I – THE APPLICATION OF EC COMPETITION RULES IN THE MEMBER STATES

1. DEVELOPMENTS IN THE MEMBER STATES

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1.1. Changes to National Competition Legislation

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2. APPLICATION OF THE EC COMPETITION RULES BY NATIONAL COURTS

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PART III – APPLICATION OF COMPETITION RULES IN THE MEMBER STATES

The present chapter is a compilation of contributions from the competition authorities of the Member States. More detailed information on the activities of these authorities may be found in the national reports which most of them draw up.

I – The application of EC competition rules in the Member States

1. Developments in the Member States

1.1. Changes to National Competition Legislation

Belgium

On 25 April 2004, a Royal Decree amending the Act on the Protection of Economic Competition, as coordinated on 1 July 1999, was adopted (Moniteur belge, 3 May 2004, p. 36537). The purpose of the Decree is to bring the provisions of the Act into line with Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC. A number of legislative amendments to the national provisions were made through the abovementioned Royal Decree. The Royal Decree entered into force on 1 May 2004, at the same time as Regulation 1/2003.

Summary of the adjustments made by the Royal Decree of 25 April 2004 amending the Act on the Protection of Economic Competition, as coordinated on 1 July 1999

Before amendment, Article 50 of the Act provided that only the Competition Service could pass on documents and information to the European Commission and to the other national competition authorities.

In order to comply with the requirements stipulated in Article 11 (cooperation between the Commission and the competition authorities of the Member States) and Article 12 (exchange of information, including the exchange of confidential information) of the Regulation, the Royal Decree extends this power to the Corps of Examiners and the Competition Council.

Similarly, Article 18 bis originally stated that: “The members of the Competition Council shall be subject to professional secrecy and shall not divulge to any person or any authority whatsoever confidential information acquired owing to their duties, save in the event that they are to testify before a court”. This provision ran counter to Article 11 of Regulation 1/2003, which obliges the Competition Council, in its capacity as a competition authority body, to provide confidential information to the European Commission. Article 18bis would also be overruled by Article 12 of the regulation, which allows the competition authorities to exchange confidential information between them.

Before it was amended by the Royal Decree of 25 April 2004, Article 31 of the Act provided that the Competition Council could find that no infringement in the form of a restrictive practice had been committed. The European Commission has the sole power to make any

1 Hereinafter referred to as “Regulation 1/2003”.
2 Article 1 of the Act of 20.7.1987 implementing the Regulations and Directives adopted under Article 87 of the Treaty establishing the European Economic Community (Moniteur belge, 24.9 1987) states that “the King may, by Royal Decree deliberated on in the Council of Ministers, take the measures necessary for performing the obligations resulting from the Regulations and Directives adopted under Article 87 of the EC Treaty (now Article 83)… Such measures may include the amendment or repeal of existing provisions in Acts of Parliament”.
such finding in European competition law. Consequently, this provision had to be amended so as to restrict its scope of application to national competition law. The last subparagraph of Article 5 of the Regulation states that: “Where on the basis of the information in their possession the conditions for prohibition are not met, they (the competition authorities of the Member States) may likewise decide that there are no grounds for action on their part”. Article 31 had therefore also to be amended to allow the Competition Council to find, as far as European competition law was concerned, that there were no grounds for action on its part.

Lastly, Article 23 of the Act provided that premises may be sealed for no more than 48 hours. This provision is not in line with the Commission’s powers under Article 20 of the Regulation, which provides that premises may be sealed throughout the duration of the inspection.

The Royal Decree of 25 April 2004 also stipulates that: “For the purposes of applying Article 35 (Designation of competition authorities of Member States) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, "competition authority" shall be understood to mean the Competition Council, the Corps of Examiners and the Competition Service, each acting in accordance with its powers as laid down in this Act”.

Introduction of a leniency programme and guidelines on fines to be imposed for infringement of the Act on the Protection of Economic Competition, as coordinated on 1 July 1999

On 30 April 2004, the Moniteur belge published a joint notice of the Competition Council and the Corps of Examiners on immunity from fines and a reduction in the amount of fines in cases relating to cartels.

The notice allows undertakings wishing to end their involvement in an illegal agreement and collaborate actively in dismantling it to obtain immunity from fines or a reduction in fines subject to certain conditions.

To be eligible for immunity from fines, the undertaking must:
(1) be the first to submit evidence which may enable the Competition Council to find an infringement of Article 81 EC and/or Article 2 of the Act on the Protection of Economic Competition, affecting Belgian territory;
(2) cooperate fully, on a continuous basis and expeditiously throughout the proceedings, with the Belgian competition authorities and provide them with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it must remain at their disposal to answer swiftly any request that might contribute to the establishment of the facts concerned;
(3) end its involvement in the suspected illegal activity no later than the time at which it submits its request for immunity from fines to the Competition Council;
(4) not have taken steps to coerce other undertakings to participate in the infringement.

In addition, the Belgian competition authorities must not have, at the time of the submission, sufficient information and evidence to find an infringement of Article 81 EC and/or Article 2 of the Act in connection with the alleged cartel. All of these five conditions must be met.

To be eligible for a reduction of a fine, the undertaking must:
(1) provide evidence of the suspected infringement which represents significant value added with respect to the evidence already in the possession of the Belgian competition authorities;
(2) terminate its involvement in the suspected illegal activity no later than the time at which it submits its application for a reduction in a fine to the Competition Council;
(3) cooperate fully, on a continuous basis and expeditiously throughout the proceedings, with the Belgian competition authorities and provide them with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it must remain at their disposal to answer swiftly any request that might contribute to the establishment of the facts concerned.
All these conditions must be met.

