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The Application of EU Competition Law by the Belgian Competition Authorities and Judges: Is Belgium Prepared for the 'New Regime'?

Yves Montangie[*]

1 INTRODUCTION

Regulation 1/2003 on the implementation of the competition rules laid down in the EC Treaty will undoubtedly present a revolution in the enforcement of competition law and policy in the EC. One of the main features of this regulation is that Arts 81 & 82 EC Treaty will be fully applicable by the national competition authorities and national judges. The latter will not only be able to apply the prohibition in Art 81(1), but henceforth will also have the power to apply Art 81(3).

This article will address the question: to what extent are the Belgian Competition authorities and the Belgian tribunals and courts ready for the 'new regime'. Although it is impossible to formulate definitive conclusions, nevertheless, it is submitted that an analysis of the visible role of competition law and policy in the current competition law and policy decision-making practice of the Belgian competition authorities and judges offers interesting insights which may allow us to make tentative observations on the degree of preparedness of the Belgian administrative and judicial authorities to apply the European competition rules.

First, this article will commence with a short overview of Belgian competition law and its development during recent years. Thereafter, the application of (EC) competition law and the underlying principles by Belgian's competition authority, the Competition Council and its supporting bodies, will be outlined. Further, the current status of (EC) competition law and policy in the jurisprudence of the Belgian commercial tribunals and courts of appeals will be discussed. The article will conclude with an attempt to predict the extent to which the Belgian competition authorities and Belgian judges are likely to be capable to effectively apply the European competition law rules, *i.e.* the rules on anticompetitive agreements and abuses of dominant positions.

This article will not consider the actual or potential incompatibilities between the new EC regime and the Belgian law as it currently stands. For example, whereas Regulation 1/2003 provides for the intervention of the national competition authorities as an *amicus curiae* in competition proceedings, current Belgian civil procedure rules do not

[*] Researcher Erasmus Competition and Regulation Institute (Rotterdam), Professor Lessius Business School (Antwerp), Attorney at law (Brussels). Parts of this report are largely based on the results of an informal survey that was held among the Presidents of the Belgian commercial tribunals and Courts of Appeal. The author gratefully acknowledges the help of the magistrates who have taken time from their extremely busy schedules to take part in this survey, especially for the frank and open manner in which they answered many sometimes sensitive questions. The author is also very grateful to Professor Barry Rodger (University of Strathclyde) for his numerous useful remarks.

clearly define the circumstances under which such intervention can take place.[1] Another possible problem is the fact that, to date, no specific measures have been taken to comply with Art 35 of Regulation 1/2003. In its current form, Art. 53 of the Competition Act states quite generally that, 'when the Belgian authorities have to decide on the application of the principles laid down in Arts 81-82 EC Treaty, this decision is taken by the authorities described in this Act'. Since several administrative bodies are involved in the application of competition law in Belgium, it is not yet entirely clear which one(s) of them will be competent to execute the different tasks entrusted by Regulation 1/2003 to the national authorities.[2] Nonetheless, these interesting issues remain outside the scope of this article.

2 A BRIEF OVERVIEW OF BELGIAN COMPETITION LAW & CULTURE

Until 1991, Belgium did not really have a competition law and policy 'culture'. Obviously, Arts 81-82 EC Treaty were applicable in a number of cases due to their direct effect and their precedence over national rules. However, Belgium did not have any effective competition legislation. An earlier Act of 1960 dealt only with abuses of a dominant position. This law, however, was scarcely applied.[3]

In 1991, the first fully-fledged competition Act was passed by Parliament. With this legislation, the intention was to create a Belgian competition regime which was in line with the existing EC rules. The aim of the Act was to create an environment in which a genuine and effective competition law and policy would safeguard competition in the Belgian market. The Competition Act 1991[4] introduced a set of substantive rules which are very similar to the EC competition rules. The Act contains a prohibition of agreements restricting competition, of abuse of dominance and a prior control of mergers with a Belgian dimension.

Inevitably, the Act is different in some respects from EC law. Since the Act is primarily intended at safeguarding effective competition in the Belgian market, an interstate trade effect does not require to be demonstrated for either prohibition. Furthermore, the merger control regime applies only to concentrations with a Belgian dimension, which

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1 On these problems, see Spiritus-Dassesse, 'Recente wijzigingen inzake de uitvoering van de Europese mededingingsregels – de rol van de rechter na de modernisering van het EG-mededingingsrecht' [Recent changes in EC competition law – the role of judges after the modernisation of EC competition law], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 50.

2 Ponet, 'Enige beschouwingen over de moderniseringsverordening vanuit het perspectief van de Raad voor de Mededinging' [Some thoughts on the modernisation from the perspective of the Competition Council], in De Belgische Mededingingswet anno 2003, Kluwer, Mechelen, 2003, p 78. For other examples of possible tensions between the current Belgian legislation and the European regime, see Swennen, 'Na tien jaar, toch opnieuw: de wet economische mededinging en de wet handelspratkijken' [After ten years, once again: the Competition Act and the Act on Fair Trade Practices], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 234.

3 See Van de Walle de Ghelcke, 'Actualiteit van de toepassing van de Wet van 27 mei 1960 tot bescherming tegen misbruik van economische machtspositie' [Recent developments in the application of the Act of 27 May 1960 against abuse of dominance], (1986) *TBH*, pp 3-44.

4 Wet van 1 juli 1999 tot bescherming van de economische mededinging, *(Belgian) Official Journal,* 1 September 1999, p 32315.

is determined in accordance with defined turnover criteria.[5] Other technical differences concern the grounds for exemption of cartel agreements[6] and the *de minimis* rule.[7]

It was clear from the start that, despite these minor differences, the 1991 Act should be applied and interpreted in the light of the EC rules on competition and their interpretation by the European courts and the Commission. In addition to the adoption of certain definitions directly form the European Court of Justice's case law, such as the definition of an "undertaking" and of "dominant position", Belgium's Supreme Court has also confirmed that all substantial provisions of the Act are to be interpreted in the light of existing EC competition law.[8]

The major difference between the Belgian Competition Act and the European regime lies in its institutional aspects. Whereas both European and national competition law can be applied by national judges in private actions, the administrative control of potential anti-competitive conduct and mergers is quite different. In Belgium, no less than four institutions are involved in the decision making process.

