 2000, for the first time ever the Court of Appeal ordered the *Conseil* to provide it with the minutes of the deliberations, in order to judge whether the session complied with formal rules.

**The main contributions to Court of Appeal case law in 2000 concern procedural rules, the jurisdiction of the Conseil, proof of agreements and the evaluation of penalties.**

## **Procedural rules**

In a decision dated 18<sup>th</sup> January 2000, the Court ruled that it was of little consequence that, during the course of a simplified procedure, the case officer had not attached to his statement of

objections, photocopies of all the documents on which it was founded, where these documents can be consulted in the file at the office of procedure.

Repeating the principles stated by the Supreme Court of Appeal in its Campenon-Bernard decision dated 5<sup>th</sup> October 1999, the Court of Appeal ruled, in its own decision of 29<sup>th</sup> February 2000, that the absence of publicity for deliberations before the *Conseil* does not run contrary to Article 6 of the European Convention on Human Rights, provided that the decisions taken by the *Conseil* are subsequently subjected to effective checks by a legal body offering all the guarantees of an impartial court.

In a decision dated 23<sup>rd</sup> May 2000, the Court ruled on several procedural matters: the summons sent by the case officer do not have to be attached to the file; it is sufficient for copies of these summons to be disclosed during the proceedings before the Court and made available for consultation by the parties; the formal validity of reports may not be contested by third parties; there is no need for questions to be transcribed in reports.

The formal invalidity of reports may be raised automatically, where this argument is subject to the *inter partes* principle, i.e. provided it appears in the report (6<sup>th</sup> June 2000, Société auxiliaire d'entreprise de l'Atlantique).

The absence of a retranscription of contributions made by parties or witnesses during the proceedings gives rise to no objection, since deliberations are subject to the *inter partes* principle (3<sup>rd</sup> October 2000, SARL Phototelem).

In a decision dated 21<sup>st</sup> November 2000 (TF1), the Court once again clarified the following points:

- the fact that, in accordance with the provisions of the Ordinance, the Chairperson of the *Conseil* sent the director general of competition a request for inquiry, does not raise doubt that the case officer was the author of the guideline paper enclosed with the request for inquiry; this procedure is therefore not contrary to the principle by which the functions of inquiry and judgment are separate;
- the statement of objections is authenticated by the inclusion of the name of the case officer who drew up the document and the date of its communication;
- the transmission of the statement of objections by the Chairperson of the *Conseil* is purely formal, and is therefore not contrary to the principle by which the functions of inquiry and judgment are separate;
- written documents or notes used by the case officer and the executive case officer to present their oral reports do not need to be communicated prior to the deliberations;
- the fact that the date of the *Conseil's* decision is the same as that of the deliberations is not sufficient to make the decision null and void, since there is nothing to show that the decision was acquired prior to the deliberations;
- the *Conseil* may ground its decision on case documents that do not appear in the appendix to the report.

### **The jurisdiction of the *Conseil*: Article 53 of the Ordinance (Article L. 410-1 of the Code of Commercial Law)**

The Court of Appeal took the view that:

- the provision of signposts in the vicinity of an airport constitutes an economic activity that is not subject to public power prerogatives; it is “a service provision activity to which the Ordinance of 1<sup>st</sup> December 1986 applies” (8<sup>th</sup> February, Aéroports de Paris);

- where a trade union organisation engages in an economic activity distinct from its primary mission to defend the interests of its members, the Ordinance of 1986 applies to practices implemented as part of this economic activity (29<sup>th</sup> February 2000, *Syndicat général du livre et de la communication écrite*, Trade Union for Books and Written Communication);
- the *Conseil* may only rule on commercial practices that can be considered as distinct from the legality of an administrative act; (...), “*this Ordinance does not apply to the implementation of a public power prerogative by public entities as part of their mission*”; where a concession is granted for occupation of the public domain, this does not constitute a production, distribution or service activity in the sense of Article 53 (6<sup>th</sup> June 2000, *Société auxiliaire d’entreprise de l’Atlantique*).

## **Proof of agreements**

In a decision dated 15<sup>th</sup> February 2000 (SARL Ploermelaise de friction industrielle), the Court ruled that to establish an agreement, as opposed to a straightforward unilateral practice, it must be shown that there has been “*assent or desire to implement an anticompetitive practice that constitutes an agreement*”, which cannot be presumed. In application of this principle, it considered that where a supplier sends one of his distributors confidential notes, concerning a competing product and which affirm the threat posed by the product, this in itself is not sufficient to establish the existence of an agreement between the two parties, designed to eliminate the said product. Furthermore, where a retailer receives more favourable sales conditions from his supplier than those accorded to his competitors, whereas he is unaware of the sales conditions granted to his competitors, these observations are not sufficient to establish that the said retailer has adhered to a concerted distribution process with a discriminatory purpose in full knowledge of the facts.

## **Evaluation of penalties**

The fact that the company has taken the internal measures necessary for combating anticompetitive practices has no influence on the penalties handed down, where the said company is guilty of behaviour that infringes competition rules, which are public policy (5<sup>th</sup> December 2000, SA *Entreprise industrielle*).