The first undertaking to meet these three conditions will obtain a reduction of between 30% and 50%. The second undertaking to meet the conditions will obtain a reduction of between 20% and 30%. Subsequent undertakings meeting the conditions will obtain a reduction of between 5% and 20%.

Furthermore, to be eligible both for immunity from fines and for a reduction of fines, the undertaking which has revealed the cartel in which it was involved and has provided evidence of the existence of the cartel may not dispute the facts set out in its submission.

The Competition Council also drew up guidelines on fines that may be imposed for infringement of the Act on the Protection of Economic Competition, as coordinated on 1 July 1999. The guidelines were also published in the Moniteur belge on 30 April 2004.

**Czech Republic**

National competition rules in the Czech Republic are set by the Act No. 143/2001 Coll., on the Protection of Competition. In 2004 this act was amended as of 2 June 2004 by the Act No. 340/2004 Coll., which aimed in particular at ensuring implementation of principles of the modernised EC competition law after 1 May 2004 and enabling the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Office”) to engage in the decentralised enforcement of the EC competition law within the framework of the European Competition Network. Apart from that, an objective of the amendment was also to strengthen compliance of the Czech competition law with the current EC competition rules and to respond to the changes in the Community law, which took place since the enactment of the competition act in 2001. A more detailed description of the new provisions introduced in 2004 into the Czech competition legislation follows below.

In 2004, the Office also elaborated a draft of another amendment to the Act on the Protection of Competition, which was approved by the Government in January 2005. This draft amendment aims at ensuring further convergence of the Czech competition law with the Community law in particular in connection with adoption of the Council Regulation No. 139/2004 on the control of concentrations. It also proposes to incorporate the Community block exemptions directly into the Czech competition law so that they would be applied in the Czech Republic also to agreements with no effect on trade but falling under the prohibition pursuant to the national competition rules. The draft Amendment to the Act on the Protection of Competition will be discussed by the Parliament of the Czech Republic during the year 2005.

The Act No. 484/2004 Coll., adopted on the basis of an initiative of a member of the House of Deputies of the Parliament of the Czech Republic, amended the Act on the Protection of Competition with regard to its application to the production of and trade in agricultural
products. The second draft amendment to the Competition Act, elaborated by the Office in 2004, abolishes these provisions, which have not been applied with regard to their legal and factual nullity.

**Summary of new provisions**
The amendment to the Act on the Protection of Competition by the Act No. 340/2004 Coll., prepared by the Office, entered in force as of 2 June 2004 and includes in particular the following changes to the Czech competition law:

- The Office is empowered to apply Articles 81 and 82 EC in compliance with the Council Regulation 1/2003 and procedural rules for such proceedings before the Office are provided for.
- Effective co-operation of the Office with the European Commission and national competition authorities of the EU Member States within the framework of the European Competition Network is ensured, including the assistance by the Office to the European Commission during its investigations in the territory of the Czech Republic.
- Rules for acquiring court permission for carrying out investigations in other than business premises are set.
- The former notification system for agreements distorting competition is replaced by the direct applicability of the provisions concerning exemption from the prohibition of agreements. Similar to EC law, undertakings need not ask the Office any more for an exemption decision in the framework of administrative proceedings, but if their agreements meet the conditions for exemption stipulated by the Act for the Protection of Competition, they are exempted automatically. The criteria set by the Act are identical to those applied by the European Commission.
- Maximum market shares for so-called *de minimis* agreements are increased to the level of 10% in case of horizontal agreements and 15% in case of vertical agreements (the original thresholds were 5% and 10% respectively).
- The so-called negative clearance procedure, related to agreements and abuse of a dominant position, is abolished.
- A new legal instrument, in line with the Council Regulation No. 1/2003, is introduced in the form of decisions that make binding commitments offered by the participants to the proceedings. Such commitment decision enable termination of the proceedings and removal of competition concerns without the necessity to issue a decision on the existence of a prohibited agreement or the abuse of dominant position. Such possibility, however, does not apply in case that a prohibited agreement was already performed and resulted or could have resulted in a substantial breach of competition.
- The definition of an abuse of a dominant position in the form of refusal of access to so-called essential facilities is made more precise and it newly includes not only cases where transmission networks and infrastructures are owned, but also where they are controlled in another way by a dominant undertaking.
- Merger notification thresholds are changed so that the local nexus of the concentrations subject to notification to the territory of the Czech Republic is strengthened.
- Time-limits for proposing remedies in merger cases are introduced as well as an extension of deadlines for issuing decisions in case of mergers, where remedies are proposed.
On 17 December 2004, an amendment to the Danish Competition Act was adopted by the Danish Parliament. The amendment, which entered into force on 1 February 2005, serves two purposes. It aligns the Danish competition regime with Regulation 1/2003, and the substantive test on merger control is aligned with Regulation 139/2004. Furthermore, the amendment improves the Danish Competition Council’s possibilities to efficiently enforce the provisions of the act.

**Summary of new provisions**

**Publication of decisions**
The amendment warrants the publication of decisions where a fine is imposed or agreed upon in connection with infringements of the Competition Act.

**Commitments**
The Council is authorized to receive commitments from undertakings, in order to counter the concerns of the Council related to anti-competitive agreements or abuses of a dominant position, i.e. section 6(1) or 11(1) of the Act or Articles 81 or 82 EC. These commitments can be made binding for the undertakings by the Council. If the commitments are binding, the Council can issue orders to ensure their fulfilment.