The most important institution is the Competition Council. The Council is a quasi-judicial administrative body composed of magistrates and competition law and policy experts. The Council has the primary competence in competition affairs and can take decisions in all cases relating to mergers or anti-competitive behaviour. It is currently also the national authority applying the provisions of Arts 81-82 EC Treaty.[9] Under certain circumstances, the President of the council can grant interim measures. Decisions of the Council and of its President can be appealed against with the Brussels court of appeals.

The Council is assisted by two other bodies; the Corps of Reporters and the Competition Service. The Members of the Corps are highly qualified officials who lead and co-ordinate investigations into mergers and anticompetitive agreements or behaviour. After an investigation, they analyse the data which have been compiled and draw up an investigative report which is presented to the Competition Council. They give instructions to the members of the Competition Service, which is a part of the Ministry of Economic Affairs. Its members are civil servants who actually undertake the concrete investigative activity 'in the field' as instructed by the Corps. The Council

5 A merger is to be notified when the undertakings concerned realise a total turnover of at least €40 million and when at least two of them realise a turnover in Belgium of at least €15 million (Art 11 Competition Act).

6 In comparison to Art 81(3) EC Treaty, Art 2(3) Competition Act contains an additional ground for exemption for agreements that lead to a reinforcement of the competitive position of small and medium-sized enterprises.

7 Agreements the parties to which do not meet the requisite turnover criteria do not have to be notified but are not necessarily deemed automatically compatible with the prohibition on cartel agreements: see Art 5 Competition Act

8 See Hof van Cassatie [Supreme Court], decision of 9 June 2000 ('Trade Mart'), (2000) *Arr Cass*, p 354.

9 It should be stressed again that, to date, no measures have been taken to comply with Art 35 of Regulation 1/2003.

of Ministers, a purely political body, can overrule decisions of the Competition Council, in merger cases, under certain well defined circumstances.[10]

Apart from these administrative bodies, 'ordinary' judges in the Belgian civil courts can apply the European rules as well as the national Competition Act. They can invalidate agreements which are prohibited under the Act and punish abuses of dominance. Judges may also deal with the civil consequences of infringement of the prohibitions (*e.g.* by awarding compensation), although, currently under Belgian law, they cannot grant exemptions or negative clearances.

A considerable part of the competition-related jurisprudence in Belgium has been developed by the Presidents of the commercial tribunals. There is a clear reason for this. These judges possess a specific competence derived from the Belgian Act on Fair Trade Practices and Consumer Protection. Under this Act, any behaviour which is a breach of any law or regulation is automatically deemed to be contrary to fair trade practices. A breach of the European and/or Belgian competition rules is therefore automatically and simultaneously a breach of the Fair Trade Practices Act.

This procedure under this Act is advantageous to interested parties, as any order at the culmination of the procedure constitutes a decision on the merits. However, it is decided in a procedure which is decidedly similar to ordinary summary proceedings and thus leads to a judgment in a relatively short period of time, combining 'the best of both worlds'. Accordingly, consumers and competitors often take recourse to this procedure to attack a potential breach of the competition rules.

Another important aspect of the enforcement of competition rules by judges concerns Art 42 of the Competition Act which provides that when the outcome of a case before any judge depends on whether conduct may be compatible with the Act, the judge can suspend the procedure and refer the case to the Brussels Court of Appeal to obtain a preliminary ruling. This procedure is similar to the preliminary rulings mechanism in European law, although referral is not required where the principle of *acte claire* applies.

3 THE BELGIAN COMPETITION AUTHORITIES AND EC COMPETITION LAW

3.1 The institutional problems in the Belgian competition regime

As indicated above, the main responsibility for the administrative enforcement of the competition rules in Belgium lies with the Competition Council and its auxiliary bodies. However, it is clear that the Council has malfunctioned from the outset. To put it bluntly, the evolution of the Competition Council as Belgium's competition authority almost reads like the script of a very bad soap opera. Initially, the Council was composed of 20 part-time members, partly consisting of judges who at the same time remained in post as magistrates, partly of competition law experts such as professors in law and/or economics, and partly of private practitioners with experience in competition law. Following the entry into force of the Competition Act, the workload

[10] The Council of Minister can overrule these decisions "for reasons of public interest, taking account of the national security, the competitiveness of the relevant sector in the light of international competition, consumer interests and employment" (Art 34bis Competition Act).

was too great a burden for the Council. The only supporting body at that time, the Competition Service, experienced similar problems, with 15 case-handlers within the Service being insufficient for this purpose. It is generally accepted that the problems were largely due to a combination of the thresholds for Belgian merger control, set too low, and the strict time-limits for merger control procedures. This led to the Council and the Service being drowned in merger notifications, leaving them with little or no time to focus on the other aspects of competition policy. In addition, the Council and Service lacked the necessary financial and physical resources to execute their tasks effectively. For example, they did not even have the most essential economic and legal literature and journals at their disposal.[11] Any request to the government for additional resources remained unanswered. Another more technical problem concerned the unclear division of powers between the Council and the Competition Service. The Service started appropriating certain powers which led to friction with the Council.

