

RÉPUBLIQUE FRANÇAISE



CONSEIL DE LA CONCURRENCE
(French Competition Authority)

2003 ACTIVITY REPORT

CONTENTS

EDITORIAL	3
Section I – New developments in competition law	5
CHAPTER I - ORDINANCE N° 2004-274 OF 25 TH MARCH 2004 SIMPLIFYING THE LAW AND FORMALITIES FOR COMPANIES	5
CHAPTER II - LAW N° 2003-706 OF 1 ST AUGUST 2003 CONCERNING FINANCIAL SECURITY	5
CHAPTER III - LAW N° 2004-237 OF 18 TH MARCH 2004, EMPOWERING THE GOVERNMENT TO TRANSPOSE EC DIRECTIVES BY ORDINANCE AND TO IMPLEMENT CERTAIN PROVISIONS OF EC LAW	7
Section II – The Conseil de la concurrence	8
CHAPTER I - THE CONSEIL'S ACTIVITY IN 2003	8
Flow and stock of cases	8
Collegial Board activity	15
Deliberations by the <i>Conseil</i>	22
CHAPTER II - ORGANIZATION AND OPERATION	23
Human resources	23
Budget	24
CHAPTER III - COURT OF APPEAL STATISTICS	25
CHAPTER IV – COMMUNITY AND INTERNATIONAL ACTIVITY	26
Community activity	26
International activity	36

EDITORIAL

The *Conseil de la concurrence* has seen many changes during the course of 2003.

In addition to consolidating the first positive results of the administrative and budgetary reforms undertaken three years ago, the *Conseil* has now begun implementing the major reforms introduced by the New Economic Regulations Act. Meanwhile, the cases handled during the course of the year have provided the *Conseil* with an opportunity to develop some rich and varied case law, intervening in key sectors of the economy with the constant aim of protecting consumer interests. Finally, 2003 has seen intense preparations for 1st May 2004, the date when the new European Regulation 1/2003 is due to come into force.

The number of cases pending before the *Conseil* has continued to fall, demonstrating an extremely positive trend. For the first time since 1993, the number of cases pending has fallen below 300. This figure, which represents around two years of activity for the *Conseil*, remains too high, yet it does demonstrate that progress is being made, and there is considerable optimism that the *Conseil's* efforts to cut file handling times will bring good results. This improvement has been achieved thanks to the various administrative and budgetary reforms undertaken back in 2000, which have given the *Conseil* complete management independence and revalued its resources. It is also due to a collective and sustained effort on the part of all the *Conseil's* staff, case officers and head of case officers, as well as members of the collegial board and its chairpersons. All of these people are to be congratulated on their achievement.

In 2003, the *Conseil* began taking advantage of the new paths of action opened to it by the New Economic Regulations Act. Two sets of leniency proceedings were undertaken in 2003, although as yet neither has been concluded. Consequently, they have not yet given rise to public rulings. However, transaction proceedings have already been implemented on two occasions this year, and have led to two rulings. By studying them carefully, companies and lawyers should be able to gain an understanding of the way the *Conseil* has interpreted them, subject to the judgement of audit courts, and thereby gain a better idea of the advantages of using them.

At the time of going to press, ordinance n° 2004-274 dated 25th March 2004 has just been adopted. It introduces a system based on the "*de minimis*" rules applied by the European Commission, and forms part of moves to extend law n° 2003-591 of 2nd July 2001. This text entitles the Government to simplify the law stipulating that it is authorized to issue ordinances aimed at "*introducing fast-track proceedings for the Conseil de la concurrence to scrutinize cases below a given threshold*". This system forms part of the same approach that led to the reform of simplified proceedings (New Economic Regulations Act). It enables the *Conseil*, which is not empowered to determine the "*appropriateness of proceedings*", to handle the various files submitted to it differently according to their importance, interest or complexity.

All these reforms are aimed at bringing the *Conseil* more into line with its foreign counterparts, which already have similar resources, and ensuring that its actions are more effective.

As every year, 2003 was a chance for the *Conseil* to touch upon a number of particularly rich or new topics, as part of its advisory or litigation activity. Although there is insufficient space for an exhaustive list here, some of these subjects are worth highlighting. The introduction of competition to the postal services sector and the transposition of the "*Telecoms package*" have enabled the *Conseil* to hand down some particularly interesting verdicts. The emergence of competition issues in the media industry has also led the *Conseil* to issue an opinion, setting out the red lines that it believes must separate

competition regulation - of an economic nature - from pluralist regulation in the audiovisual sector. It is worth noting that this approach is reflected in the government bill submitted to Parliament.

The *Conseil* has also handed down several rulings in the health sector, where a number of anticompetitive agreements and abuses of dominant position were observed. There are certainly grounds for examining these cases closely, as part of the debate on the future of social protection.

Finally, as every year, the *Conseil* has handed down a number of decisions which highlight its efforts to protect consumer interests, by guaranteeing the possibilities for price reductions. This is best reflected in the decision on practices implemented in the strawberry market, or the ruling in the school calculators sector.

This report includes two theme-based studies, which are intended to provide a broader picture of *Conseil* case law. The study entitled "*anticompetitive aim, effect and intent*" gives an update on these particular concepts, which are crucial to competition law. The second study, which is more economic in nature, looks at "*public monopolies in competition*". It touches upon all the issues raised by this subject, which is particularly important in France.

Finally, January 2003 saw the publication of a new regulation adopted by the Council of the European Union, concerning implementation of the competition rules stipulated in articles 81 and 82 of the Treaty of the European Communities. It goes without saying that this text is absolutely crucial to the activity of national competition authorities. It is set to come into force on 1st May 2004. But most of all, 2003 has been a period of intense co-operation between the *Conseil*, the Commission and the other national competition authorities, as they prepare the ground for a major new innovation: networking between European competition authorities.

This year, the format of the report has changed somewhat, with the decisions and opinions issued by the *Conseil* now included on a CD-Rom at the end of the document. As you are no doubt aware, most of these documents have already been published on the *Conseil de la concurrence* website.

In conclusion, it is my belief that this report accurately reflects the wide range of activities in which the *Conseil* is involved. I hope it provides readers with the information they are looking for.

Marie-Dominique Hagelsteen

Chairperson of the *Conseil de la concurrence*

Section I

– New developments in competition law

CHAPTER I - ORDINANCE N° 2004-274 OF 25TH MARCH 2004

SIMPLIFYING THE LAW AND FORMALITIES FOR COMPANIES

In application of article 26-10 of law n° 2003-591 dated 2nd July 2003 entitling the Government to simplify the law, articles 24 and 25 of ordinance n° 2004-274 dated 25th March 2004 (Official Journal edition n° 74 of 27th March 2004, page 5871) introduce a fast-track procedure by which the *Conseil de la concurrence* can examine cases below a given threshold. They also raise the turnover threshold, above which companies become subject to merger control procedure.

Article 24 inserts two new articles in the *Code de commerce* (French code of commercial law), namely articles L. 464-6-1 and L. 464-6-2. These additions empower the *Conseil* to hand down non-suit rulings on anticompetitive agreements, where the cumulative share of the companies party to the agreement or practice does not exceed certain market share thresholds (identical to those stipulated in the "*de minimis*" notice issued by the European Commission on 22nd December 2001). This does not apply to practices that are considered to be characterized restrictions and contracts agreed in application of the *code des marchés publics* (French public procurement contracts code), which are not covered by this "*de minimis*" system.

Article 25 of the same ordinance raises the threshold for turnover, above which merger control procedures are applied, to 50 million Euros.

CHAPTER II - LAW N° 2003-706 OF 1ST AUGUST 2003 CONCERNING

FINANCIAL SECURITY

Law n° 2003-706 of 1st August 2003 on financial security (Official Journal edition n° 177 of 2nd August 2003, p 13,220) was voted and came into force during the course of 2003. Article 24 of this law integrates control of merger operations in the banking sector into common competition law. Competition issues concerning merger operations in the banking sector are now identified and dealt with by the Minister of Economy and also by the *Conseil de la concurrence*, in cases where its opinion is requested in application of article L.430-5 III.

Merger control nevertheless remains specific. As for the audiovisual and insurance sectors, the *Conseil de la concurrence* is required to consult the relevant industry regulator, namely the *Comité des établissements de crédit et des entreprises d'investissement* (Credit Institutions and Investment Undertakings Committee or CECEI).

Section I of article 24 stipulates that:

"The first paragraph of article L.511-4 of the code monétaire et financier (French monetary and financial code) reads as follows:

' Where mergers or planned mergers, either directly or indirectly concerning a credit institution or an investment undertaking, are referred to the Conseil de la concurrence in application of article L.430-5 of the Code of commercial law, the Conseil gathers the opinion of the Comité des établissements de crédit et des entreprises d'investissement (Credit Institutions and Investment Undertakings Committee). To this end, the Conseil de la concurrence communicates any referral concerning such operations to the Comité des établissements de crédit et des entreprises d'investissement. The Comité des établissements de crédit et des entreprises d'investissement notifies the Conseil de la concurrence of its opinion within a period of one month after receiving the aforementioned communication. The opinion of the Comité des établissements de crédit et des entreprises d'investissement is made public according to the conditions set down in article L.430-10 of the Code of commercial law.'"

This law fills a legal vacuum highlighted by the *Conseil d'État* (Administrative Supreme Court), in a ruling dated 16th May 2003, setting aside the conditions attached by the CECEI to the merger between *Crédit Agricole* and *Crédit Lyonnais*.

Crédit Agricole had been authorized to take control of *Crédit Lyonnais* by the Minister of Economy (for non-banking activities) and by the *CECEI* (for banking activities) on 28th January and 13th March 2003; the *CECEI* had attached a number of conditions to its authorization, leading to 85 banking outlets being divested, whilst a 2-year freeze was placed on the opening of new outlets in some 32 *départements*.