**Other issues**
The obligation to notify the Council of anti-competitive agreements is lifted. From now on it is up to the undertakings to assess the legality of their agreements. It is still possible to notify the Council of agreements in order to obtain an individual exemption, but the Council can abstain from considering such a notification, if the Council estimates that the agreement may have an appreciable effect on trade between Member States.

The Council is given the possibility to deal with cases and to pass its decisions in English if it is requested by the parties.

The Council is authorized to order a dominant undertaking to submit its general trading terms to the Competition Authority if a number of conditions are fulfilled. A reasoned complaint must be raised by a competitor, there must be special conditions in the relevant market and due to these special conditions, there must be a need for the Competition Authority to obtain greater knowledge on how the undertaking fixes its prices, discounts etc.

The “Significant Impediment of Effective Competition Test” is introduced in the merger control provisions in order to align the Act with the new EC regulation. Thus, a merger can be prohibited even though it does not create or strengthen a dominant position.

The number of members in the Competition Appeals Tribunal is increased from three to five.

**Germany**

On 26 May 2004, the Federal Government decided to amend the Law prohibiting Restraints of Competition (GWB). The purpose of the amendment is to bring German law into line with European law - and in particular with Regulation 1/2003. The Government’s draft law was given the third and last reading by the Bundestag on 11 March 2005. Adoption is scheduled for mid-2005. Adoption by the Upper House (Bundesrat) is pending.
In German law, too, it is intended to replace the present notification and approval system for anticompetitive agreements with a legal exception system. To establish wide-ranging unity of competition law, horizontal and vertical agreements which have no effect on trade between member states are also included in the new arrangements. Harmonisation will include a provision that the maximum level of fines for hard-core cartels can be up to 10% of the respective company’s turnover. Only in a few exceptional cases, specific arrangements in German competition law will remain intact. As regards control of abuses in the form of unilateral anticompetitive behaviour, a few tried and tested provisions of German law, which have no equivalent in Article 82 EC, are being maintained. In addition, the Federal Cartel Office and the regional cartel authorities will be given more extensive powers, following the model of European law. Civil-law sanctions for infringements of antitrust law will also be improved following the “Courage”-judgement of the European Court of Justice. The general question of the admissibility of the "passing-on-defence" is left to be decided by the judiciary. However it is made clear that, if the defence is admitted, the full burden of proof lies with the defendant (i.e. the member of the cartel).

In the field of merger control, changes in the basic features of interim relief measures in the case of third-party complaints against authorised mergers are planned. In addition to that, there will be higher thresholds for mergers of newspaper publishing houses as well as a wider scope for cooperation and joint ventures between them under certain conditions.

**Estonia**

The amendments to the Competition Act entered into force 1 August 2004 mainly focusing on the implementation of Regulation 1/2003 and improvements to procedural rules.

The Estonian Competition Board is responsible for the application of Articles 81 and 82 EC and if necessary giving assistance to the Commission in accordance with Regulation 1/2003. The Tallinn Administrative Court is the competent authority for authorising Commission inspections specified in Articles 20 and 21 of Regulation 1/2003. The Estonian Competition Board was nominated as a designated authority pursuant to Article 35 of Regulation 1/2003. As regards amicus curiae in proceedings for the application of Articles 81 and 82, the courts can ask the Estonian Competition Board for its opinion.

Regarding the procedural rules, involvement in activities causing abuse of a dominant position or failure to carry out obligations related to concentrations is examined by the misdemeanour procedure. If a punishment for a misdemeanour has been imposed on the offender for the same act before, then such a “repeated offender” will be subject to criminal prosecution. Breaches of competition law related to anti-competitive agreements, decisions or practices are still investigated as crimes according to the Penal Code and Code of Criminal Procedure. The level of fine for competition related misdemeanours was raised up to 500 000 EEK.

The Code of Criminal Procedure was also amended to introduce immunity. The Public Prosecutor’s Office may now terminate criminal proceedings with regard to a person suspected or accused with his or her consent if the suspect or the accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of public interest in the proceedings and if, without the assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated.
**Greece**

There were no legislative developments during the year. The Greek competition authority sent recommendations to the responsible Ministry, the Ministry of Development, for the amendment of Act No 703/77 to take account of the entry into force of Regulation 1/2003. The Authority’s recommendations are concerned mainly with the adaptation of procedures in line with Regulation 1/2003. The Bill now drafted also contains provisions designed to strengthen the Authority. It has been the subject of consultation with the social partners, and has been notified to the European Commission. The draft was submitted to the Greek Parliament in May 2005.

**Spain**

The main legislative activities in the competition policy field in 2004 are as follows:

*Royal Decree 2295/2004 of 10 December 2004 on the application of Community competition rules in Spain* was published in the Official State Gazette of 23 December 2004. This Act adapts the previous Royal Decree 295/1998 of 27 February 1998 on this matter, which is now repealed, to the new Community competition legislative framework laid down in Regulation 1/2003 and Regulation 139/2004.

In the framework of Competition Act 16/1989, this new Royal Decree gives the state competition bodies the powers and obligations deriving from Community legislation, including the task of cooperating with the Commission, with the national courts and the national competition authorities of other Member States. It also defines the powers of the officials or agents responsible for carrying out inspections in Spain, establishes the system applicable to the secrecy obligation and to confidential information with respect to the activities deriving from this Royal Decree, provides for cooperation with the courts and lays down the rules of procedure that will govern the application of Community rules by the national authorities. The draft Royal Decree was submitted to the public hearing procedure through the Competition Service website.