These issues led to a rather peculiar situation in 1997: the Council announced publicly that it would no longer be able to fulfil its tasks unless additional resources were granted. Effectively, the Council went on strike, and in the subsequent period, only a limited number of cases were dealt with. Moreover, the annual reports for the years 1996-1999 were never published. It took two years for the government and the legislator to enact new legislation to meet the concerns of the Competition Council. Finally, in 1999, a revised Belgian Competition Act was enacted. Apart from some substantive changes, the Act introduced important institutional changes. In relation to the Competition Council, it was decided that from the 20 members, four members would be appointed full time: the President and Vice-President, both judicial magistrates, and two other members. In relation to the Competition Service, the government pledged to expand the Service to a level of about 40 full time employees.

The 1999 modification of the Competition Act also introduced the Corps of Reporters which would lead and co-ordinate investigations, instruct the Competition Service to undertake specific investigative activity and, after an investigation, present a report on individual cases to the Council. Four full time members would be appointed, each with a degree in law and/or economics and experience in competition affairs and procedural matters.

However, even following modification of the Competition Act, certain problems remained. The nomination of the new, full-time president of the Council immediately caused some trouble. The person who was initially appointed, did not deliver proof that he was bilingual, as required by the Act.[12] The appointment was annulled by Belgium's supreme administrative court. The procedure was repeated and culminated with the appointment of Mrs Beatrice Ponet, who had previously acted as President of the commercial tribunal of Hasselt, a medium-sized city and commercial centre in Belgium. The appointment of the other full-time members also took a period of time.

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[11] Bourgeois and Gerrits, 'De raad voor de mededinging stapt op: een sprong in het duister?' [The Competition Council quits: a leap into the dark?] (1998) *Vlaams Jurist Vandaag*, p 6.

[12] One has to bear in mind that Belgium has three official languages (Dutch, French and German). Most senior officials have to deliver proof of competence in the two major official languages, Dutch and French.

Furthermore, by the end of 1999, none of the four members of the Corps of Reporters had been appointed. Two civil servants fulfilled the task of the reporters temporarily, although the Act did not provide for such a temporary appointment. It was not until November 2000 that half of the reporters were officially installed, as there were only two people who passed the exams required for this appointment.

The expansion of the Competition Service promised by the Government was never really realised. In 2000-2001, only 14 case-handlers were active, as opposed to the team of 40 full-time members which was initially planned. The number of members only gradually expanded to around 30 members at the present time.

Nevertheless, Belgian competition law and policy gained momentum. The number of cases dealt with increased slightly, especially non-merger cases, and in 2000, the Competition Council published its first annual report in a number of years. The Council also started to take part more regularly in international activities. From 2002, the Council started publishing its decisions systematically in a self-managed quarterly journal. These improvements can at least partially be explained by the dynamic and ambitious role played by the President of the Council, Mrs Beatrice Ponet.

However, the soap opera of the Competition Council appears to be rather atypical: 'not all is well that ends well'. Although the current government stated in its government programme of July 2003 that competition policy would be one of the priorities of government policy, Belgian competition policy is currently experiencing a new crisis situation.

On December 9th of 2003, Mrs Beatrice Ponet resigned as President of the Competition Council.[13] She considered that one of the full time members of the Council had wilfully tried to impede the effective functioning of the Council, and had requested on various occasions that disciplinary measures be taken against this person. A disciplinary procedure was started, and the member was consequently suspended, but the disciplinary file "disappeared" shortly before the general elections in Belgium in 2003. In the meantime, it had become very clear that the person in question had close ties with one of Belgium's major government parties. It is reported that, during a meeting on 3 December 2003, that member questioned the authority of Mrs Ponet and threatened to use his political contacts to prevent any disciplinary sanction being imposed.[14] In addition to this problematic issue, Mrs Ponet also confirmed that, even after all these years, the Council still did not have the necessary resources to function effectively. The total budget of the Competition Council is currently estimated at about not more than €200,000. Furthermore, at the end of the 2003, one of the other full time members of the Council resigned, to work as a legal secretary in the Court of First Instance of the EC.

Accordingly, the current status of the Belgian competition authorities is as follows:

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[13] 'Voorzitster Raad voor mededinging stapt op' [President of Competition Council quits], *De Tijd* (Belgium's leading business daily paper) of 9 December 2003.

[14] Belgian Parliament, Parliamentary Documents, Report of the meeting of the Commission on Economic Affairs, Tuesday 16 December 2003, CRIV 51 COM 100, p 20.

- only one full time member of the Competition Council remains active, since two other members have resigned and one is suspended. The remaining one full time member now acts as interim president;
- the Corps of Reporters consists of two persons, where there should be four;
- the Competition Service is staffed by about thirty members, instead of the originally planned forty.

Therefore, currently, an estimated 33 full time professionals are dealing with the administrative enforcement of competition law and policy in a country with more than 10 million inhabitants which claims to function as a modern market economy. It is not surprising, therefore, that in a recent discussion about this topic in the Belgian Parliament, the current Minister of Economic Affairs stated that competition policy in Belgium is 'like a wasp's nest, a knot that cannot be disentangled and that I would like to look at with the peace and quiet that is needed'.[15] To suggest that the administrative enforcement of competition law and policy in Belgium is suffering a severe crisis is quite clearly an understatement.

3.2 EC competition law in the Competition Council's decision-making

These unsettling but nevertheless important facts about Belgian competition law and policy raise the question whether, in these circumstances, the Belgian Competition authorities have been able to develop any jurisprudence which can demonstrate whether or not they are capable of dealing with the new challenges that Reg 1/2003 presents after 1 May 2004.