In a decision dated 12<sup>th</sup> December 2000 (SNC Société Sogea Sud-Est), the Court of Appeal stated the criteria to be used for evaluating the seriousness of anticompetitive practices in the field of public works; with regard to damage to the economy, “*these anticompetitive practices (...) are reprehensible by the very fact of their existence, in that they distort the reality of competition*”.

## **B. DECISIONS OF THE SUPREME COURT OF APPEAL (COUR DE CASSATION)**

In 2000, the Supreme Court of Appeal handed down nine decisions on appeals lodged against decisions by the Paris Court of Appeal, themselves rulings on appeals against decisions by the *Conseil de la concurrence*.

### **Decisions relative to interim measures**

In a decision dated 18<sup>th</sup> April 2000 (NC Numéricâble), the Supreme Court of Appeal rejected the appeal against the Paris Court of Appeal’s ruling of 15<sup>th</sup> March 1999. By this latter ruling, the

Court had upheld decision n° 99-MC-01 by the *Conseil de la concurrence*, dated 12<sup>th</sup> January 1999. The *Conseil* had ruled that the excessive increase in the fee demanded by France Télécom from the company NC Numéricâble for transporting its audiovisual signals via its cable network, constituted abuse of a dominant position or abusive exploitation of a state of economic dependence. It ordered France Télécom to provisionally continue transporting NC Numéricâble's audiovisual signals in exchange for payment of a provision equal to the former fee.

The Supreme Court of Appeal considered that the *Conseil* was entitled to hand down these measures, which were intended not to fix the tariffs to be applied between the parties, but rather to prevent the risk of abusive exploitation of a state of economic dependence, since the company Numéricâble was in a state of dependence on the company France Télécom; furthermore, the Court stated reasons of principle on the nature of the checks carried out by the *Conseil* to determine the admissibility of requests for interim measures, which appeared to restrict it to minimal control: "*interim measures may be decided by the Conseil de la concurrence on the grounds of Article 12 of the Ordinance of 1<sup>st</sup> December 1986, within limits justified by the urgency of the situation, in the event of serious and immediate damage to the economy in general, that of the sector concerned, consumer interests or the plaintiff company. This applies even where there is no prior evidence of clearly illegal practices under Articles 7, 8 or 10-1 of the Ordinance of 1<sup>st</sup> December 1986, provided the facts denounced, which are the subject of the investigation on the merits, are sufficiently characterised to be taken as the direct and certain cause of the damage observed*". This case law seems to invalidate that of the Court of Appeal, which traditionally considers that before interim measures can be granted, clearly illegal facts must first be observed, which constitute practices prohibited by Articles 7 and 8 of the Ordinance, which should be removed without delay in order to prevent or end a serious and certain prejudice<sup>9</sup>. For the Supreme Court of Appeal, it seems enough that the practice should appear illegal, the most important thing being the causal link between the practice and the damage identified.

Moreover, judges ruling on the merits have a sovereign right to determine the immediacy and seriousness of the damage. The Supreme Court of Appeal thus refuses to verify this, a position it also reiterated in another decision dated 18<sup>th</sup> April 2000, concerning a Planète Câble case.

In a decision dated 3<sup>rd</sup> May 2000, concerning the renewal of public water distribution concessions in several towns and villages, the Supreme Court of Appeal looked at the facts raised by the appeal judges, namely: the nature and object of markets concerning the supply of water; the need for competitors of Suez-Lyonnaise des Eaux (SLE) to have access to the wholesale price of the water sold by that company, which manages fresh water resources, in order to determine their own offers; the fact that potential candidates were deterred from competing, following SLE's failure to disclose the required water prices. The *Cour* considered that these elements were sufficient to justify the Court of Appeal's decision to impose interim measures, in the form of an injunction ordering SLE to provide its competitors with wholesale water prices.

## **Procedural case law**

In a decision dated 16<sup>th</sup> May 2000, the Supreme Court of Appeal quashed a ruling by the Paris Court of Appeal, dated 25<sup>th</sup> February 1999. The Court of Appeal had annulled an original decision by the *Conseil de la concurrence* to grant interim measures. It had set aside the documents obtained following a request for information signed by the Chairwoman of the *Conseil*, without taking account of the purely administrative nature of the letter of communication from the Chairwoman and without seeking to establish whether the note attached to this letter "could not be attributed to the case officer designated, even in the absence of indications identifying him expressly as the author".

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<sup>9</sup> 29<sup>th</sup> June 1998, Suez- Lyonnaise des Eaux

In a decision dated 7<sup>th</sup> March 2000 (Pont-à-Mousson), the Supreme Court of Appeal confirmed its case law of December 1999, according to which the President of the ordinary court of first instance may not rule on the legality of search and seizure operations after the said operations have ended. The judge ruling on the merits is now competent to rule on this matter.