*A White Paper on the Reform of the Spanish Competition System* was drawn up in 2004 and officially presented by the Second Deputy Prime Minister and Minister for Economic and Financial Affairs on 20 January 2005. This document is a discussion paper intended to initiate a revision of the legislative and institutional competition framework in Spain to ensure that the best instruments and structure are in place to protect effective competition in markets with a view to social well-being and efficient allocation of resources. The White Paper proposes various reform measures affecting the institutional framework of the Spanish Competition Authority. These measures provide for greater independence for this Authority, the speeding up of judicial review procedures, coordination with industry regulators and, possibly, the direct application of national competition rules by courts. After public consultation, work will begin on drafting a new Competition Act that will make the necessary legislative changes to the Spanish regulatory and court system.

**France**

The major work on modernising legislation launched last year has resulted in two ordinances adopted by the Government in early and late 2004 pursuant to enabling legislation passed by
Parliament. Amending several provisions of Book IV of the Commercial Code, the ordinances constitute a new, decisive stage in the process of increasing harmonisation, which began back in 1992, and make it possible for the French competition authorities to carry out directly their procedures for the application of Articles 81 and 82. Since the entry into force of Regulation (EC) No 1/2003, this possibility has become an obligation and national procedures have been adjusted to allow the full application of Community law.

The first amendment, provided for by the ordinance 204-274 of 25 March 2004 on simplifying legislation (published in the Journal Officiel de la République Française of 27 March) introduced an accelerated procedure in the Competition Council for hearing cases below a certain threshold. The arrangements are similar to those in the Commission notice on agreements of minor importance.

The second legislative development, which came into force with the ordinance 2004-1173 of 4 November 2004 (published in the JO of 5 November 2004), made it possible to adapt all the provisions of the Commercial Code concerned by the reform of the Community antitrust rules. French restrictive practices law, already very close to the directly applicable exception system introduced by Regulation 1/2003, had been revised earlier, in 2001, when account was taken of foreseeable developments at Community level and several important innovations were made, such as the establishment of a leniency system similar to that operated by the Commission or the alignment of the maximum penalties for restrictive practices with the Community standard. Compliance of the procedural rules with the new Community arrangements is thus completed by this second reform. In addition, the ordinance includes the new powers conferred directly on national authorities to ensure the uniformity of instruments and legal certainty as to their implementation. It will be supplemented early in 2005 by regulations explaining the procedural rules, in particular as regards the transfer of judgments delivered pursuant to Articles 81 and 82.

**De minimis provision**

This provision is expressed in a new Article (Article L. 464-6-1) of the Commercial Code. The *de minimis* threshold is based directly on the current Community system. Automatically, therefore, proceedings are dismissed in the case of horizontal restraints between firms accounting for less than 10% of the market and vertical restraints between firms accounting for less than 15% of the upstream and downstream markets. The decision to dismiss the case is based on a lack of appreciable effect; it must therefore be substantiated and can be annulled or reviewed on application to the Paris Appeal Court. A decision to reject must be based on examination of the facts, and grounds for dismissal have to be given. The provision makes it possible to simplify the examination of numerous "small" cases and will help to reduce the backlog of cases before the Competition Council.

**Reform adapting the Commercial Code to Regulation 1/2003**

The ordinance adopted pursuant to the enabling law of 18 March 2004 supplements the decision-making powers of the Competition Council by enabling it to accept commitments from firms and impose penalty payments. It clarifies the procedures for international cooperation between competition authorities and improves the protection of business secrecy. It aligns the limitation rules and extends to the Community sphere the procedure by which courts may consult the Competition Council, and makes it possible for courts handling competition matters to specialise. Lastly, it specifies the intervention procedures for investigators by incorporating the new investigative powers conferred by Regulation No 1/2003.
**Inspections**

With regard to investigative powers, the ordinance of 4 November 2004 changed the legislation in two ways. Firstly, the Minister for Economic Affairs may authorise officials from another authority in the Union requesting assistance under Article 22(1) of Regulation No 1/2003 to accompany the French investigators, if they can help direct searches. Secondly, the provisions on the inspection procedure, covering both operations ordered by the French authorities and assistance to Commission inspections in the event of objections, were adapted in view of the new arrangements concerning the duty of assistance. There are three changes. The first provides for the affixation of temporary seals to prevent the loss of evidence during the inspection. The second specifies that the police officer assisting the operations may actively help in their conduct. The last extends to Commission officials the possibility to see documents seized by national investigators.

**Amicus Curiae**

As regards cooperation with the courts, the direct application of the Regulation's provisions on the *amicus curiae* procedure means that the current French legislation does not have to be substantially altered. The new instrument, however, supplements the existing provisions of the Commercial Code on consultation of the Competition Council by the courts, in order to take account of cases where national and Community rules are applied in parallel. Notwithstanding the procedure provided for in Article 15 of the Regulation, courts are now entitled to seek the Council's opinion not only when applying national competition law but also in cases where proceedings are initiated under Articles 81 and 82 EC.

**Exchange of information**

Concerning the exchange of information, the Commercial Code already recognised the possible transfer of information by the Competition Council to other competition authorities but did not expressly provide any obligation as regards the Commission. The order supplements it in this respect. It clearly distinguishes between exchanges falling within the scope of Regulation No 1/2003 and the other rules on cooperation, in particular with the authorities of third countries, where there may be a condition of reciprocity, which is not the case in the European network.