Despite the considerable problems, there is, nonetheless a body of case-law which allows one to draw certain conclusions. Looking at the existing case law of the Competition Council, one thing immediately springs to mind: although the Council is the national competition authority which is entrusted with the task of applying Arts. 81-82 of the EC Treaty, no cases have actually been decided on the basis of these rules to date. There is probably a logical explanation for this. Since the Belgian competition rules are very similar to their European counterpart, it is possible to assess the legality of certain practices or behaviour on the basis of the Belgian Act alone. The result will normally be the same, without the Council having to consider the additional requirement of an effect on trade between the member states. This does not mean that the Competition Council has no experience with, or interest in, European competition law and policy. As already noted, Belgium's Supreme Court has decided that the Belgian legal provisions have to be interpreted harmoniously EC competition law and policy.[16] From the case-law, it is clear that the Council is indeed familiar with the EC rules and their interpretation by the European Courts and the Commission. For example, in deciding whether or not a health fund is an undertaking as defined in the EC

[15] Belgian Parliament, Parliamentary Documents, Report of the meeting of the Commission on Economic Affairs, Tuesday 16 December 2003, CRIV 51 COM 100, p 29.

[16] Hof van Cassatie [Supreme Court], decision of 9 June 2000 ('Trade Mart'), (2000) *Arr Cass*, p 354.

competition rules, the Council, making explicit reference to the European Court of Justice's interpretation of this issue, has decided that a health fund is not to be considered as an 'undertaking' but rather as a state body when it provides health services that are compulsory by law. On the other hand, when it provides additional non-compulsory insurance cover, it is to be considered as a private 'undertaking' which has to comply with the rules on anticompetitive agreements and behaviour as for any other private undertaking.[17]

On a more critical note, the following remarks can be made:

1. Sometimes the Council deviates from European concepts with no obvious explanation. For example, in a relatively recent case regarding decisions by professional associations, the Council suggested that such associations themselves can be considered as undertakings for the purposes of the competition rules[18]. However, in the European Court of Justice's case-law, these associations are considered to be associations of undertakings, not as undertakings themselves[19]. Although merely a theoretical point, it demonstrates that, in some respects, the Belgian authorities do not always follow the European example.
2. Until now, the Council has built up its experience mainly in the area of merger control.

The following statistics show the number of cases which have been dealt with by the Competition Council to date.[20]

Decisions	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
On mergers	25	45	46	29	25	17	6	36	47	58	50
Mergers tacitly allowed without formal decision	0	0	4	19	37	40	31	6	1	0	0
Following notification	1	0	0	1	1	2	0	1	2	4	1
Following complaints	0	1	5	5	0	0	2	1	6	24	10
On interim measures	1	6	3	5	3	3	7	4	9	9	5
Following investigations on the Council's own initiative	0	0	0	0	0	1	0	0	1	0	2

[17] Competition Council, Decision of 11 May 2001, case 2001—V/M-22, Unie der Belgische Ambulancediensten/Belgische Rode Kruis, *(Belgian) Official Journal*, 28 September 2001, p 33030.

[18] Competition Council, Decision of 19 June 2002, case 2002-P/K-45, De Smet/Beroepsinstituut van vastgoedmakelaars, (2002) *Driemaandelijks Tijdschrift van de Raad voor de Mededinging* 2, p 77.

[19] See, for example, European Court of Justice, decision of 19 February 2002, Case C-309/99 *Wouters* [2002] ECR I-1577.

[20] Source: Competition Council, *Annual Report 2002*, p 54 and, for 2003, own estimates based on preliminary 2003 figures.

These figures clearly show that, to date, merger control proceedings have been at the centre of the Council's attention. A substantial proportion of these files have been closed by tacit approval by the Council, especially during its 'crisis' years. After the 're-launch' of the Council in 1999, it stated in its 2001 Annual Report that the non-merger cases would become a priority in its activity. Indeed, the figures for 2002 show a considerable increase in the number of decisions taken following complaints by third parties. However, many of these decisions dealt with cases which had already passed the statutory limitation period. Another observation is that a relatively large number of non-merger cases have been decided by the President of the Council in the procedure for interim measures initiated by competitors.

One can conclude from this that, so far, the enforcement of the rules on cartels and abuse of dominance has played a minor role in the decisional practice of the Competition Council. Furthermore, it seems that the procedure leading to interim measures is one of the most favoured instruments for complainants to ensure that competitors comply with competition law. This is likely to mean that the President (currently interim-president) will be over-burdened with interim measure cases and will have little or no time to deal with "ordinary" cartel cases.

3.3 The limited role of economic analysis in the Council's decision-making

Despite the presence of some members with an economic background, neither the Council nor its President appear to have focused their attention to the relevant economic issues in competition cases. In numerous decisions, for example, the issue of market definition was completely ignored.[21] In other cases, the exact market definition was left aside, not because the result of that analysis would be irrelevant to the outcome of the case, as the European Commission sometimes does, but because it was considered that defining the precise relevant market would simply be 'too difficult'.[22]

On other substantive issues, the Council often undertakes a rather unsophisticated approach to competition issues. Typical of the Council's approach – and this may sound familiar - is the focus on rather static data such as market shares. This may be explained by the fact that the Council adopts some of the "safe harbours" which have been developed in the decision practice of the European Commission. For example, in an abuse of dominance case, the Council stated that 'a market share of 50% is in itself sufficient, save exceptional circumstances, to prove a dominant position, a market share of 40% is a strong indication of the existence of a dominant position, and a market

[21] See, for example, Competition Council, Decision of 26 May 1998, case 98-C/C-10, Bodycote International/HIT, Kruis, *(Belgian) Official Journal*, 1 July 1998, p. 21626; the relevant geographic market was defined as 'Belgium' without any analysis or further explanation, even though the investigation had shown that the market was very open and allowed pressure to be exercised by foreign competitors. For other examples of cases demonstrating a very 'sloppy' analysis of the relevant market, see Camesasca and Ysewyn, 'Overzicht van rechtspraak van de Raad voor de Mededinging in 2001-2002' [Case-law of the Competition Council in 2001-2002], (2004) *TBH*, p 113-114.