The *Conseil d'État* took the view that "merger operations concerning banking activities are not subject to prior authorization from the Minister of Economy". It also indicated that the capacity "granted by lawmakers to the Comité des établissements de crédit et des entreprises d'investissement, for ensuring that the banking system runs properly, in the absence of basic and procedural rules decreed by the lawmakers and which would replace those set aside by article L. 511-4 of the code monétaire et financier, does not give the Comité jurisdiction to audit a merger operation by attaching special conditions to its approval, requiring competition to be respected". The *Conseil d'État* also specified that the law did not grant *CECEI* general jurisdiction empowering it to audit merger operations as a preventive measure.

This legal vacuum has now been rectified, as the law has been brought into line with the common law rules applicable to mergers.

**CHAPTER III - LAW N° 2004-237 OF 18TH MARCH 2004, EMPOWERING THE
GOVERNMENT TO TRANSPOSE EC DIRECTIVES BY ORDINANCE AND
TO IMPLEMENT CERTAIN PROVISIONS OF EC LAW**

Article 2 of this law authorizes the Government to issue ordinances, setting out the legal provisions required to enable national competition authorities and national courts to apply Council regulation (EC) n° 1/2003 dated 16th December 2002, relative to implementation of the competition rules set out in articles 81 and 82 of the Treaty.

One of the main purposes of the draft ordinance is to hand the *Conseil de la concurrence* new powers, in line with the decision-making powers of other members of the network of national and EC competition authorities. Consequently, the *Conseil de la concurrence* will have jurisdiction to accept undertakings by companies. There are two objectives behind this. The first is to correct competition problems, whilst the second is to impose obligations on companies, requiring them to respect a commitment or an injunction.

Section II

– The Conseil de la concurrence

CHAPTER I - THE CONSEIL'S ACTIVITY IN 2003

In accordance with the format adopted in 2002, the statistics detailing the *Conseil's* activity include separate indicators for the stock and flow of cases, and collegial board activity indicators.

FLOW AND STOCK OF CASES

New referrals

In 2003, the *Conseil* recorded 97 new referrals, of which 79 were litigious referrals (on the merits and requests for interim measures) and 18 requests for opinions. This figure is significantly lower than in previous years, as can be seen in the following table, which details developments in the number of litigious referrals and requests for opinions since 1994.

Table 1: New referrals

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Legal referrals	114	130	115	93	135	109	109	102	82	79
Requests for opinions	27	19	27	27	29	27	35	25	26	18
<i>Total</i>	<i>141</i>	<i>149</i>	<i>142</i>	<i>120</i>	<i>164</i>	<i>136</i>	<i>144</i>	<i>127</i>	<i>108</i>	<i>97</i>

The overall drop recorded in 2003 is due to the substantial reduction in the number of requests for opinions, whereas the number of litigious referrals remains similar to that observed in 2002. For the last two years, the overall number of referrals has been well down on that recorded between 1995 and 2001. This drop is partly explained by more moderate activity by certain categories of plaintiffs, but is mostly due to better filtering of requests as they arrive. Some referrals are clearly inadmissible, since the parties filing them lack the necessary status to take

such action. Referrals by private individuals, which represent a potential caseload of fifteen to twenty files per year, are a case in point. However, clearly inadmissible cases of this kind are now dealt with before they are recorded, and in almost all cases are immediately withdrawn. Consequently, they no longer appear as new cases.

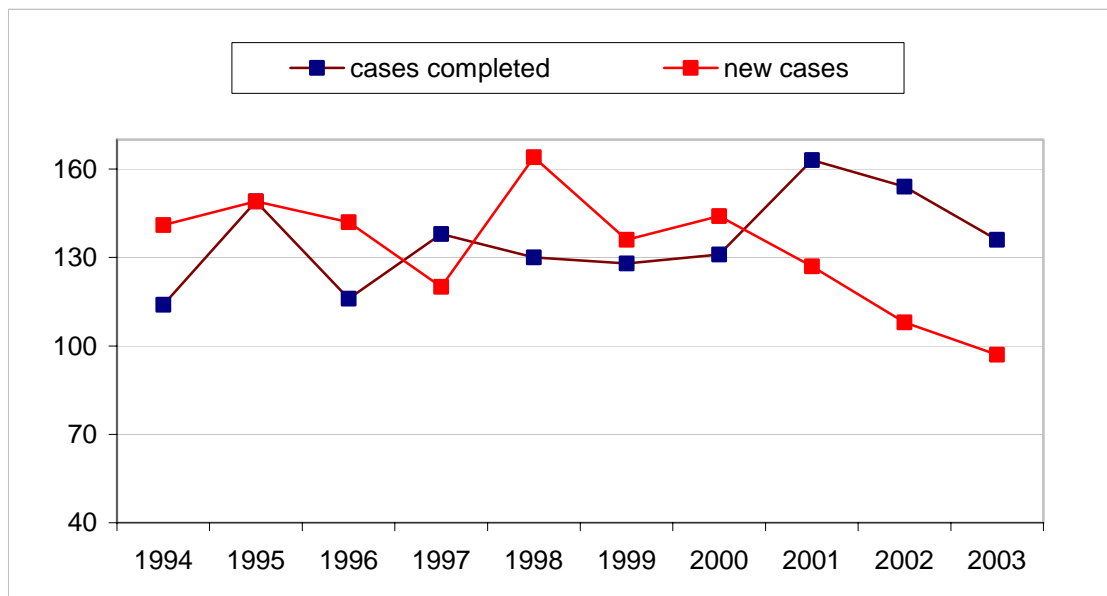
Cases completed

In 2003, 136 cases were completed. This figure matches the average over the last ten years (136 between 1994 and 2003), confirming that the results recorded in 2001 and 2002 were exceptional in nature. These were partly explained by the number of cases closed following the *Cour de cassation's* (Supreme court of appeal) decision of 17th July 2001, in which it ruled that the limitation period could not be suspended for the benefit of the plaintiff. This led to a rise in the number of cases closed on the grounds of limitation.

Table 2: Cases completed

Cases completed	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Litigious cases	83	130	98	111	108	106	96	138	130	108
Requests for opinions	31	19	18	27	22	22	35	25	24	28
<i>Total</i>	<i>114</i>	<i>149</i>	<i>116</i>	<i>138</i>	<i>130</i>	<i>128</i>	<i>131</i>	<i>163</i>	<i>154</i>	<i>136</i>

It must also be remembered that the level of cases completed is extremely dependent on the number of cases which are the subject of joinders. In these instances, one set of proceedings and one ruling serve to complete several cases. Around twenty cases benefited from this joinder effect in 2002, compared with just twelve in 2003.



Stock of cases pending

As in 2002, the number of cases completed was substantially higher than that of new cases, resulting in another drop in the stock.

Table 3: Developments in stock

	Number of cases pending as of 31/12/2002	2003		Number of cases pending as of 31/12/2003
		New cases	Completed cases	
Cases on the merits	304	59	89*	274
Interim measures	5	17	17	5
Respect for injunction	3	3	2	4
Opinion	23	18	28	13
<i>Total</i>	<i>335</i>	<i>97</i>	<i>136*</i>	<i>296</i>

**The total of 89 cases on the merits closed does not include two files created by disjunction for the purposes of the proceedings. Given that this one case was turned into three separate files, the figures would have been 91 and 138 respectively.*

For the first time since 1993, the number of cases pending has fallen below 300. However, the situation varies widely depending on the type of case involved. For referrals on the merits, the number of cases pending represents around three years of activity. But the number of requests for opinion pending has been reduced significantly, and now represents no more than six months of work.

It should be noted that the substantial fall in requests for opinions (-10) is mainly a result of the *Conseil's* efforts to deal with opinions requested by courts, the stock of which was reduced to zero at the end of the year.

Interim measures constitute a separate category, since the *Conseil* respects an average case handling time of three months. Consequently there is no real stock to speak of, rather a mere gap between the incoming flow and the outgoing flow as of 31st December. This gap represents no more than a few cases, and barely changes from one year to the next.

Over the long term, the stock indicator changes as shown in the table below (table 4).

Table 4: Stock

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Stock as of 1 st January	280	307	307	333	315	377	404	417	381	335
New cases	141	149	142	120	192	155	144	127	108	97
Cases completed	114	149	116	138	130	128	131	163	154	136
Variation in stock	+ 27	0	+ 26	- 18	+ 62	+ 27	+ 13	- 36	- 46	-39
Stock as of 31 st December	307	307	333	315	377	404	417	381	335	296

The very clear trend observed since 2000 has been confirmed in 2003, and the stock of cases continues to fall at the same rate as in 2001 and 2002.

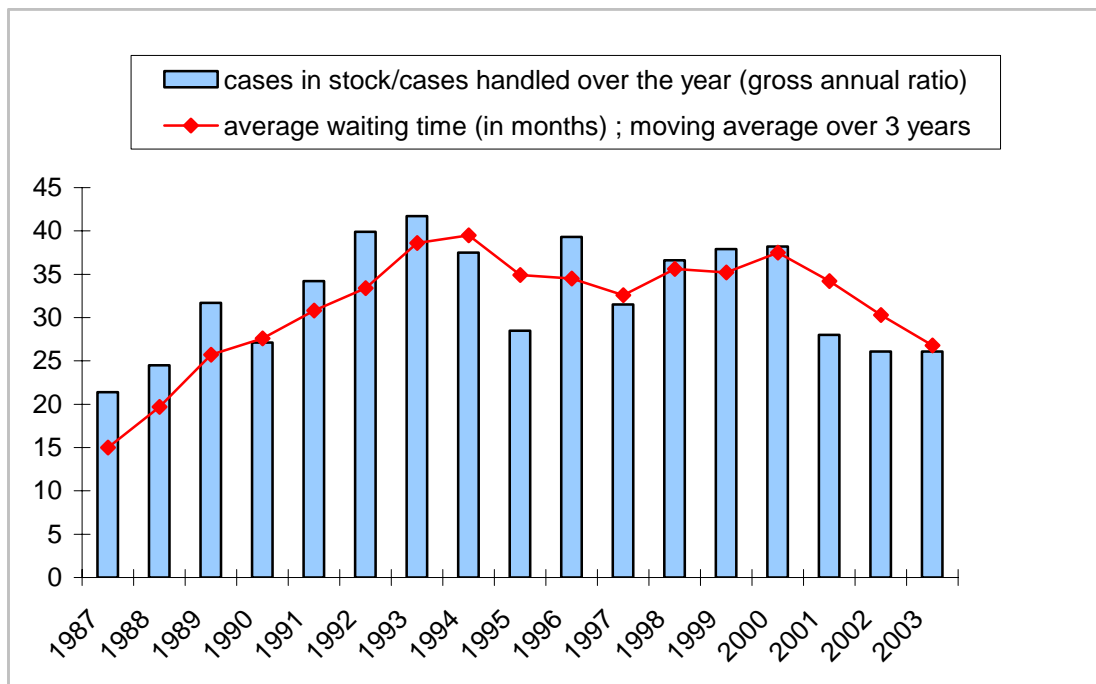
Stock development indicator

Since 2002, the *Conseil* has used an indicator to measure its workload, equal to the ratio "cases in stock/cases handled over the year", which gives a theoretical time for stock to be dealt with or a theoretical waiting time for new cases.