**Access to file**

As regards the arrangements for access to the file, the ordinance of 4 November harmonizes the French system for protecting business secrecy with the Community rules, while respecting the requirements of the *audi alteram partem* procedure. The Commercial Code, which on the pattern of court procedure used to treat all parties to proceedings alike, now makes it possible to differentiate between the complainants and the prosecuted firms: the latter enjoy the extensive guarantees associated with respect for the rights of the defence, while, to avoid disclosure or misuse in the market, complainants may be refused information containing business secrets.

**Designated Competition Authorities**

The reform also sets out the rules enabling the competent authorities to apply Community competition law for the purposes of Article 35 of Regulation No 1/2003. While the Regulation confers directly on national competition authorities and their officials’ powers which are specific to the Community, in particular regarding investigations, it leaves to the Member States the task of Designating those authorities and the officials they want to empower. In France, general responsibility for applying Articles 81 and 82 had already been allocated by...
the Commercial Code to the Competition Council and to the Minister for Economic Affairs and the officials authorised by him (Directorate-General for Competition, Consumer Affairs and Fraud Control, DGCCRF). Further designation by means of legislation was therefore superfluous. However, the earlier provisions related only to the powers conferred by Book IV of the Commercial Code. They have been supplemented by a reference to Regulation No 1/2003, so as to create a clear legal basis for the parallel application of the new powers provided by Community law.

Sanctions
The revision of the Commercial Code supplements the Competition Council's decision-making and sanctioning powers by conferring on it two new powers as provided for by Regulation 1/2003. The Council may now accept commitments and impose a fine for failure to fulfil them. It may also impose penalty payments, at the same rate as that provided by the Regulation. This power to impose penalty payments may be applied, however, only to force a firm to end an infringement or comply with an injunction. Transposal of the Commission's power to impose penalty payments to force firms to undergo inspections was not necessary, since the Commercial Code already contains criminal provisions for use when an investigation is obstructed.

Other issues
Various other procedural rules have been amended in order to complete the alignment with Regulation 1/2003. Thus, the reform harmonises the national and Community rules on the limitation period for offences, to allow full application of the cooperation mechanisms between the Commission and the Competition Council. The limitation period for infringements of the competition rules, both Community and national, is increased from three to five years, and the grounds for suspending the national limitation period include investigations by the Commission or the competent national authorities in the same case. This harmonisation removes all obstacles to the desirable reallocation of cases between the Competition Council and the Commission where the rules on the suspension or termination of proceedings laid down in the Regulation are applied. For the same reason, the power of the Competition Council to suspend or terminate proceedings has been increased in domestic law to take account of cases of parallel treatment by another national authority or evocation by the Commission.

Lastly, under the reform the possibility of assigning litigation about the application of the national competition rules to certain specialised courts, which already exists, is extended to Articles 81 and 82. This rule of specialised jurisdiction is not directly linked to the strict alignment of French law, but reflects the principles of consistency and convergence established by Article 3 of Regulation 1/2003. The arrangements for its implementation will be the subject of a Council of State decree to be adopted in 2005.

Ireland
There has been no substantive change of national competition legislation. In order, however, to give effect to the provisions of Regulation 1/2003, Regulation 2004 (Statutory Instrument (S.I.) 195 of 2004) was implemented (“the Statutory Instrument”).

The Statutory Instrument – Designated Competition Authorities
The Statutory Instrument designates all the Courts except the Special Criminal Court for the purposes of Article 5 of the Regulation; designates the Competition Authority to perform the
functions set out in Chapters IV, V, VII, VIII and IX of the Regulation; and designates the
Competition Authority, the DPP and the Courts, or the offices of the courts for the purpose of
performing the functions set out in Articles 11(1), 11(5), 27(2) and 28(2) of the Regulation.

The Statutory Instrument maintains the enforcement of competition law status quo that
prevailed prior to the coming into effect of the Regulation:
• The Competition Authority is responsible for the investigation of competition cases;
• The Competition Authority may institute civil proceedings and/ or the Competition
Authority and/or the DPP may prosecute criminal competition cases; and
• Only the Courts may take decisions as to whether a breach of national law and/or an
infringement of the EC Treaty has occurred.

**Italy**
No legislative changes to the Italian competition rules took place in 2004.

**Cyprus**
The Commission for the Protection of Competition (hereinafter: «C.P.C») is an independent
administrative body, established in 1990 with the enactment of the Protection of Competition
Law 207/89 (hereinafter: «Law») and since then, it has been the investigative and decision
making body responsible for the protection of competition. Additionally, with the enactment
of the Control of Concentrations between Undertakings Law 22(1)/99, the C.P.C has also the
power to investigate concentrations of undertakings and decide whether to approve, reject or
conditionally accept the concentration.

In the light of Regulation 1/2003 the national legislation during 2004 was under legal reform
in order to accommodate the provisions included in the Regulation and thus designating the
C.P.C as the competition authority responsible for the application of Articles 81 and 82 EC in
a way that the provisions of the Regulation are effectively complied with. In the new piece of
legislation there are provisions that improve the current powers of the C.P.C, like the
extended powers in investigations of business premises and non business premises.

The central feature of amendments is the abolition of the national notification system for
companies to obtain negative certification or individual exemption and therefore, agreements
that fulfil the conditions of section 5(1) of the existing Law 207/89 (equivalent to Article
81(3)) are legally valid and enforceable without the intervention of an administrative decision.
Also, the Programme concerning Cartel Immunity and Reduction of a Fine, that came into
force on the 1st of February 2003 and sets out the basis of the leniency policy in situations
where an undertaking that is part of an illegal cartel in accordance with section 4 of Law
207/89 can obtain total immunity or reduction of fines, will become part of the national law
with the new legislation.