[22] See, for example, Competition Council, Decision of 11 September 2002, case 2002-C/C-49, Cadbury Denmark/Dandy Holding, (2002) *Driemaandelijks Tijdschrift van de Raad voor de Mededinging* 3, p 90.

share of less than 30% indicates that, save in exceptional circumstances, a dominant position is rather unlikely'.[23]

The lack of economic analysis has led to at least one decision of the Competition Council being quashed by the Brussels Court of Appeals. In its judgment of 9 March 2001 relating to a Council Decision concerning anticompetitive practices on the market for the disposal of slaughter waste, the Court noted that it had expected a more thorough investigation into the effect of cross subsidising and very low pricing on the relevant market.[24] After this judgment, the Competition Council has shown, to a certain extent, the intention to engage into a more sophisticated economic analysis of competition issues, although the Competition Council sometimes still sticks to rather old-fashioned and unsophisticated views on competition law and policy.

3.4 The Belgian competition authorities and Regulation 1/2003

In the light of the foregoing, it is uncertain whether the Belgian competition authorities will be able to cope with the additional responsibilities confronting them under Regulation 1/2003.

The authorities themselves are of course fully aware of the existence of the Regulation and its impact. Mrs Beatrice Ponet, until recently President of the Competition Council, stated that the Competition Council's workload will inevitably increase significantly. She warned that the current lack of staff and resources may mean the Council and its supporting bodies are ill-prepared deal properly with all cases brought before them, and urged the Government to invest in more staff and resources, and to modify the Competition Act to allow a larger number of Competition Council members to be appointed full time. Another suggestion would be to appoint supporting staff (legal secretaries) to assist the members of the Council.[25]

The author endorses the sceptical view that the ongoing problems of staffing and financing of the Council and its supporting bodies is a problem that will make the transition to the 'new regime' extremely difficult. However, this is not the only problem.

Another institutional problem is the fact that, to date, a considerable number of cases have been dealt with by the President of the Competition Council in procedures leading to interim measures. It may reasonably be expected that a number of the additional cases derived from Regulation 1/2003, will be dealt with under the same procedure. It is likely that the President will almost certainly have to focus exclusively on these cases and will not be able to devote sufficient time to 'ordinary' cartel cases.

Further, some substantive issues cast some doubts on the competence of the Belgian authorities to deal with the new regime. First, as indicated above, the Belgian authorities

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[23] Competition Council, Decision of 11 May 2001, case 2001—V/M-22, Unie der Belgische Ambulancediensten/Belgische Rode Kruis, (*Belgian) Official Journal*, 28 September 2001, p 33030.

[24] Court of Appeal of Brussels, decision of 12 November 2002, Rendac/Incine, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed.), Kluwer, Mechelen, 2003, p 975.

[25] Ponet, 'Enige beschouwingen over de moderniseringsverordening vanuit het perspectief van de Raad voor de Mededinging', see fn 2, pp 86-88.

have no direct experience in applying Arts 81-82 EC Treaty and, more specifically, the complex concept of interstate trade. This may prove to be a considerable handicap. Secondly, in its case-law on Belgian competition law, the Competition Council has developed an interpretation of some concepts which diverges from their interpretation by the European Commission and/or European Courts. This may lead to inconsistencies in approach in the application of Arts 81-82 EC between the national and European institutions. Thirdly, the lack of sound economic analysis in the Council's case-law threatens to turn assessments based on Art 81(3) EC Treaty into a very difficult exercise.

4 THE BELGIAN JUDGE AND EC COMPETITION LAW

4.1 The uncertain role of competition law in Belgian jurisprudence

As indicated in the introduction, questions related to Belgian and EC competition law can also be dealt with by 'ordinary' judges. In fact, since EC competition law is deemed to be of public order nature, they are obliged to apply these rules *ex officio*, even when the parties to a dispute do not raise them in their briefs or oral arguments.[26]

Due to the nature of the matter, in most cases the competent judge in Belgium will be the commercial tribunal and, on appeal, the Court of Appeals. As already indicated in the introduction, a number of decisions involving competition law issues have been issued by the Presidents of the commercial tribunals in cases where the application of the Act on Fair Trade Practices and Consumer Protection is linked to a competition law issue.

One might expect that parties regularly take recourse to a tribunal or a court when there is a competition law-related dispute. Compared to the procedure before the European Commission or the Belgian competition authorities, the procedure before a judge offers certain advantages. As the current President of the Brussels commercial court indicated, the independence of a judge is guaranteed by the fact that he has been appointed for life and cannot be moved to another post, even within the judiciary, without his approval. From a more practical viewpoint, rather surprisingly, a decision by a tribunal or a court may often be obtained quicker than a decision by a competition authority, especially when the case is being decided during the course of summary proceedings described above.[27] However, the general view among competition law practitioners in Belgium is that very few cases are decided on competition law grounds.

It is actually rather difficult to get a clear view of the role of competition law in the Belgian jurisprudence. Although all cases are decided on in a public hearing, not all cases are subsequently published. Only some courts have established a website which gives access to their decisions. The numerous legal reviews and periodicals are the only

[26] See European Court of Justice, decision of 14 December 1995, Joined Cases C-430/93 & C-431/93 *Van Schijndel & Van Veen/Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. However, this decision does not require the national judge to abandon the passive role assigned to him by going "beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim" (Recital 22).

[27] Spiritus-Dassesse, 'The new frontiers of international antitrust', (1994) *DAOR*, 32, p 55.

other source of case-law. However, these obviously focus on cases with a particular importance and do not offer a representative sample.

To a certain extent, one can consult previous studies and reports on the application of (EC) competition law by Belgian judges. Special reference can be made to the report written by Professor Jules Stuyck as a contribution to the 1998 conference on this topic of the International Federation for European Law (FIDE)[28] ('the Stuyck Report').