This is a "prospective" indicator – it does not indicate times actually observed for past cases (see above). When it deteriorates, it serves as a warning signal for a future deterioration in times. When it improves, it can herald a shortening of the time taken to handle cases.

However, this rough indicator is highly sensitive to annual fluctuations in activity and can serve to artificially amplify passing trends. To provide a more reliable indication of developments in expected waiting times, annual deviations can be "smoothed out" by a "moving average" type calculation, in which the *Conseil's* productivity (number of cases completed during the year) is taken as a moving average over 3 years.

The graph below shows the long-term development of these two indicators, expressed in months.



It should be noted that they have been developing for the last three years, since the average waiting time has fallen from 38 months in 2000 to 26 months in 2003. Although still too high, this forecast time is now back to its 1989 level and is far removed from the average of 36 months observed during the 1990s.

The drop in stock observed over the last two years and the improved forecast waiting times must not divert attention from the worrying situation of outgoing files, whose average duration remains very long, mainly for litigious cases on the merits.

For cases completed in 2003, the overall average handling time was almost 3 and a half years, although this figure conceals strong individual disparities.

This disparity is particularly clear between the different categories of referrals. The cases with the shortest times concern opinions issued at the request of government and regulatory authorities (2.5 months), merger opinions (3 months) and decisions to grant interim measures (3.8 months). The longest are cases on the merits (4 years and 4 months) and opinions requested by courts, subject to inter partes proceedings (3 years).

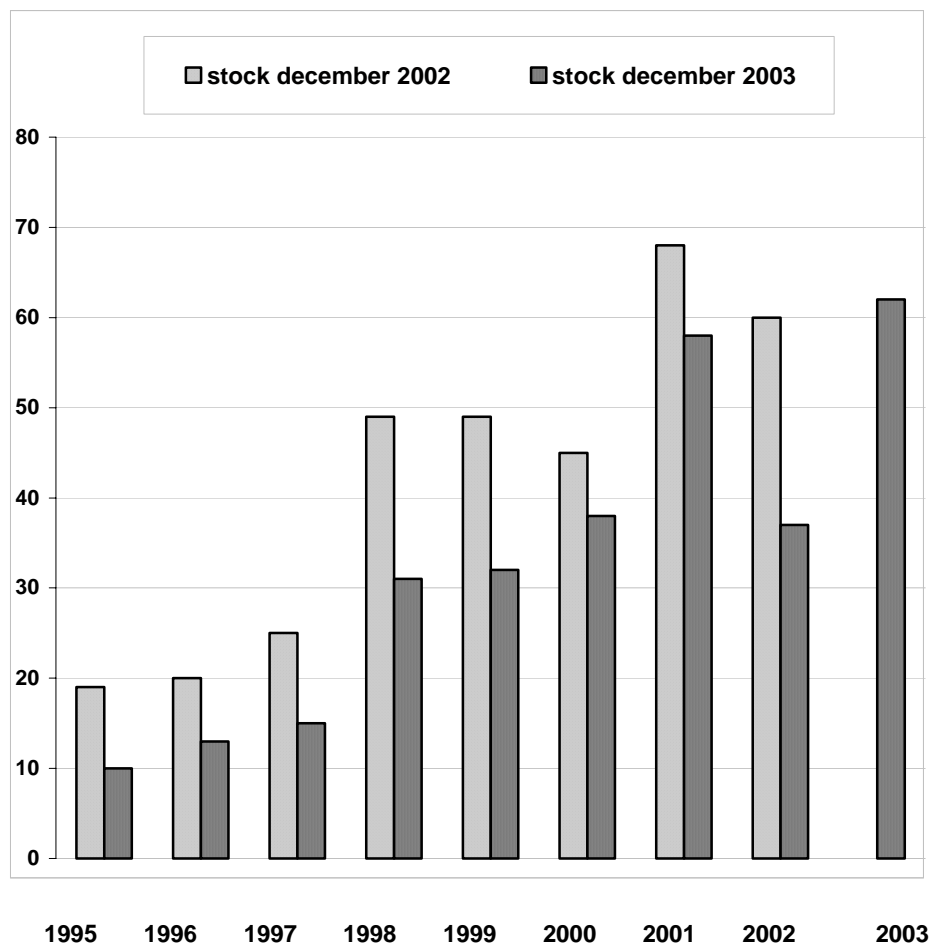
These figures, and especially variations in them, must nevertheless be interpreted with a degree of caution. This is because the small numbers concerned in each sample mean that averages are highly sensitive to the weight of a few particularly lengthy cases.

In 2003, the *Conseil* made a considerable effort to put the situation of opinions requested by courts in order, with the result that the stock of cases fell from seven requests for opinion pending on 1st January to zero on 31st December, whereas no opinions requested by courts have been handled in 2002.

Stock age indicator

Year of referral	In stock on 31/12/2002	In stock on 31/12/2003
1995*	19	10
1996	20	13
1997	25	15
1998	49	31
1999	49	32
2000	45	38
2001	68	58
2002	60	37
2003		62
Total stock	335	296

* 1995 and previous years (including 1 case pending before the ECJ and 3 cases attached to a new inquiry)



This year, the *Conseil* presents a qualitative analysis of the stock of cases. This indicator is intended to provide an overview of the time the stock has been on the *Conseil's* caseload, and any changes to it.

The overall drop in stock of around forty cases between 2003 and 2002 affects all years. Of the 162 cases dating from before 2000 and which were in stock at the start of 2003, some 61 were completed this year. Consequently, the resulting stock stands at 101, a drop of 38%.

On the other hand, the stock of cases from 2000 and 2001 has only fallen slightly (-15%). This reflects the fact that the *Conseil* gives priority to the longest standing cases. It should be noted that many cases dating from 2002 have been completed in 2003 (-45%). This phenomenon is explained by the speed with which interim measures, opinions, dismissals and inadmissibility decisions are handled.

COLLEGIAL BOARD ACTIVITY

All the statistics in this second part concern the qualitative analysis of collegial board decisions and referrals. For activity in the strict sense, the reference base is made up of decisions themselves, without taking account of the number of referrals completed when these decisions are handed down.

Analysis of referrals

Nature of litigious referrals

The following table displays the number and source of litigious referrals on the merits submitted to the *Conseil* over the last five years.

Table 5: Source of referrals on the merits

	1999	2000	2001	2002	2003
Minister of Economy	24	20	16	11	16
Companies	44	40	41	34	34
Professional associations	19	9	3	4	4
Consumer associations	1	3	5	4	2
Local and regional administrations	1	2	2	0	1
Others (including inadmissible referrals)	2	7	8	0	0
The <i>Conseil</i> itself (assuming jurisdiction on its own initiative)	7	5	6	5	2
Adherence to injunction	0	0	4	0	3*
<i>Total</i>	88	86	85	58	62
* ministerial referrals. The number of ministerial referrals therefore stands at 16 referrals on the merits + 3 cases concerning adherence to injunctions, making a total of 19.					

After the substantial drop observed in 2002, the number of litigious referrals increased slightly in 2003, mainly due to the rise in ministerial referrals (+ 5). These nevertheless remain within the average seen over the last four years. Consequently, the proportion of company referrals compared with ministerial referrals has reverted to its 1999/2000 level, i.e. two company referrals for every ministerial referral.

The other notable development is the drop in litigious referrals by consumer associations, which contrasts with the trend observed over the previous two years. The drop in instances where the *Conseil* assumes jurisdiction at its own initiative may only be temporary.

Finally, the practice of eliminating clearly inadmissible and poorly oriented referrals has now been confirmed. The preventive measures undertaken in this field are now well established.

Requests for interim measures

Table 6: Requests for interim measures

1999	2000	2001	2002	2003
21	23	17	24	17

These requests have remained relatively stable over the long term, even if 2003 is at the lower end of the range. However, the number of requests for interim measures recorded is sensitive to the end-of-financial-year cut-off effect. Referrals at the end of December and in January are relatively interchangeable, and handled according to similar timescales.

The vast majority of these requests are submitted by companies, although of the seventeen requests, one was filed by the Minister of Economy and two others by professional associations.

Requests for opinions

The *Conseil* received eighteen requests for opinions:

- one under the terms of article L. 462-2 of the *code de commerce* (French Code of Commercial Law), which stipulates that the *Conseil* must be consulted regarding draft legislation restricting competition;
- seven under the terms of article L. 462-1 of the *code de commerce*, which stipulates that the *Conseil* may be consulted on any competition issue by the Government, parliamentary committees, local administrations and professional, trade union or consumer organizations;
- two under the terms of article L. 430-1 of the *code de commerce*, which stipulates that the Minister of Economy consults the *Conseil* if he believes a merger operation is likely to adversely affect competition;
- three under the terms of article L. 410-2, which stipulates that the *Conseil* must be consulted regarding legislation regulating prices;
- one under the terms of article L. 462-3, which stipulates that the *Conseil* may be consulted by courts;
- two on the basis of article L. 464-2 III, which stipulates that the *Conseil* may adopt a leniency opinion in which it specifies the conditions to be met before a party may be exonerated from a fine;
- one at the request of the *Commission de régulation de l'énergie* (Energy Regulation Commission);

- one at the request of the *Autorité de Régulation des Télécommunications* (Telecommunications Regulation Authority).