Moreover, in the light of Article 15 of Regulation 1/2003, the Supreme Court will issue a
Procedural Order to accommodate the provisions of Article 15(3), enabling thus the C.P.C to
submit written or oral observations to the national courts on issues relating to the application
of Articles 81 and 82 EC.
**Latvia**

In order to ensure decentralized application of the EU competition law and assistance to the European Commission and to other competition authorities of the Member States in investigations provided under Articles 81 and 82 EC, the following essential amendments were done to the Competition Law in 2004:

- powers assigned to the Competition Council of the Republic of Latvia to apply the EU competition law;
- extended investigation rights of the Competition Council of the Republic of Latvia;
- legal regulations in place, to be applied for investigation, examination and sanctioning violations of the EU competition law;
- temporary arrangements, which can be applied if there is evidences testifying about possible violation of the EU competition law, and non-termination of this violation could create relevant and irrevocable damage to competition;
- procedure of support in place, which will be ensured by the Competition Council of the Republic of Latvia to investigation activities undertaken by the European Commission or by other competition authorities of the EU Member States;
- more precise procedure for notifications/examination of mergers between market participants;

Law “Amendments to the Competition Law” was adopted by Saeima (the Parliament) on the 22nd of April 2004 and entered into force by the 1st of May 2004. During year 2004 several Regulations of the Cabinet of Ministers were adopted which support efficient performance of the Competition Council.

**Leniency Programme**

In 2004, Cabinet Regulation No. 862 “Procedures for calculation of fines for violations specified in First part of Section 11, and Section 13 of the Competition Law” (i.e. about prohibited agreements between market participants and prohibition of abuse of dominant position) was adopted. This Regulation provides also the “leniency programme”, i.e. discharging from fines or fines’ reduction for a participant of a horizontal cartel agreement, due to different levels of his co-operation with the Competition Council.

A 100 % exemption from fines is available for a market participant who, as the first, will furnish evidence to the Competition Council, if this market participant has not been initiator of this specific prohibited agreement or he has not played a decisive role in this prohibited activity and he has not forced other market participants to participate in this prohibited activity. Fines can be reduced with 49 %, if the initiator of a violation, who had a leading role in prohibited activities, furnishes determinant evidence on violation.

**Inspections**

One of the essential changes provided by the Law “Amendments to the Competition Law” is the widening of investigation powers of the Bureau of the Competition Council. In addition to existing investigation rights, there are assigned new rights to the Bureau, which can on the basis of a court decision and in presence of the police, without a preliminary notification, get inside the premises, vehicles, apartments, non-living premises, buildings and other real estates, belonging to market participants, their employees and other persons, open them as well as stores situated inside them, in order to carry out an inspection of goods and documents located there as well as belonging to market participants and their employees.
Amicus Curiae
A court, which has received a claim statement and initiated a case concerning a possible violation of EU competition law, is obliged to transmit a copy of the claim statement to the Competition Council of Latvia and later – to transmit a duplicate or copy of the judgement to the Competition Council and the European Commission. This obligation is included in the competition law in order to promote “amicus curia” by the Competition Council and to facilitate supervision over implementation of the EU competition law in the Member States by the European Commission.

Access to file
Undertakings suspected of a competition infringement are allowed access-to-file after they receive the notice from the Competition Council of the Republic of Latvia that the information collected during the investigation is sufficient for the adoption of the decision by the Competition Council of the Republic of Latvia. If evidence contains business secrets, then it is not accessible to other persons.

Designated Competition Authorities
The Competition Council of the Republic of Latvia is designated as the competition authority to apply Articles 81 and 82 EC.

Sanctions
The Competition Law provides possibility to reduce fines or to exempt fully from fines in cases of certain violations of Article 81 EC, if the enterprise co-operates with the Competition Council.

Lithuania
Accession of Lithuania into the European Union and the modernization of the EU competition rules, in particular the adoption of Regulation 1/2003 and Regulation 139/2004 required relevant amendments to the Lithuanian competition law. To facilitate the enforcement of the new EU competition rules after Lithuania’s accession, it was necessary to create the appropriate necessary preconditions, primarily through the amendments to the Law on Competition of 1999 and the Code of Civil Procedure. To that effect, on 15 April 2004, the Parliament passed the Law on amendment to the Law on Competition, which came into force on 1 May 2004.

The amendment to the Law on Competition, which was enacted as of 1 May 2004, sought most importantly, to put the Lithuanian legislation in line with the EU acquis. This objective has been expressly manifested in Article 1(3) of the Law on Competition, which stipulates that this Law seeks for the harmonization of the Lithuanian and the European Union law regulating competition relations. The same Article 1 was supplemented with par. 4 with a reference to the Annex containing Regulation 1/2003, which is being implemented by the Law on Competition.

Furthermore, the Law on Competition was supplemented by a new Chapter VII - “Application of the European Union Competition Rules”, Article 47(1) of which stipulates that “the Competition Council shall be the institution authorized to apply the EU competition rules, the

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3 Law No IX-2126 of 15 April 2004 on amendment to the Law on Competition of the Republic of Lithuania, on recognition as invalidated the Law on Monitoring of State Aid to undertakings, and on amendment to Article 1 of the Code of Civil Procedure of the Republic of Lithuania
supervision of compliance whereof according to the European Union competition law is entrusted to the national competition authority”. This provision expands the competence of the Competition Council by ensuring the simultaneous application of Articles 81 and 82 EC and the Law on Competition.