To update the position set out in this report and to ascertain the views of Belgian judges on the issue, a short informal survey was organised. The survey was undertaken by sending an elaborate questionnaire on:

- the experience of Belgian magistrates with competition law and EC law in general, as well as the underlying principles,
- the role of competition law in their case-law, in particular the number of cases and decisions that have been based on Arts 81-82 EC Treaty and the importance of economic arguments and expert evidence,
- their knowledge of Reg 1/2003, namely its contents and the expected impact on their tribunal's or court's activity.

This questionnaire was sent to all Presidents of commercial tribunals in Belgium, as well as to all Presidents of the Courts of Appeal.

32 questionnaires were distributed; 8 responses were received. Although the total number of questionnaires sent and received may be too small to obtain statistically significant data, the responses nevertheless reveal interesting facts and tendencies. The findings are discussed in the following sections.

4.2 EC Competition law in the Belgian jurisprudence

Ever since the 1980s, Belgian plaintiffs and defendants in commercial cases have frequently relied on arguments relating to Arts 81-82 EC Treaty. As Stuyck noted, no specific problems in the context of Belgian substantive and procedural law have been reported. On the contrary, the procedure for obtaining orders under the Act on Fair Trade Practices and Consumer Protection has proven to be a very effective instrument to ensure compliance with the EC competition rules.[29] It is not surprising that a majority of theses cases concerned practices which lie at the crossroads between competition law and fair trade practices law, such as selective distribution, refusals to deal and parallel imports. Through the preliminary ruling procedure of Art 234 EC Treaty, a number of these cases became milestone cases in EC competition law.[30]

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[28] Stuyck, 'National application of Community Competition Law – Belgian Report', report presented to the FIDE Congress Stockholm 3-6 June 1998, 23 p.

[29] Stuyck Report, p 9.

[30] See, for example, European Court of Justice, decision of 11 December 1980, Case 31/80 *L'Oréal/De Nieuwe AMCK* [1980] ECR 3775; European Court of Justice, decision of 3 July 1985, Case 243/83 *Binon/AMP* [1985] ECR 2015.

One might have expected that, following the enactment of the Belgian Competition Act in 1993, parties would more regularly invoke the provisions of the Belgian Act. Theoretically, the burden for a complainant using competition law arguments is lower when using national competition rules, as no effect on interstate trade has to be demonstrated.

However, initially the Belgian Competition Act was only invoked in a very limited number of cases. This may be explained by the fact that both Belgian lawyers and magistrates were reluctant to apply this new legal instrument and that, in practice, it was not always difficult to show an interstate effect, given Belgium is a fairly small economy.[31]

It seems that, from 1994-1995 onwards, the Belgian legal profession became more comfortable in using the new instrument. Since then, there has been a slight shift of attention in the case law in favour of the application of the Belgian Competition Act.[32] This may partly be explained by the fact that the Belgian Competition Council's activity remained rather limited due to the problems described above. This may have caused parties who wanted to initiate proceedings on the basis of the Belgian Competition Act, to opt for the 'judicial' route as a substitute for the procedure before the Council.[33]

However, one cannot deny that the overall status of both European and Belgian competition law in the case-law of the Belgian tribunals and courts in the 1990s remained largely the same. The ever-growing importance of competition law, at least in terms of the public profile gained by Commission enforcement of major cartels and other infringements, has not been reflected in the number of private actions being raised. Today, the role of competition law in the Belgian jurisprudence still seems rather limited.

While there are no hard figures to support this view, the responses to the survey suggest that the number of commercial cases in which competition law issues have played a role can be estimated at between 2 and 5%.[34] When specifically asked about the role of the European competition rules in their case law, the majority of the respondents cite similar figures, both for the number of cases in which the parties relied on Arts 81-82 of the EC Treaty as for those cases in which the magistrate raised these provisions *ex officio*. A large percentage of these cases concern brewery contracts and practices in the automobile sector.

4.3 Economic analysis in the Belgian jurisprudence

Another striking issue which springs to attention when studying the Belgian case law, is the fact that a large majority of decisions lack basic economic analysis. Even the most

[31] Ratliff & Wright, 'Belgian competition law. The advent of free market principles', (1993) World Competition 33.

[32] Steenbergen, 'Drie jaar Belgische Wet mededinging' [Three years of Belgian Competition Law], (1996) *SEW*, p 325; Stuyck Report, p 8.

[33] Swennen, 'De wijziging van de Belgische Wet tot bescherming van de economische mededinging' [The modification of the Competition Act], (1999) *TBH*, p 372.

[34] One respondent stated that he had never faced any competition issues at all.

elementary concepts of competition analysis, such as the definition of the relevant market (substitutability of products or services) or the calculation of market shares are rarely used. In only a few of the published decisions was an attempt made to develop any economic reasoning. The absence of any sophisticated analysis may be understandable, since the courts are staffed exclusively by members who have had a purely legal training, as opposed to the Competition Council which is composed of lawyers and economists.[35] However, this point merits two remarks.

First, Belgian judges can appoint external experts when the need arises. An expert report may meet the – understandable - lack of knowledge relating to specific economic issues such as market analysis, the effect of oligopolies, portfolio power etc… However, apart from some isolated cases in 'major' jurisdictions, most of the respondents to the survey have never appointed an expert. It is not entirely clear why. One respondent states that this is due to the high costs involved in appointing such experts. Secondly, certain decisions in 'major' jurisdictions (i.e. commercial tribunals or courts in the larger economic centres such as the province capitals Brussels, Antwerp & Ghent) evidence a greater openness to more sophisticated economic analysis. This is quite peculiar, since magistrates in 'major' jurisdictions have undertaken the same training as their colleagues in 'smaller' jurisdictions and may thus be expected to have the same knowledge. The difference may probably be explained by the presence in those areas of major law firms which have a specialised competition division regularly developing economic arguments, thereby requiring the competent judge to deal with these matters. This appears to confirm the conclusions of Stuyck, who argued that 'smaller' courts in particular hear competition law cases less frequently and are therefore less familiar with this branch of the law.[36]

From the limited number of decisions actually published, the Brussels Court of Appeal appears to be a notable exception to the main trends identified in the previous discussion.