Cases handled

Decision categories

A total of 103 decisions were handed down in 2003.

The following table details the way the number of litigious decisions in each category has evolved since 1999:

Table 7: Decisions

	1999	2000	2001	2002	2003
Cases investigated on the merits:	49	53	56	47	56
- penalty decisions (fines and others)	27	36	30	13	21
- non-suit decisions	22	17	26	34	35
Interim measures	12	18	8	9	4
Inadmissibility decisions and dismissals	25	19	23	28	16
Discontinuance/withdrawal decisions	17	15	20	10	26
Others				7	1
<i>Sub-total final decisions</i>	<i>103</i>	<i>105</i>	<i>107</i>	<i>101</i>	<i>103</i>
Adjournment of proceedings	6	7	10	6	0
<i>Total</i>	<i>109</i>	<i>112</i>	<i>117</i>	<i>107</i>	<i>103</i>

Two positive developments are worth noting: on the one hand, the number of decisions on cases on the merits rose, whilst on the other hand, there were no decisions to adjourn proceedings. Decisions to adjourn proceedings are traditionally counted as completed cases, whereas in reality they do not close a file but send it back for investigation.

There has also been a substantial drop in dismissals and inadmissibility decisions. This development is partly due to the deliberate policy of filtering referrals, which has been a major source of inadmissibility decisions in previous years. But it is also due to the action taken to obtain withdrawals on the stock of these groundless referrals, as is shown by the significant rise in the number of cases closed in this way in 2003.

The way decisions on requests for interim measures are counted was changed in 2003: IM decisions which grant interim measures are now counted in the "*interim measures*" category. Unlike previous years, decisions which see the *Conseil* reject requests for interim measures (whether or not the referral on the merits itself is rejected) are now counted as inadmissibility or

dismissal decisions (table 7). In 2003, eight requests for interim measures were dismissed and five were discontinued after the plaintiffs withdrew their requests.

Opinions

The *Conseil* handed down twenty-two opinions in 2003, which break down as follows: two concerned merger issues (article L. 430-5), twelve dealt with general competition issues (L. 462-1), four were issued at the request of courts (L. 462-3), and one related to draft legislation regulating prices (L. 410-2). One opinion was issued under the *code des postes et télécommunications* (French code of posts and telecommunications), whilst another was issued in application of the law opening the natural gas monopoly. Finally, the *Conseil* issued a leniency opinion (L. 464-2 III). Not all requests end with the *Conseil* issuing an opinion, and in 2003 it ruled a request for opinion inadmissible.

Results for each economic sector

As with the previous year, the index of decisions and opinions handed down by the *Conseil* for each sector of activity has been drawn up on the basis of the Insee's "NAF" table of economic activities and can be found at the end of this document. Using this method, the economic sectors in which the *Conseil* has intervened during the year can be grouped together more easily and identified more systematically.

It is merely a quantitative summary and gives no indication of the importance of decisions, either in terms of their contribution to case law or the amount of fines handed down.

Thus, the economic sectors in which the *Conseil* has intervened in both its legal and advisory capacities break down as follows, in decreasing order. Only those sectors in which the *Conseil* has taken action at least three times have been included.

As in 2002, the construction sector accounts for a substantial portion of cases, and indeed this sector topped the list in 2003. The telecommunications sector also maintains a high position, although the number of cases fell compared with the previous year (this is partly explained by the particularly high number of requests for interim measures handled in 2002).

But the past year was especially marked by the appearance of the insurance sector (3rd place) and the rise of the chemical industry (mainly pharmaceutical products), for which the number of decisions and opinions doubled. There were also more press-related cases. The energy sector remained at the same level as the previous year.

Public markets accounted for 15 decisions and 3 opinions, mainly in the construction, civil engineering and highways industry, which explains the highly prominent position of this particular economic sector.

Table 8: Decisions and opinions by main economic sectors

Economic sectors	Number of decisions and opinions
Construction	12
Postal and telecommunication services	7
Insurance and financial insurance auxiliaries	7
Chemical industry (pharmaceutical products, cosmetics, fertilizers)	6
Production and distribution of electricity, gas and heat	5
Automobile trade and repair	5
Services provided mainly to businesses	5
Publishing, printing and reproduction (press)	4
Recreational, cultural and sporting activities	4
Health and social action	4
Manufacture of medical, measuring and optical instruments and clocks	3
Wholesale trade and intermediary trade activity	3
Information technology activities	3
Personal services	3

Decisions to impose fines

Amount of fines

The *Conseil* imposes three categories of penalties: fines, injunctions and publication of decisions. In 2003, nineteen decisions resulted in fines totalling 88,535,095 Euros.

The table below shows the main details of the penalties imposed by the *Conseil* over the last five years:

Table 9: Decisions to impose fines

	1999	2000	2001	2002	2003
Number of decisions to impose fines	13	28	30	12	19
Number of companies or groups of companies penalized	58	67	116	103	57
Amount of fines	€9,3 M	€14,6 M ¹ €189 M ²	€51,2 M	€64,3 M	€88,5 M
Number of professional associations fined	8	4	3	8	4
Amount of fines	€0.1 M	€0.06 M	€0.03 M	€0.5 M	€0.05 M
Total amount of fines	€9.4 M	€189.1 M ²	€51.2 M	€64.8 M	€88.5 M
¹ Not including the amount of fines handed down under the terms of decision 00-D-28 relative to the competitive situation in the mortgage sector. ² Not including the amount of fines handed down under the terms of decision 00-D-28 relative to the competitive situation in the mortgage sector.					

The year 2003 has been marked by a rise in penalty decisions and a fall in the number of companies fined, which has merely reverted to the levels observed in 1999-2000 after varying strongly for two years.

The overall amount of fines imposed (€88.5 M) has increased by 36% compared with 2002, and has achieved a new record high if bank cases in 2000 are excluded.

The development in the average amount of fines for companies (ratio of the amount of fines imposed on companies divided by the number of companies fined) naturally reflects these trends, and rose very considerably in 2003 compared with previous years.

Table 10: Average level of fines

Average level (in M€)	1999	2000	2001	2002	2003
	0.16	0.22 (exc. bank) 2.82 (inc. bank)	0.44	0.62	1.55

The Minister of Economy 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.

Practices penalized

The table below shows the practices penalized by the *Conseil* in 2003, according to a commonly accepted typology: bid rigging, impediments to market access, market sharing, price agreements. It is specified that the number of practices does not reflect the exact number of decisions, since a single decision can penalize several categories of practices.

Table 11: Nature of practices penalized

Categories	Number of practices
Abuse of dominant position	5
Anticompetitive agreements	21
- bid rigging	8
- impediments to market access	4
- market sharing	3
- price agreements	6
Breach of injunction	1

The most heavily penalized economic sectors

The table below shows which economic sectors received the highest fines.

Table 12: The most heavily penalized economic sectors

Economic sectors	Amount of fines (in M€)
Telecommunications	40
Retail fuel industry	27
Chemical industry (pharmaceuticals)	12
Office and information technology equipment	3.8
Construction	3.5

DELIBERATIONS BY THE *CONSEIL*

The *Conseil's* overall activity has been identical to that observed in 2002, with around one hundred meetings. This figure is highly satisfactory, and confirms the high level of activity seen since 2000. The following table shows the number of meetings held by the *Conseil* in its different forms over the last six years.

Table 13: Meetings of the *Conseil*

	1998	1999	2000	2001	2002	2003
Meetings	89	83	109	106	100	100

In 2003, the breakdown of meetings between the various session types was as follows: fifty-five meetings in divisions, forty-seven in standing committees and one plenary session.

CHAPTER II - ORGANIZATION AND OPERATION

HUMAN RESOURCES

Reform of the *Conseil's* administrative status

In 2003, the process of establishing the *Conseil's* management independence was finally completed. In budgetary documents, all case officer positions are now included under the single heading of contractual positions. They are managed according to the rules set down in the agreement signed in December 2002, with the Ministry of Economy, Finance and Industry's personnel and administration modernization department (DPMA).

The general idea behind the agreement, which worked most satisfactorily in 2003, is to give the *Conseil* complete control over the individual management of its employees, with the DPMA taking responsibility for paying salaries.

Organization of services

There were several individual decisions in 2003, which led to changes in the services' organization chart. Mrs Valérie Michel-Amsellem has been appointed an assistant judge at the *Cour de cassation* (Supreme Court of appeal). She has been replaced in the position of deputy head case officer by Mrs Irène Luc, who was previously counsel for European affairs.

As a result of this appointment, the European affairs service has been reorganized and reinforced, notably in preparation for EC regulation 1/2003. Consequently, Mrs Frédérique Daudret-John, case officer, and Mr Christophe Lemaire, who arrives from the Foreign Ministry's legal affairs department, have been appointed European affairs counsels, reporting to the executive case officer.

Movement of case officers

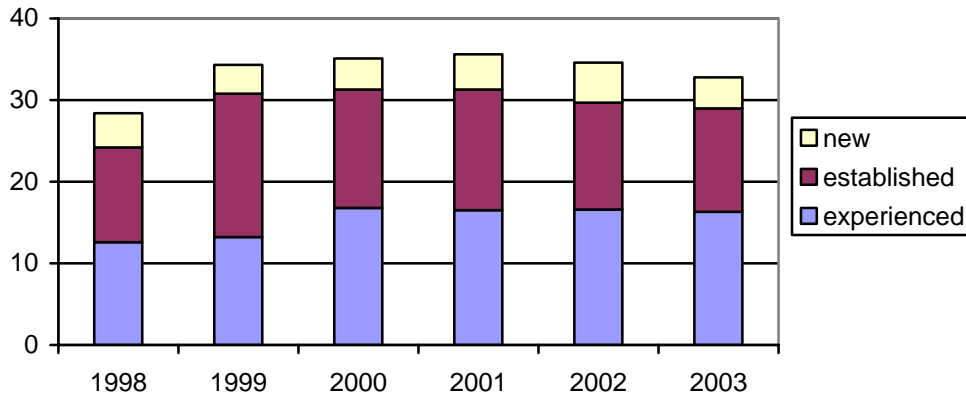
As in previous years, the *Conseil's* inquiry services have been heavily affected by staff movements, with seven case officers and two special assistants leaving, whilst six new case officers and one new special assistant have arrived.