Restricted agreements (Article 81)
The system of prior notification and individual exemptions in respect of agreements between undertakings has been abolished. Agreements complying with the established terms and conditions for block exemption shall be effective from the moment of the conclusion thereof (ab initio) without any prior decision by the Competition Council. In case of any dispute concerning the compliance of the agreement with the established terms and conditions for block exemption, the burden of proof concerning the compliance shall fall upon the Party to the agreement benefiting from the exemption. And, accordingly, where the Competition Council seeks to demonstrate that the agreement constitutes an infringement, it shall have to prove the allegation. Thereby the possibility for undertakings to apply to the Competition Council concerning the granting of an individual exemption, as well as the obligation to submit information concerning an agreement concluded under conditions qualifying for a block exemption was removed from the Law.

Merger control
Several important new provisions have been introduced into the section on concentrations. First, the term for the submission of the notification has been liberalized. The requirement upon the undertakings participating in the concentration to submit a notification within 7 days following the first action related to the concentration, as well as the requirement to suspend the concentration after the first action has been performed until the decision was passed by the Competition Council to permit the further course of the concentration concerned, have been abolished. Under the current Law and prior to the implementation of the concentration, undertakings participating in concentration have the right to determine when they notify the Competition Council. In connection with that, sanctions for failure of timely submitting the notification on concentration have also been abolished.

Further, the term of four months that is allowed the Competition Council to finally decide has also been liberalized, i.e. upon a duly grounded request of the person notifying the concentration it may be extended for an extra month. This may be of special importance in some more complex cases where the Competition Council intends to approve the concentration however subject to certain conditions and obligations.

Second, the Law stipulates that the undertakings concerned have to pay a fee of the amount established by the Government for the submission and the examination of the notification on concentration.

Third, for the purpose of the assessment of a concentration, the dominance test has been supplemented by the criterion of significant impediment of competition. In order to declare the concentration impermissible, it is sufficient that one of the criteria, either creating or strengthening of a dominant position or a significant impediment of competition, is satisfied.

Fourth, the new wording of the Law provides for an additional right for the Competition Council to oblige an undertaking to submit a notification in case there is a threat that the concentration will create or strengthen dominant position or significantly impede competition, even though the turnover thresholds established by the Law are not exceeded. This new
procedure has been introduced in the view of past experience, which showed that in certain markets (services market in particular), concentrations could be implemented without notification to the Competition Council thereof, because the minimum turnover threshold was not met, even though a dominant position was created or strengthened. However, this new procedure will be applicable only if less than 12 months have passed since the implementation of the concentration.

Sanctions
The system of sanctions has been reformed in accordance with the principles of imposition of sanctions used by the European Commission. Fines imposed by the Competition Council upon undertakings for prohibited agreements, abuse of a dominant position, putting into effect of a notifiable concentration without the permission of the Competition Council, continuation of concentration within the period of its suspension, infringement of concentration conditions or mandatory obligations established by the Competition Council, have been increased up to 10 percent of the gross annual income in the preceding business year. In accordance with the new provision of the Law on Competition the procedure for the establishment of the amount of the fine was approved by the Government Resolution No. 1591 of 6 December 2004.

Investigation procedure
Under the new provisions introduced into the Law on Competition, the Competition Council is bound to complete the investigation of the applications concerning restrictive practices not within 14 days as it used to be the case, but within 30 days from the submission of the application, as well as pass the decision to start or to refuse to start the investigation. The time limit for the completion of the investigation has been prolonged up to 5 months, providing for a possibility to extend the term each time for another 3 months. Also, in the absence of evidence justifying the suspicion of an infringement of the Law, a possibility has been provided to refuse to start the investigation.

Another significant amendment is related to a possibility to terminate the investigation. In accordance with the new provisions of the Law on Competition, the investigation may be terminated not only where no infringement of the Law is established, but also where the actions did not result in a significant damage to the interests protected by the law and the undertaking suspected in the infringement of the law voluntarily ceases the actions and submits to the Competition Council a commitment in writing not to perform such actions. Such commitments shall be binding upon the undertakings concerned. In case of a failure to fulfil the commitments, a fine up to 5 percent of the average gross daily turnover in the preceding business year may be imposed for each day of exercise (continuation) of the infringement.

Having regard to Regulation 1/2003, a new provision providing for the use of coercive measures was introduced. The provision establishes that use of coercive measures during inspections conducted by the European Commission is subject to a prior authorization from the Vilnius Regional Administrative Court.

Since in accordance with Regulation 1/2003 the right and duty to directly apply Articles 81 or 82 EC have been also imposed upon the national courts, the Law on Competition governs the particularities of judicial proceeding of the competition cases. For that reason the Code of Civil Procedure has been supplemented by a provision that the competition cases are examined in accordance with the rules of the Code, save the exceptions provided for by the Law on Competition. Upon receipt of a claim related to the application of Articles 81 or 82
EC, the court shall notify the European Commission and the Competition Council. The European Commission and the Competition Council may, at their own initiative, submit comments concerning the application of Articles 81 or 82 EC, provide explanations, evidences and participate at the examination thereof, as well as submit requests and applications.

New Article 50 of the Law on Competition stipulates that undertakings, whose legitimate interests have been violated by actions contradicting Articles 81 or 82 EC or other restrictive practices, shall have a right to appeal to the Vilnius Regional Court with a claim concerning the termination of illegal actions and the indemnification for the damage incurred. Thus, the Vilnius Regional Court has an exclusive authority to investigate cases concerning the indemnification of the damage incurred through the restrictive practices mentioned above.