First, the Brussels Court seems to deal with competition issues in a larger number of cases than the other courts or tribunals. It should be borne in mind that this Court decides on preliminary questions regarding the Belgian Competition Act and also decides on appeal against decisions of the Competition Council, and this undoubtedly explains the fact that this Court is more often confronted with competition issues. Secondly, another striking difference is that more decisions of this Court focus on the economic background to competition issues. The Court is clearly aware of the fact that dealing with competition cases sometimes requires an in-depth analysis of the economic rationale behind the purely legalistic competition rules. For example, in a case concerning the validity of an exclusive purchasing agreement, the Court stated that it had to assess the concrete effects of the agreement, implying a thorough analysis of 'the relevant market, the economic context in which the undertakings are active, of the products and services covered by the agreement, of the structure of the market and the

[35] Wytinck, 'Enkele ervaringen vanuit de advocatuur met de WEM na de wetswijziging van 1999' [Lawyer's experiences with the Competition Act after the 1999 modification], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 175.

[36] Stuyck Report, p 16.

circumstances in which it functions'.[37] While this may seem a rather broad and general statement, the Court certainly does not refrain from making more specific requirements in certain cases. In a decision quashing a previous decision by the Competition Council in an abuse of dominance case, the Court stated that it had expected more solid empirical analysis of the effects of cross-subsidising and low pricing on a neighbouring market.[38] This undoubtedly demonstrates familiarity with the economic reasoning behind the prohibition of the abuse of dominance, and actively requires the Competition Council to provide solid economic data in its decisions.[39]

Several key reasons may explain the Brussels Court's greater familiarity with competition law issues. As noted, it is confronted more often with competition law questions due to its special role in the preliminary procedure and as it decides on appeal against decisions of the Competition Council. In these appeals, the Court is confronted with a number of divergent views and arguments in the briefs and reports presented by the parties and the Corps of Reporters. This forces the Court to undertake a more in-depth analysis of the relevant issues.[40] This is in part explained by the presence of a high number of large law firms with specialised competition divisions, because the European Commission is based in Brussels.

4.5 Why does competition law play such a limited role in the Belgian jurisprudence?

The question remains why, with the exception of the Brussels Court of Appeals, competition law has in recent times played only a relatively limited role in the case law of Belgian tribunals and courts. Some explanations are suggested in the responses to the survey.

It is notable that, while in theory the maxim *curia novit ius* (the court knows the law) applies, most respondents from the commercial tribunals, as opposed to those from the courts of appeal, consider that they have a limited knowledge of competition law and policy. Nevertheless, the survey indicates that most of them are familiar with the meaning and contents of the competition rules, in specific Arts 81-82 EC Treaty.

However, the knowledge on more specific aspects of competition law is weaker. With the exception of one court of appeal, the respondents display a rather fragmentary knowledge of the different block exemptions, the general notices and the notices for specific sectors (*e.g.* telecommunications, transport …) of the European Commission. The familiarity with the crucial concept of the relevant market differs strongly from one

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[37] Court of Appeal of Brussels, decision of 29 October 2002, Decock/Claerhout en De Ketelaere, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed), Kluwer, Mechelen, 2003, p 951.

[38] Court of Appeal of Brussels, decision of 12 November 2002, Rendac/Incine, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed), Kluwer, Mechelen, 2003, p 975.

[39] Camesasca & Van den Bergh, 'Economische analyse bij de toepassing van het Belgische mededingingsrecht' [Economic analysis in the application of Belgian competition law], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 14.

[40] Wytinck, 'Enkele ervaringen vanuit de advocatuur met de WEM na de wetswijziging van 1999' (see fn 35), p 173.

tribunal/court to another. The questionnaire also aimed at gaining insight into magistrates' awareness of the economics behind competition law, such as the different schools of thought on competition, oligopoly theory and game theory. The participants were also asked to briefly explain certain concepts used in competition law and policy, such as the SSNIP-test, the Herfindahl-Hirschmann-Index, resale price maintenance, predatory pricing, vertical and horizontal agreements, homogenous and heterogeneous goods, comfort letters and intra-brand vs inter-brand competition. Only one respondent showed a thorough knowledge of the economics behind competition law and policy and some of the more specific concepts; not entirely surprisingly this respondent had enjoyed an additional economic training. Only a minority of the other respondents have undergone some form of training in competition law and/or economics, for instance at conferences or workshops. This additional training was organised either on their own initiative or by the Ministry of Justice.

In the light of the foregoing, it is not surprising that a majority of the respondents who have been confronted with competition law issues have encountered some difficulties in applying competition rules to the matter before them. Competition cases are generally seen as 'very complex'. Apart from problems in working with the more sophisticated substantive aspects of competition law and economics, most respondents reported experiencing some difficulty in dealing with certain procedural aspects, such as the co-operation with the European Commission and the effect of notifications and informal Commission action (such as the comfort letter). A few respondents argued that the primary cause for these problems is the failure of the government to pay sufficient attention to competition law and policy. The lack of effort by the government in informing magistrates of the importance of competition law and of the latest developments in this field may limit the judges' knowledge of and interest in competition issues.