The inquiry services' overall workforce represents around forty people, and consequently these movements appear rather substantial. However, they remain similar to those observed in 2002, when there were six departures and six new arrivals.

In 2003, the *Conseil's* ratio of months to case officers was lower than in previous years. This indicator fell from 426 months in 2001 to 415 months in 2002 and 395 months in 2003.

As an annual full time equivalent, these figures show an annual available workforce of 32.9 case officers in 2003, compared with 34.6 in 2002 and 35.5 in 2001. This in turn shows a weakening in the real resources available to the inquiry service.

Table 14: Full time equivalent in case officers



The graph above gives a breakdown of the case officers present at the *Conseil* as a full time equivalent over a year N, for each of the last six years. Case officers who have been at the *Conseil* for more than two years on 1st January are considered to be "experienced", whilst those who have been at the *Conseil* for less than two years on 1st January are classed as "established". Those who have been recruited during year N, after 1st January, are considered to be "new" case officers.

The period 1999-2001 was marked by an increase in the *Conseil's* overall labour resources. Meanwhile, employee numbers actually remained relatively stable, since the numbers of experienced and established case officers rose substantially. On the other hand, the significant staff turnover seen in 2002 and 2003 led to an opposite trend: the gradual reduction in the number of experienced and established case officers is leading to a gradual decrease in labour resources, which is not offset by the arrival of new case officers.

BUDGET

Compared with 2002, the *Conseil's* overall budget remained stable in 2003: 8.6 million Euros. This stability masks differing trends in administrative appropriations and staff appropriations. The former fell slightly, as appropriations granted on an exceptional basis in 2002 for financing the international symposium on 13th February 2002, were not renewed. On the other hand, staff appropriations increased slightly, from 5.7 to 5.8 million Euros. This increase served to finance moves to transform and revalue certain positions.

CHAPTER III - COURT OF APPEAL STATISTICS

The decisions handed down by the *Conseil de la concurrence* "are notified to the parties concerned and to the Minister of Economy. Within a period of one month thereafter, the parties or the Minister may lodge an appeal with the Paris Court of Appeal, requesting that the decision be set aside or amended" (article L. 464-8 of the *code de commerce*).

In 2003, the Paris Court of Appeal issued 35 judgements on decisions originally handed down by the *Conseil de la concurrence*, of which 20 included judgements on the merits of cases.

In 13 cases, the decisions of the *Conseil* were fully endorsed. This represents an endorsement rate of 65%. However, of the three decisions classed as partial amendments in the table below, two can also be regarded as upholding the *Conseil's* competitive analysis. In the chartered surveyors case (02-D-14), the amendment simply threw out the case against one of the five companies originally found guilty by the *Conseil*. In the ADP case (98-D-34), the amendment did not concern the *Conseil de la concurrence's* reasoning, but rather the issue of the *Conseil's* very jurisdiction after the Court of Arbitration ruling. If these two decisions are switched to the "partial endorsement" category, the overall endorsement rate is raised to around 75%.

Table 15: Court of Appeal statistics

	NUMBER OF DECISIONS	DECISION REFERENCE NUMBERS
Endorsement	8	02-D-33 / 02-D-35 / 02-D-37 / 02-D-44 / 02-D-76 02-D-59 / 03-D-07 / 03-D-25
Partial endorsement (1)	5	95-D-76 / 02-D-36 / 03-MC-02 / 02-D-62 / 03-D-12
Total amendment or setting aside (2)	4	02-D-43 / 02-D-60 / 02-D-42 / 03-D-17
Partial amendment (2)	3	02-D-57 / 02-D-14 / 98-D-34
Total judgements on merits of cases	20	

(1) Endorsement on the merits with amendment to penalties or the wording of interim measures)

(2) On the merits

CHAPTER IV – COMMUNITY AND INTERNATIONAL ACTIVITY

COMMUNITY ACTIVITY

Once again, 2003 has been another particularly productive year in terms of community activity. Whilst some projects undertaken several years ago have now been completed, others have been opened by the Commission. Obviously, the main developments follow on from the adoption of new texts intended to modernize competition law, both in terms of anticompetitive practices and merger control. In addition to these reforms, the Commission has also begun examining a number of new issues. These include general interest services, on which it published a Green Paper on 21st May 2003, and the regulation of liberal professions and its implications, for which it organized a huge consultation and data collection process.

Modernization of the law on anticompetitive practices

The main feature of moves to modernize the law on anticompetitive practices is the adoption of the "*modernization package*". These moves continue with the adoption of several proposed amendments, either to sectorial regulation, or to regulations on block exemptions.

The "*modernization package*"

Adoption of the "modernization package"

During the course of 2003, work on modernizing the law on anticompetitive practices continued. On 16th December 2002, the Council issued a regulation on the implementation of the competition rules laid down in articles 81 and 82 of the Treaty. This regulation was published in the first edition of the *Official Journal of the European Communities* dated 4th January 2003 (hence number 1/2003). In addition to this, the last year was mainly marked by the publication of other texts, which together make up what is commonly referred to as the "*modernization package*".

Initially, seven new texts were submitted for public consultation, and the parties concerned were invited to inform the Council of their observations. The Commission received fifty-four contributions, all of which are available on the Directorate General for Competition's website. After final discussions with the national competition authorities during the second consultative committee held on 10th and 11th February 2004, and after a number of amendments, these texts were formally adopted by the Commission on 30th March 2004.

- *Commission Regulation (EC) n° 773/2004 of 7th April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty*

Under article 33 of regulation (EC) n° 1/2003, the Commission is authorized to take such measures as may be appropriate in order to apply the said regulation. In application of these

measures, in regulation (EC) n° 773/2004 of 7th April 2004 the Commission defined the rules on conducting proceedings pursuant to articles 81 and 82 of the Treaty.

These rules mainly concern:

- the opening of proceedings by the Commission; investigations conducted by the Commission, and more specifically the Commission's power to gather declarations and request explanations during inspections;
- the processing of complaints, whether in terms of their admissibility, the complainant's participation in the proceedings or the conditions for dismissing a complaint;
- the right to be heard, both for the companies accused and for the complainant or third parties who are able to show sufficient interest; and finally access to the case file and handling of confidential information.

The appendix to the regulation includes "*form C*", which lists the information that complainants are required to supply to the Commission when submitting their complaints.

➤ *Commission notice on co-operation within the network of competition authorities*

Content of the notice

For the purposes of implementing regulation (EC) n° 1/2003, a "*European competition network*" (ECN) was set up between national competition authorities and the Commission. The ECN is a forum for discussion and cooperation. According to the terms of the notice, it is "*the basis for the creation and maintenance of a common competition culture in Europe*" and must ensure "*both an efficient division of work and an effective and consistent application of EC competition rules*".

In this context, the notice first of all sets out the principles governing the division of work between competition authorities. This includes setting out the criteria used to determine whether an authority is well placed to deal with a case. Similarly, the notice provides a detailed description of the co-operation and assistance mechanisms created by regulation (EC) n° 1/2003, particularly articles 11(3) (information at the start of the investigation), 12 (exchanges or use of confidential information), 13 (suspension or termination of proceedings) or 22 (investigations). It also clarifies the role of companies in this system, specifically when they request special treatment.

Next, the notice refers to the mechanisms in place to ensure that EC competition rules are applied consistently. This includes mechanisms for co-operation within the ECN prior to the adoption of a final decision. It also refers to the conditions in which the Commission is entitled, under the terms of article 11(6) of regulation (CE) n° 1/2003, to open proceedings and relieve national authorities of their competence to apply articles 81 and 82 of the Treaty.

Finally, the communication summarizes the role and workings of the advisory committee in the new system.

Signature of a declaration by competition authorities

As stated in the Commission notice on co-operation within the network of competition authorities, almost all members of the ECN have signed a statement, in which they acknowledge and undertake to abide by the principles set forth in the said notice (this includes the principle concerning the protection of applicants claiming the benefit of a leniency programme). These authorities are listed on the European Commission website. The undertaking is a positive move to protect leniency programmes and the companies that apply to benefit from them.

➤ *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*

Like competition authorities, national courts are required to apply articles 81 and 82 EC, when applying their national competition law to practices, agreements or abuses of a dominant position which are likely to affect trade between Member States.

In this context, the notice specifies the conditions in which EC rules are applied by Member States' courts, in terms of both their jurisdiction and procedural aspects. It also reiterates the principles set down by EC case law in the event of parallel or consecutive application of EC competition laws by the Commission and national courts.

Finally, the notice includes a detailed explanation of the mechanisms for co-operation between national courts and the Commission. In this respect, co-operation can take two forms. On the one hand, the Commission can act as *amicus curiae* to assist national courts in applying EC competition rules. This means the Commission is required, in principle, to provide national courts with the information in its possession. It also means that national courts are able to request the Commission's opinion, whilst the Commission may submit its observations to national courts on issues linked to the application of articles 81 and 82 EC. On the other hand, national courts may be called upon to facilitate the role of the Commission in the enforcement of EC competition rules. They may do this by providing it with documents required for the assessment of a case in which the Commission would like to submit observations. Alternatively, they may assist the Commission by sending it any judgements applying article 81 or 82 EC or authorizing an inspection in a Member State.

➤ *Commission Notice on the handling of complaints under Articles 81 and 82 of the EC Treaty*

The notice on the handling of complaints submitted under Articles 81 and 82 EC reflects the Commission's wish to be informed of suspected breaches of competition rules, and to help companies and citizens to obtain compensation for such breaches. To this end, the notice calls on citizens and companies concerned to contact the Commission, either by submitting a complaint in accordance with article 7(2) of regulation (EC) n° 1/2003, or by providing it with information on the suspected existence of anticompetitive practices on a dedicated website.

The notice goes on to detail the various options open to citizens and companies who feel they have been victims of anticompetitive practices. More specifically, it sets out the complementary roles of competition authorities and national courts, and the main elements that must enable citizens and companies to ensure that their actions are as effective as possible. Furthermore, the notice reiterates the principles governing work-sharing between the Commission and national competition authorities under the system set up by regulation (EC) n° 1/2003.