Concerning the jurisdiction of the *Conseil de la concurrence* with respect to the actions of public entities, on 16<sup>th</sup> May 2000 the Supreme Court of Appeal issued a fundamental judgment on the subject of fees for occupation of the public domain, demanded by the company Semmaris from companies managing drinks distribution in the Rungis market. These actions do not come under the jurisdiction of the *Conseil*, if the following two criteria are both met: “*the Conseil de la concurrence has no jurisdiction over decisions by which public or private entities responsible for a public service exercise their mission and implement public power prerogatives, which can constitute production, distribution or service activities in the sense of Article 53 of the ordinance of 1<sup>st</sup> December 1986 and which fall within its field of application*”; if at least one of these criteria is met, the *Conseil* retains jurisdiction: “*(...) the same does not apply where, by virtue of these decisions, the entities concerned act outside the remit of their mission or do not implement public power prerogatives*”.

In another decision dated the same day (*Ordre national des pharmaciens*, National Order of Pharmacists), the Supreme Court of Appeal applied the following principles: by distributing a notice which prohibited professionals from delivering medicinal products to homes and gave an inaccurate interpretation of the public health code, the Central council of the *Ordre national des pharmaciens* “*failed to demonstrate that it was exercising a public power prerogative, acted outside the public service mission entrusted to it as a professional association and conducted an intervention on the market for home delivery of medicinal products*”; its actions thus came under the jurisdiction of the *Conseil*, as stipulated by Article 53 of the Ordinance.

In a decision dated 21<sup>st</sup> March 2000, the Court quashed a ruling by the Court of Appeal dated 13<sup>th</sup> January 1998, which had itself altered the *Conseil*'s decision n° 97-D-11 of 25<sup>th</sup> February 1997. The Court of Appeal had accepted that the companies EMCC and Quillery had reached agreement on four markets for redeveloping the banks of the river Seine, basing its decision on a declaration by the general manager of the company EMCC. However, this declaration did not meet the obligation of fairness in the search for evidence. The report in question included no indication of the object of the check, nor any indication that it had been made clear to the party concerned. The Court of Appeal had ruled that the party had been heard regarding other markets than those concerning the work to redevelop the banks of the Seine, and that it could therefore have legitimately misunderstood the scope of his declarations. The Court indicated that “*by ruling in this way, whereas Article 47 of the Ordinance of 1<sup>st</sup> December 1986 does not oblige the investigators to delimit the market or markets concerned by their investigation, in the sense of Article 7 of the said Ordinance, the Court of Appeal breached the above-mentioned texts*”<sup>10</sup>.

## Case law on the merits

The aforementioned decision of 16<sup>th</sup> May 2000, concerning the *Ordre national des pharmaciens*, presents another interesting point. It explicitly affirms that members of a professional association or a trade union which has implemented an anticompetitive practice are presumed to have entered into a consensual agreement: “*a professional association represents the collectivity of its members, and a practice likely to have an anticompetitive aim or effect, that is implemented by such a body necessarily indicates an agreement between its members, in the sense of Article 7 of the Ordinance*”.

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<sup>10</sup> On 12<sup>th</sup> December 2000, the Court of Appeal ruled on a case that had been referred back to it, after its initial decision was quashed by the Supreme Court of Appeal. In its new ruling, the Court once again set aside the litigious report, on the grounds that the declarations contained therein had been gathered twenty months after a procedure to seize documents, based on Article 48 and that, moreover, the declarations concerned a number of markets that did not form part of the object of the inquiry, such that the person heard may have misunderstood the object of his hearing.

The Supreme Court of Appeal upheld the verdict of the Court of Appeal in its entirety. The Court had itself upheld the *Conseil's* original ruling of 30<sup>th</sup> May (Canal Plus) concerning audiovisual broadcasting rights.

In a decision dated 24<sup>th</sup> October 2000, the Supreme Court of Appeal rejected an appeal against a Court of Appeal ruling dated 10<sup>th</sup> March 1998. The decision concerned the commercial policy of the company Philips, and in it the Court stated reasons of principle on the practice of discounts, remuneration for specific services and listing rebates:

*“the granting of deferred rebates or discounts does not restrict competition, provided the principle and the amount of these advantages are acquired categorically, as soon as the quantitative thresholds determining their attribution are exceeded, and provided all distributors are able to pass on the amount discounted in their sales prices, without unknown factors or restrictions”*; in this particular case, the Court of Appeal had checked that the company had fixed *“reasonable thresholds”* and that it had not treated distributors unequally.

In order for remuneration for specific services to be valid under competition law, it must meet the following conditions: the scale must not be compulsory; the remuneration must be given in return for real consideration; the rates and conditions for granting the remuneration must be fixed objectively; there must be no discrimination in the rebate rates granted; the independent fixing of remuneration for these services must be justified by their specific nature and must not constitute *“a practise of imposing a margin prohibited by Article 7 (...), where in establishing invoices for the said services themselves, the distributors are necessarily aware of the elements and may take them into account to determine their floor price”*.

As far as listing rebates are concerned, it is the responsibility of the seller to justify their legality; the Supreme Court of Appeal took the view that the Court of Appeal had legally justified its decision *“by deducing that these rebates (for listing) do not present an anticompetitive character, provided they are accompanied by a real and objectively defined consideration for the supplier”*.