Some respondents suggested that the limited role for competition law and magistrates' awareness on this subject may to a large extent be attributed to the fact that the parties themselves rarely use these arguments in their briefs and pleas. Indeed, as in most continental legal systems, the role of the judge in Belgium is a 'passive' one, which means – in short - that he can only decide on arguments that have been raised by the parties and that he has to refrain from considering legal points on his own initiative. Some commentators have supported this view, and argue that party litigants bear responsibility for the fact that competition law has not yet entered the legal 'conscience' in Belgium.[41] This is partially confirmed in Stuyck's Report, indicating that many courts and tribunals are not equipped to apply the competition rules in all their complexity when the parties themselves do not present detailed economic data in support of their case.[42]

In our view, however, this is a false argument as far as European competition law is concerned. As already mentioned above, EC competition law is considered to be of a

[41] See, for example, Laura Parret, 'België heeft als kartelparadijs geen toekomst' [Belgium has no future as a cartel paradise], *De Tijd* of 10 February 2004, p 2.

[42] Stuyck Report, p 16.

'public order' nature, which means that the rules have to be applied by a magistrate on his own initiative, even when the parties do not raise them in their arguments. We therefore endorse the views of Mrs Spiritus-Dassesse, currently president of the Brussels commercial tribunal, that judges should actively introduce competition law arguments in the case, even when the parties forget (or refuse) to do so. In this manner, parties will gradually be forced to introduce competition law in their arguments, and in the long term this may lead to a greater general awareness of competition law in the Belgian legal community.[43]

4.6 The Belgian judge and Regulation 1/2003

The above certainly raises concerns about the suitability and preparedness of Belgian judges to tackle the new challenges which will be presented by Regulation 1/2003. A crucial question is whether Belgian magistrates are aware at all of the existence of this Regulation, its contents and its effect on their activities.

As noted above, the main importance of Regulation 1/2003 for national magistrates lies in the fact that they are required to apply Art 81 EC Treaty to its full extent. This means that, as of 1 May 2004, they also bear the responsibility for considering whether or not an agreement qualifies for an exemption to the cartel prohibition on the basis of Art 81(3) EC. One may expect that Belgian magistrates are to a certain level familiar with this provision. They may have some experience in assessing the compatibility of agreements with Art 81(3) to evaluate the probability of an exemption in the framework of the co-operation between the national judge and the European Commission.[44]

To gain further insights, the survey conducted among the Belgian magistrates included some questions on this particular topic, answers to which can be summarized as follows. The respondents from commercial tribunals in larger jurisdictions and from Courts of Appeal confirmed their awareness of Reg 1/2003; on the contrary, the majority of their counterparts from smaller jurisdictions claim to have no knowledge of this Regulation whatsoever. These responses seem, once again, to be in line with the finding that smaller courts are generally less familiar with competition issues.[45] Those respondents who know about the existence of the Regulation, obtained this knowledge through certain training activities organised by the government, through keeping track of recent legal developments by reading legal journals or, surprisingly, through occasionally reading about the Regulation in the briefs and other documents presented by parties.

However, a large majority of the respondents stated that they had no idea at all about the extra responsibilities and workload with which they may be confronted as a result of the introduction of the Regulation. Some respondents, however, fear they may need additional support, especially in relation to economic know-how.

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[43] Spiritus-Dassesse, 'Recente wijzigingen inzake de uitvoering van de Europese mededingingsregels – de rol van de rechter na de modernisering van het EG-mededingingsrecht' (see fn 1), p 44.

[44] *Ibid*, p 48.

[45] *Supra*, section 4.3.

5 CONCLUSION

It is submitted that the background to competition law application in Belgium, supported by the Stuyck Report and the more recent survey undertaken by the author, demonstrates that the Belgian competition authorities and the Belgian judges are far from ready for the 'new regime'. In 1991, the Belgian legislator enacted a 'modern' Competition Act, which entered into force in 1993. In doing so, Belgium embarked upon an ambitious project. The idea was to introduce a modern competition law to safeguard effective competition in the Belgian market.

The Belgian Competition Council and its supporting bodies were created to function as fully fledged competition authorities. However, subsequently, these authorities never received the necessary resources in order to function adequately. The Competition Council and its supporting bodies, the Competition Service and – later – the Corps of Reporters, have undertaken considerable efforts to execute their tasks as effectively as possible. However, even today, they still lack the necessary staff and resources to be able to perform their functions adequately. Furthermore, today it seems that political intervention may be preventing the Council from functioning properly. Since Regulation 1/2003 is expected to lead to an increased workload, the Belgian competition authorities will under these circumstances probably not be able to cope with their additional responsibilities after 1 May 2004. This problem is exacerbated by the fact that they have no direct experience in applying Arts 81-82 EC Treaty and that their case-law so far lacks a sophisticated economic analysis of the relevant competition issues. This will prove to be a serious handicap when applying the European competition rules to their full extent.

As far as the application of (EC) competition law by the Belgian tribunals and courts is concerned, one can only conclude that, despite its ever growing importance, (EC) competition law has been applied in a very limited number of cases only. Although most judges have some knowledge of competition law, the survey undertaken suggests that magistrates have a lack of knowledge of the more sophisticated aspects of competition law and policy. Some judges partially blame this on the fact that the parties themselves show too little commitment to involve competition law arguments in their briefs and pleas. However, the 'public order' nature of competition law requires its application by judges on their own initiative. Therefore, it seems fair to surmise that the government should assume greater responsibility and better inform the judges of the importance of and recent developments in competition law and policy.

In conclusion, it seems that neither the Belgian competition authorities, nor the Belgian judges have at their disposal the necessary knowledge and means to apply competition law effectively. Therefore, it seems rather unlikely that they will be able to assume the additional responsibilities placed on them by Regulation 1/2003 and ensure the effective application of EC competition law. It is submitted that the Belgian government bears the major responsibility for this state of affairs, as until now it has never demonstrated the willingness to invest the necessary resources for developing an adequate competition law regime. We can only endorse the view that 'Belgium may pride itself on being one of the main advocates of the European ideals, but as far as

competition law and policy is concerned, it may well be one of the weakest pupils in the European classroom'.[46]

[46] Parret, 'België heeft als kartelparadijs geen toekomst' (see fn 42), p 2.