Thirdly, the notice describes the way in which the Commission handles complaints submitted by natural or legal persons under article 7 (2) of regulation (EC) n° 1/2003. The notice thus reviews, on the one hand, the rules on submission of complaints, for which the complainant must comply with the requirements of "form C" (appended to the notice) and show a legitimate interest. On the other hand, it reviews the rules according to which the Commission examines complaints, and in particular the assessment of their community interest and the factual and legal elements used to assess the alleged infringement. Finally, the notice sets out the rules on the handling of complaints, the period during which the complainant benefits from a series of rights, and notably the right to present his observations and to have the complaint dismissed.

- *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*

Despite the move from an authorization mechanism to a legal exception mechanism and the Commission's view that companies are generally well placed to assess the legality of their actions, there is no reason why informal relations should not be maintained between companies and the Commission. Recital 38 of regulation (EC) n° 1/2003 states that "*where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission.*". The notice specifies the procedure according to which the Commission provides companies with "*guidance letters*".

First of all the notice sets out the conditions in which a guidance letter may be published. Three cumulative conditions must be fulfilled. The case must pose a novel question for which there is no clarification in existing case law or precedents, and the request must contain all the factual elements required for it to be handled immediately. Also, the notice specifies the manner in which such guidance should be requested and the way it is handled by the Commission. Finally, it indicates the content and the scope of guidance letters. They must include a description of the facts, as well as the principal legal reasoning underlying the understanding of the Commission. Subject to any business secrets, guidance letters will be placed on the Commission's website. Their scope is limited since, even if they are taken into account, they do not bind national authorities or courts, or the Commission.

- *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*

The concept of trade between Member States being affected is one of the conditions for applying EC competition rules and a criterion for attributing jurisdiction. This fifth notice defines the concept in detail. It describes the principles and their application to standard types of agreements and abusive practices.

With regard to the principles, after reiterating some general rules, the Commission gives a precise definition of the various concepts that make up the effect on trade criterion. Whilst there are some new features, most of the rules are taken directly from solutions resulting from case law. First to be defined is the concept of "*trade between Member States*". This covers any international economic activity with an effect on cross-border economic activities involving at least two Member States. Next, the notice states what is understood by the notion "*may affect*". In this respect, it suggests a standard criterion made up of three elements: a sufficient degree of probability on the basis of a set of objective factors of law or fact; an influence on the pattern of trade between Member States; a direct or indirect, actual or potential influence on the pattern of trade. Finally, in order for EC law to apply, the effect must be appreciable. The notice defines this notion and indicates how it should be appraised. In particular, it states that two assumptions are made on the basis of calculated thresholds. One such assumption is negative, with agreements presumed not to affect trade between Member States appreciably. The other is positive, with effects on trade presumed to be appreciable.

Having set out these principles, the notice goes on to illustrate how they may be put into practice. To do this, it draws a distinction between the following: agreements and abusive practices covering several Member States; those which are confined to a single Member State or to part of a single Member State; and agreements and abusive practices involving third countries.

➤ *Guidelines on the application of Article 81(3) of the Treaty*

Under the reform, the agreements, decisions by associations of undertakings and concerted practices referred to in article 81(1) of the Treaty, but which fulfil the conditions set down in article 81(3), are now valid and applicable, without the need for a prior decision. To help national courts and authorities determine whether the conditions stipulated by article 81(3) of the Treaty have been fulfilled, the Commission decided to issue this latest notice. It goes hand in hand with the regulations on block exemptions and the existing guidelines on vertical restraints and horizontal co-operation agreements.

To begin with, the Commission reiterates the general framework of article 81 EC, looking in turn at the basic principles for assessing agreements under article 81(1) EC, ancillary restraints and the principles underlying implementation of article 81(3) EC.

Next, the Commission focuses on the application of article 81(3) EC. After a few general reminders, the guidelines examine each of the four cumulative conditions set down in article 81(3). Firstly, the restrictive agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress. The Commission develops this point extensively, mainly from an economic viewpoint. This involves looking for the cost or qualitative efficiencies made as a result of the practice in question. According to the next condition, the restrictive agreement must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement in question. To ascertain whether this condition has been met, two tests are required. First, it must be determined whether the restrictive agreement as such is necessary in order to achieve the efficiencies. Secondly, the individual restrictions on competition that result from the agreement must be necessary for the attainment of the efficiencies. To benefit from application of article 81(3) of the Treaty, companies must demonstrate that consumers receive a fair share of the efficiencies generated by the restrictive agreement. To this end, the guidelines suggest using an analytical framework to assess the extent to which efficiencies are passed on to the consumer. Finally, the agreement must not afford companies the possibility of eliminating competition in respect of a substantial part of the products concerned.

Continued activity by working sub-groups

The four sub-groups set up in 2002 at the meeting to form the ECN working group have continued their work. Over the course of the year, they have finalized preparations for Commission notices and expanded the concrete operating conditions for co-operation within the ECN.

These activities provided an opportunity to take an in-depth look at a number of specific issues, including joint investigations, the application of leniency programmes, allocation of cases or exchanges of information.

The *Conseil* played an active role in this process. Frequent meetings and high quality exchanges provided a means of improving the workings of the network and enhancing mutual knowledge of the control systems in force across the enlarged EU.

Although the "*modernization package*" has now been finalized, the working group decided to continue its activities in the future, constantly improving the operation of the ECN.

Revision of sector-based regulations and block exemptions

Revision of Council regulation (EEC) n° 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport

Council regulation n° 4056/86, which comprises the main EC competition rules applicable to maritime transport, came into force on 1st July 1987, and has not been revised since. Unlike other block exemption regulations, regulation n° 4056/86 applies for an indeterminate period and contains no revision clauses. Consequently, the validity of this exemption has not been examined for more than fifteen years.

But the Commission believes that there are at least four reasons that now justify the need to carry out just such an examination: market conditions have changed substantially over the last fifteen years; some of the Community's trading partners have undertaken to revise their own exemptions; studies carried out by the OECD in 1999 and 2002 concluded that States needed to re-examine the exemption issue. Finally, procedural rules have changed since regulation (EC) n° 1/2003 was originally adopted.

In March 2003, the Commission invited interested parties to answer a questionnaire, which would enable it to gain a more in-depth view of the need to revise regulation n°4056/86. As part of the consultation process undertaken by the Commission since March 2003, a public hearing took place in Brussels on 4th December 2003, in which the *Conseil* took part. The Commission is now analyzing the contributions submitted at the hearing.

Revision of Commission Regulation (EC) No 823/2000 of 19th April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

September 2003 saw a new development in the maritime transport sector, with the publication of a proposed draft amendment to regulation (EC) No 823/2000 of 19th April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

Although regulation (EC) n° 823/2000 applies until 25th April 2005, it was decided to bring its provisions into line with those of the other regulations on maritime transport, namely regulations (EEC) n° 479/92 and 4056/86, amended by regulation (EC) n° 1/2003. The proposed amendments are therefore mainly procedural in nature. In particular, they include moves to abolish the opposition procedure and delete references to notification of consortia. They also propose the insertion of transitional provisions in respect of notifications already made under the non-opposition procedure. Finally, the proposed amendments introduce references to the new powers of national competition authorities.

These proposals were formally adopted by the Commission on 12th March 2004 in regulation n°463/2004 (OJEU L 77 / 23).

Revision of Commission regulation (EC) n° 240/96 of 31st January 1996 on the application of article 85(3) of the Treaty to certain categories of technology transfer agreements

Under article 12 of regulation n° 240/96, the Commission is required to undertake regular assessments of the application of the block exemption regulation for technology transfer known as the "*BETT regulation*", to determine whether it should be amended. In a report dating from

2001, the Commission put forward a number of arguments in favour of carrying out an in-depth re-examination of competition policy in the field of technology transfer agreements.

After inviting third parties (companies, consumer associations, professional organizations, etc.) to submit their observations, the Commission adopted a draft regulation supported by a set of draft guidelines.

Whereas the old regulation was rather formalist, based heavily on legal considerations, the new draft regulation corresponds more to the Commission's new approach to exemption legislation, i.e. an economic approach that takes account of agreements' effects on the market in question.

One of the principal new features introduced by the draft regulation is that it moves away from the system of listing exempted clauses (white and grey clauses). Instead, it places more emphasis on defining categories of agreements that are exempted up to certain a market share threshold, and restrictions or clauses that must not appear in agreements. The draft also requires that a distinction be drawn between agreements between competitors on the one hand, and agreements between non-competitors on the other hand. Moreover, the draft regulation extends to multilateral agreements, whereas the previous regulation only covered bilateral agreements. Finally, the new regulation takes account of technological developments, and extends the exemption to cover technology transfers involving software.

Reform of EC merger control

Regulation n°139/2004 of 20th January 2004, on the control of concentrations between undertakings, comes into force on 1st May 2004. On this same date, which sees the European Union enlarged from 15 to 25 members, the new regulation n°1/2003 on the application of articles 81 and 82 of the EC Treaty (OJEU 29/01/2004) also comes into force.

The reforms introduced by the new regulation concern the substantive examination of merger operations (introduction of a new control test), jurisdiction (distribution of cases between the Commission and national competition authorities) and procedure (notification conditions and powers of investigation).

This new regulation is the culmination of a vast consultation covering all Member States, concerning a Green Paper issued by the Commission in December 2001 and aimed at improving the merger control system in force since 21st December 1990.

Besides the Mergers regulation n°139/2004, a series of applicatory tests has been designed, whilst the control process at the DG Competition has been reorganized. On 5th February 2004, the Commission adopted a set of guidelines on appraising horizontal concentrations and a code of best practices for conducting investigations into concentrations.

Regulation n° 139/2004

The new test for appraising concentrations: they are now assessed according to whether they significantly impede competition, and not just whether they strengthen or create a dominant position.

The substantive criterion to be used by the Commission to determine whether a concentration operation should be opposed has been a subject of debate between two groups. Some are in favour of the dominance test resulting from regulation n° 4064/89, which is currently used in Germany. Meanwhile, others would prefer to adopt the "substantial lessening of competition test" (the "SLC" test used in the USA and several Member States, notably France, the UK and Ireland).

The wording of the new regulation sticks close to the French text, which makes the dominant position test a sub-category of the "significant impediment to competition test": "*A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market*" (article 2(2) of regulation n° 139/04).

This new test extends the Commission's ability to intervene by enabling it to take action on all kinds of anticompetitive scenarios, whether they involve the dominance of one particular company or the effects of an oligopoly that could harm the interests of European consumers.

In other words, a concentration with anticompetitive effects that result from non-coordinated behaviour by companies ("*unilateral effects*") may be ruled illegal, even if the companies concerned do not hold a dominant position in the market.

Allocation of jurisdiction between the Commission and Member States: an extended referral mechanism

The Commission holds automatic and exclusive jurisdiction for concentrations between companies that have a "*community dimension*", i.e. those which exceed the thresholds laid down in article 1 of the regulation.

The Green Paper indicated that certain concentration operations, which do not fulfil the threshold criteria, may have a community dimension. Consequently, the practice by which notifications are filed in several States led to costs and legal insecurity for companies.

In accordance with the recommendations of the Green Paper on concentrations, the Commission included in its draft regulation a proposal to adopt the so-called "3+" rule. This rule automatically makes the Commission competent to examine concentration operations that fall within the jurisdiction of three or more Member States, even where the thresholds for turnover have not been met. This mechanism was rejected by the Council of the European Union. However, it was replaced by a provision (in article 4) entitling the parties or companies concerned to refer a concentration operation to the Commission at the pre-notification stage, provided the operation in question falls within the jurisdiction of Member States. Thus, in the case of a concentration without a community dimension, the parties or companies concerned may, before notifying the competent authorities of one or more Member States, inform the Commission that the concentration has significant cross-border effects and must consequently be examined by the Commission itself. The Commission subsequently sends the file to all Member States, which then have a period of 15 days in which to dispute the referral. If at least one Member State disputes it, the case is not referred. On the other hand, if no Member States dispute the referral, the concentration is deemed to have a community dimension. It therefore falls under the "one-stop shop" system and will be examined by the Commission. It must therefore be notified to the Commission (article 4-5).

Henceforth, these referral provisions may be applied before an operation is officially notified, either to the Commission, or to national competition authorities.

Procedural issues

➤ Strengthened powers of investigation and penalty

The new regulation strengthens the Commission's powers of investigation, which are now broadly in line with those conferred upon the Commission under the new regulation 1/2003 on the implementation of articles 81 and 82.

Where companies deliberately or negligently supply incorrect, misleading or incomplete information or fail to supply information within the required deadlines, they may incur fines up to

a maximum of 1% of their total turnover. This total replaces the previous upper limit for fines which was fixed at 500,000 Euros. The maximum amount of periodic penalty payments has also been very substantially increased.

➤ *Extension of the phase II investigation timetable("stop the clock")*

The new regulation introduces two possibilities for extending timetables:

- where the parties to the merger submit remedies, they are automatically granted an extra period of three weeks;
- at the request of the parties or the Commission, but with the agreement of the former, the phase II investigation timetable may be extended by four weeks, in order to examine difficult aspects of particularly complex cases in greater detail.

➤ *Notification in the absence of binding merger agreements*

Under the new regulation, a binding merger agreement is no longer required as a precondition for notification. It is now sufficient merely to demonstrate that there is a real intention to conduct a merger. This change is in accordance with the "*recommended practices*" developed by the International Competition Network.

Reorganization of the DG competition

Several major changes were made at the end of 2003 which affect the EC merger control process:

- on 1st September 2003, a chief economist was appointed. He heads up a team of economists which will issue opinions on files and will conduct a second, critical assessment of the conclusions reached by the team in charge of the file,
- an internal collegial assessment group has also been set up within the DG Competition. Its task is to take a "*fresh look*" at the conclusions reached by the team in charge of the investigation (in all phase II cases),
- as from 1st May 2004, concentrations will no longer be dealt with by the Merger Task Force, which has been dissolved, but by the various directorates of the DG for Competition. Finally, a merger control policy co-ordination unit has been set up.

Guidelines on the assessment of horizontal mergers

The Commission's notice on the assessment of mergers between competing companies is the fruit of almost fourteen years' experience in the field, and European case law. It is intended to inform companies and their advisors by ensuring that the Commission's appraisal is more transparent and predictable.

On market share

The notice indicates that particularly large market shares -50% or more - may in themselves be evidence of the existence of a dominant market position.

On the other hand, the notice stipulates that the merger is presumed to be compatible with the common market, provided the market share of the companies involved does not exceed 25%, either in the common market or in a substantial part of it.

On the possible anticompetitive effects of horizontal mergers

The notice stipulates the difference between the concept of unilateral effects, which it refers to as "*non-coordinated effects*", and the notion of "*coordinated effects*".

In practice, non-coordinated effects result from the elimination of significant competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour.

Meanwhile, coordinated effects result from a change in the nature of competition, such that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition.

A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.

On barriers to entry

The notice stipulates that, in order to be usefully taken into consideration by the Commission, the entry of new competitors must be sufficiently rapid so as to exert real competitive pressure. In this respect, the notice considers that market entry is normally only considered timely if it occurs within a period of two years.

On efficiencies

The notice also specifies that in its assessment, the Commission will take account of efficiencies if three cumulative conditions are met: efficiencies must benefit consumers, must be specifically related to the merger, and must be verifiable.

➤ *Benefit to consumers*

When assessing efficiency claims, the Commission verifies that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

The Commission indicates that, in the context of coordinated effects, efficiencies may compel the merged entity to increase production and lower prices, thereby reducing its incentive to coordinate its market behaviour with other companies. Efficiencies may therefore reduce the risks of coordinated effects on the market concerned.

➤ *Merger-specific efficiencies*

Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives.

➤ *Verifiability*

Efficiencies have to be verifiable, such that the Commission can be reasonably certain that the efficiencies are likely to materialize, and be substantial enough to counteract a merger's potential harm to consumers.

The code of best practices for conducting merger investigations

In an effort to improve the quality of the merger control decision-making process, the code of best practices introduces changes to daily control operations:

Pre-notification contacts

The Commission encourages companies to contact it well before the operation is notified, with a view to preparing for the initial stage under the best possible conditions.

Conditions for access to the Commission's file

Henceforth, companies whose merger plans are being examined will have access to the Commission's file shortly after phase II of the investigation is opened, rather than after the notification of complaints.

Similarly, they are entitled to access third parties' observations regularly during the course of the investigation.

"State of play" meetings at key stages in the proceedings

➤ State of play meetings with the Commission

The Commission intends to organize systematic "state of play" meetings with the parties to the merger at crucial points during the proceedings. The aim is keep them abreast of how the investigation is progressing and give them an opportunity to discuss the case.

At each stage, the parties and the Commission will have a chance to engage in constructive debate on the stage that has just been completed, and to turn their thoughts to the next stage in the best possible conditions.

➤ Meetings with third parties

If the parties so wish, the Commission plans to organize informal triangular meetings, at which the notifying parties will have chance to meet the third parties, including competitors of the newly-merged entity.

INTERNATIONAL ACTIVITY

In 2003, multilateral activity in the field of competition policy and law continued the trend observed in recent years, aimed at strengthening relations between competition authorities within the network set up in each country in response to the challenges of "globalization". Cooperation through international organizations continued apace with the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). Also in 2003, a peer review took an in-depth look at the competition policies followed by France and Germany. The World Trade Organization has also continued its work since the Ministerial Conference in Cancun.

Cooperation within multilateral institutions

There are three international organizations where national competition authorities are able to deal with the problems raised by certain anticompetitive practices, which are likely to affect international trade to varying degrees: the OECD, UNCTAD and the WTO. In 2003, the first two

bodies held complementary meetings on the main issues raised by the existence and application of competition policy and law, at national, regional or international level.

The OECD brings together all of the world's most developed countries and observers from some developing countries (Brazil, Argentina). Its Competition Law and Policy Committee is chaired by Mr Jenny, Vice-Chairman of the *Conseil de la concurrence*. The Committee is a forum for exchanging information on developments in the competition policy practised by its Member States, whilst also serving as a sort of laboratory for researching and deliberating the application of these policies. In 2003, the OECD's Competition Committee and its various working groups intensified their deliberations on the relationship between competition policy and sectorial regulation. The traditional study of the international aspects of competition policy was placed on the back burner.

Three main subjects were covered in 2003: work was carried out on structural reforms and market efficiency; studies were undertaken on the influence of competition policy on consumer protection; and work continued on the fight against unjustifiable agreements ("*hard core cartels*"). To this end, representatives from the business world were convened at round table meetings. As part of its study of the structural impact of regulatory reform on the most advanced economies, the OECD Competition Committee looked at the competition policies of three countries: Norway, Germany and France. The conditions for the French study are summarized below.

Also in 2003, the OECD continued with the cycle of "*global forums*" on all the subjects covered by its main Committees. Thus, the third global Forum was held in February 2003, with the aim of creating regular dialogue and comparing experiences between OECD countries and non-member states, thereby extending and intensifying the deliberations carried out within the joint group on International exchanges and competition, which is itself part of the OECD. This third OECD Global Forum on competition brought together around forty developing countries from four continents. On this occasion, the Chairperson of the *Conseil de la concurrence* took the initiative of bringing together the representatives of emerging competition authorities from French-speaking developing countries. Representatives from around ten countries, mainly in Africa and Asia, were thus able to hold discussions over the main competition law instruments used for development. As with other, more general development-related issues, the problem here concerns the actual process of setting up the institutional framework, coupled with the relative lack of properly trained personnel in the institutions. However, the regional integration approach would appear to alleviate some of these difficulties, by grouping together limited resources and improving regional economic efficiency. Furthermore, the meeting provided a useful opportunity for deliberating the issues covered by the UN and UNCTAD, which are examined below.

Under the auspices of the UN, the competition authorities of OECD member countries are coordinated flexibly, under the chairmanship of a representative from the *Conseil de la concurrence* at annual sessions of the Intergovernmental Group of Experts (IGE) on competition. The IGE is itself part of the United Nations Conference on Trade and Development (UNCTAD). Developing countries have considerable faith in UNCTAD and its secretariat, which is why the *Conseil de la concurrence* (like the equivalent competition authorities in the largest OECD countries) is careful to provide the UNCTAD Group with the benefit of its experience as regularly and concretely as possible.

This year the Group of Experts was chaired by Germany, which was appointed with the support of the French delegation. Experts from around forty countries, most of them developing countries, took part in the debates. The Secretariat had invited an expert from Cambridge University, Professor Ajit Singh, who is known for his relatively reserved attitude towards competition policy in developing countries. He favours an industrial policy based on a form of "*positive discrimination*", with the balance of trade tipped more in favour of developing countries than their developed counterparts.

Four issues were covered: the first two were respectively "*the interface between industrial and competition policy*" and "*the optimal design of competition law in developing countries*". In both these lively panels, certain developing countries adopted hardline stances, not all of them in favour of strengthening competition policy. However, the vast majority of countries represented indicated their desire to see a competition policy that contributes to development, designed according to the maturity of the markets. On several occasions, African delegates, supported by a sizeable Latin-American delegation, pointed out that under-development could take a number of different forms, and therefore required carefully tailored competition policy measures. These discussions served to emphasize the fact that competition law must absolutely be flexible and progressive, depending not just on the level of development, but also crucially on the degree of regional integration between the developed countries concerned.

In a logical continuation of the previous two themes, the third subject dealt with concerned "*preferential or differential treatment in competition law and policy*". The fourth subject concerned the "*roles of possible dispute mediation mechanisms and alternative arrangements, including "peer reviews"*". Under the aegis of the OECD, South Africa had recently been the subject of one such peer review on competition, to the broad satisfaction of the participants (developed and developing countries) assembled in a "*Global Competition Forum*". This was reiterated by UNCTAD. Following the discussions on this point, the UNCTAD Secretariat was asked to draw up an inventory of existing mediation and dispute settlement procedures in regional organizations, and the main lessons to be learned from a development standpoint. These subjects will therefore be discussed by the group of experts in 2004. Finally, as every year, the "*Competition*" IGE dealt with the issue of technical assistance and training programmes in the field of competition. This issue posed no particular problems, since the UNCTAD Secretariat has taken the trouble to develop programmes in all under-developed regions, whilst the Post-Doha Agenda has made a priority of strengthening developing countries' capacities, including on "*new subjects*" such as competition.

At the WTO, the working group on the interaction between trade and competition policy is chaired by Mr Frédéric Jenny, Vice-Chairman of the *Conseil de la concurrence*. It held two formal meetings in 2003, during which the group continued its work to establish the relevance of core WTO principles for competition policy, such as national treatment, transparency and most-favoured-nation status, and the means of promoting co-operation between WTO member states, whether or not they have their own competition authorities. With a view to the Ministerial Conference held in Cancun in September 2003, the group sought to clarify the position of each of the major groups of countries involved in the WTO negotiations (Europeans, North-Americans, Asians, India, China and developing countries, with the latter category actually reflecting a wide range of interests). In doing so, the group took particular account of the requirements of developing countries in terms of flexibility, with a view to future negotiations on the following themes: "*basic competition principles, including procedural transparency, non-discrimination and fairness, provisions relative to unjustifiable agreements, voluntary cooperation arrangements, support for gradual strengthening of competition institutions in developing countries, by reinforcing capacities*". The Cancun conference ended with a disagreement between the participants. Consequently, the WTO working group's activities have been suspended until a consensus can be reached on the conditions for restarting the activity with the WTO's steering body, the General Council, which includes ambassadors from all member countries.

The OECD review of French competition policy

In 2003, the OECD conducted a review of competition policy in Europe's two main economies, France and Germany. The review was part of a process of reviewing all the broad economic policies of the main OECD member countries. In both cases, the review concerned the conditions for regulatory reform, whether reforms to the workings of administrations or the opening of competition in major sectors of the economy. Furthermore, in certain fields (in particular public management, telecommunications, trading policy, competition law and policy), the review also aimed to establish a base for drawing comparisons between companies. For

each of the fields concerned, the review is based on a report by the Secretariat which highlights certain points, raised in discussions between committee members and delegations from the countries under review.

This session was chaired by the senior Committee member, the director general of the Finnish competition authority, Mr Matti Purasjoki. The French delegation was led by Mrs Marie-Dominique Hagelsteen, chairperson of the *Conseil de la concurrence*, and Mr Benoît Parlos, director general of the DGCCRF (French Directorate General for Competition, Consumption and Repression of Fraud). The first examining country was the United States, represented by the Assistant Attorney General, the Head of Antitrust at the Justice Department and the Chairman of the Federal Trade Commission. The other examining country was Italy, represented by the Chairman of the Italian competition authority, Mr Giuseppe Tesauro.

The report by the OECD Secretariat was intended to serve as a basis for a peer review of French competition policy. It highlighted the following points: the significant role of public service operators in France, the legal and institutional structures of French competition law, merger control arrangements, the original and substantial nature of regulation on unfair competition, and the workings of the French competition authorities (*Conseil de la concurrence* and DGCCRF).

The Chairperson of the *Conseil de la concurrence*, Mrs Hagelsteen, made an introductory contribution on three crucial points raised by the OECD Secretariat report, marked by an insufficiently familiar approach on the part of French institutions. In relation to regulatory reform, Chairperson Hagelsteen emphasized the far-reaching and irreversible reforms undertaken by France over the last twenty years, which include moves to modernize competition law; she indicated that where the public sector is engaged in industrial or commercial activity, it has no immunity, notably in the eyes of competition law; finally, she indicated that the onerous procedures, which the OECD Secretariat attributed to the *Conseil de la concurrence*, were in fact imposed by the appeal judge. However, she pointed out that by respecting these procedures, the *Conseil* was able to guarantee that its decisions are solid and its legitimacy undisputed. The questions from the American delegation were directed by turns at the DGCCRF and the *Conseil de la concurrence*. In particular, they concerned the following issues: an assessment of French competition culture, the various penalties imposed, leniency policy arrangements, the resources and modernization of national competition authorities in the context of EC law, relations between the DGCCRF and the *Conseil de la concurrence*, the conditions for applying competition law to public companies or those with a public service remit, relations between economic growth and employment policy and the way these elements are taken into account by the competition authorities, competition advocacy, and merger control arrangements. In the field of mergers, the US delegation asked how jurisdiction was shared between the two competition authorities. The director general of the DGCCRF explained his position on the benefit of having "two pairs of eyes" to observe operations raising major competition that remain unresolved in the first phase, which means that decisions can be guaranteed. Meanwhile, the Chairperson of the *Conseil de la concurrence* indicated that the centre of gravity for controls on anticompetitive practices lay with the *Conseil de la concurrence*, whereas merger control was more the responsibility of the minister of economy. However, she pointed out that the French system is well established, and that consequently it would not be inconsistent if, in the future, the same authority were to be given responsibility for controlling the market activities of all economic operators. The Italian delegation questioned their French counterparts at some length on the policy of communication between the respective competition authorities. On the subject of advocacy, Marie-Dominique Hagelsteen underlined the *Conseil's* increasing advisory role and – on the technical conditions for advocacy – she referred the delegations to existing documentation and the *Conseil's* new website. After the review by the United States and Italy and questions from other delegations, the European Commission (M. E. Paulis, DG Comp) indicated that the OECD report highlighted considerable developments in French competition culture. It also mentioned France's central role in the network of European competition authorities.

The International Competition Network (ICN)

At the initiative of the EU and US competition authorities, an international network of competition authorities (*International Competition Network ICN*) was set up in Naples in 2002. It brought together around forty heads of competition authorities in developed and developing countries. The *Conseil de la concurrence* is a member of the network, which is led by a fifteen-country steering group and deals with the problems raised by the application of competition law in the international arena. It brings together interested countries in a number of working groups. The network holds an annual conference. In 2003, the conference took place in Mérida, Mexico and was attended by representatives from around fifty countries.

The *ICN* currently has six working groups:

- the "*Operational framework*" group, co-chaired by the Italian Antitrust Authority and the Canadian Competition Bureau, defines the basic themes to be studied by the *ICN* and coordinates activities in relation to financial issues (studied by another group).
- the "*Mergers*" group is chaired by the United States Justice Department; it is made up of several sub-groups, responsible for studying merger notification procedures, the analytical framework for merger review, investigative techniques for conducting effective merger review and legislative texts and documents.
- the "*Funding*" group, under American chairmanship (FTC), is responsible for obtaining financial support, to ensure that competition authorities with limited resources are able to take part in the *ICN*.
- the "*Capacity Building and Competition Policy*" group is chaired by Mexican and EU representatives. It includes a number of sub-groups responsible for advocacy and drawing up reference documents (the first of which was published in 2003 with the participation of the *Conseil de la concurrence*).
- the "*Antitrust Enforcement in Regulated Sectors*" group is chaired by France and Italy and coordinated by a Vice-Chairman of the *Conseil de la concurrence*.

The *Conseil de la concurrence* participates in all the deliberations of the *ICN*, which are non-normative in nature and are not binding for States. In principle, they are merely intended to provide national competition authorities with guidelines and best practices. In addition to its participation in the *ICN* and work by the traditional multilateral organizations, the *Conseil de la concurrence* maintains bilateral relations with competition authorities in French-speaking countries.

Strengthening bilateral relations with certain countries or groups of countries

In 2003, the *Conseil de la concurrence* took part in significant moves to develop competition law in developing countries. Its involvement was principally via regional conferences organized by the secretariats of the WTO and UNCTAD, notably in Asia (Kuala-Lumpur seminars for South-East and East Asian countries, Port-of Spain for countries in the Caribbean Common Market, Doha for the Arab states, New Delhi for India and Rio for the Latin American states). In some cases, the *Conseil de la concurrence* was also involved in moves to reform or institute national competition laws in various countries, which are in transition and developing market economies (Russia, Vietnam, Macedonia).