**Luxembourg**

By an act of 17 May 2004 on competition, Luxembourg amended its legislation in two major respects:

- the act introduced into Luxembourg law the prohibition on unlawful agreements and abuses of dominant positions in identical terms to those of Articles 81 and 82 EC (apart from the references to the effects of such practices on intra-Community trade)
- the act adapted Luxembourg’s institutional structures to take account of the requirements of Regulation 1/2003 by setting up an independent competition authority in the form of an independent administrative authority, the Competition Council. The Competition Council is tasked with monitoring the application of competition law, both national and Community, by ruling on the existence of an infringement of those rules and by imposing on infringers obligations intended to put an end to the infringement and fines.

The Competition Council is assisted by the Competition Inspectorate, which does not depend directly on the Competition Council but is a service attached to the Minister in charge of the economic affairs portfolio (currently the Minister for Economic Affairs and External Trade) which carries out enquiries and investigations both into cases subject to Luxembourg law and in those subject to Community law.

The powers and procedures of these two bodies are based largely on Regulation 1/2003:

- the Competition Inspectorate has extensive powers of enquiry: requests for information; taking of statements; inspections and searches of business premises and of any other premises and seizure of documents (subject to judicial authorisation in the case of searches and document seizures); appointment of experts
- the Chairman of the Competition Council may order interim measures
- various sanctions may be imposed: any coercive measure proportionate to the suspected infringement and necessary to bring the infringement effectively to an end, fines, periodic penalty payments
- the Competition Council may apply a leniency programme
- the Competition Council may render binding the commitments offered by undertakings
- the safeguarding of business secrets and confidential information: a request may be made to this end to the Chairman of the Competition Council
- the members of the Competition Council and of the Competition Inspectorate and the experts appointed by the Competition Inspectorate are bound by professional secrecy
• the rights of defence of the parties concerned are guaranteed: statement of objections by the Competition Inspectorate; access to the file; hearing by the Competition Council before a decision is adopted; appeal from any decisions before the administrative court
• the Competition Council and the Competition Inspectorate must cooperate with the European Commission and the competition authorities of the Member States with a view to exchanging information or documents
• the Competition Council and the Competition Inspectorate assist the European Commission in the application of Regulation 1/2003 on the implementation of the rules on competition and Regulation 139/2004 on the control of concentrations
• the Competition Inspectorate cooperates with national courts.

The two competition authorities were finally set up only at the end of October 2004, when their members were appointed.

**Hungary**

The President of the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) and the President of the Competition Council of the GVH issued two notices in December 2003, both of them entered into force on 1 January 2004. These two notices are:

*Notice 2/2003 on the method of setting fines in antitrust cases*
This notice makes the fine calculation method of the GVH public and transparent. This method differs in several aspects from that described in the EC “Guideline on the method of setting fines”. Contrary to the EC guideline there are not pre-defined amounts of fines for certain levels or types of infringement but the method builds on a two-phase process. In the first phase points are associated to certain characteristics of the violation as a result of which the basic amount of fine is determined. Factors like the gravity of the infringement (including the threat to competition and the impact of the infringement on the market); moreover, the attitudes to the infringement (i.e. active or passive), the imputability, etc. are considered on a scale of 100 points. In the second phase of the calculation certain adjusting factors are contemplated like the duration and the repeated nature of the infringement. If the gains resulting from the infringement can be determined their amount should be trebled and it will be a further basis for calculation. The result of this calculation may not exceed the legally allowed maximum level of 10% of the undertaking’s net turnover of the preceding business year and the fine could also be mitigated should the case be one falling under lenient treatment.

*Notice 3/2003 on the application of a leniency policy*
The GVH elaborated its leniency regime in full harmony with the EC leniency programme. The most essential features of the Hungarian leniency policy correspond to those described in the EC notice.

Two Hungarian block exemption regulations were renewed based on the law approximation obligation enshrined in the Europe Agreement since the EC BERs, which served as basis for the original Hungarian BERs had also changed beforehand. These two regulations are:
– Regulation 18/2004. (II. 13.) Korm. of the Government on the exemption from the prohibition of restriction of competition of certain groups of insurance agreements,
Regulation 19/2004. (II. 13.) Korm. of the Government on the exemption from the prohibition of restriction of competition of certain categories of vertical agreements in the motor vehicle sector

The two new Hungarian BERs basically copy the relevant EC regulations.

Due to the accession of Hungary to the EU, Act X of 2002 “on the promulgation of Decision No 1/2002 of the Association Council replacing Decision No 2/96 of the Association Council on the implementation of the competition rules adopted under Article 62(3) of the Europe Agreement establishing an association between the Republic of Hungary, of the one part, and the European Communities and their Member States, of the other part” lost its relevance, consequently it was repealed as from 1 May 2004.

Act XXXI of 2003 modifying the Hungarian Competition Act due to the accession entered into force on 1 May 2004. The provisions of this Act focused exclusively on the introduction of rules that are Hungarian for the Hungarian competition authority and national courts applying Community competition law to cope successfully with the tasks ensuing from the Community rules.

Malta

Pursuant to Malta’s accession to the European Union on 1 May 2004, several amendments were made to the Competition Act (Chapter 379, Laws of Malta). The amendments mainly empower the Office for Fair Competition to investigate suspected infringements of Articles 81 and 82 EC, and enable the Commission for Fair Trading to apply the EC Competition Rules in conjunction with national competition law, with respect to anti-competitive practices having an effect on trade between Member States. Act III of 2004, which came into force on 1 May 2004, thus brought the Competition Act into line with Regulation 1/2003. The main amendments are as follows.

Interpretation

Article 2 of the Competition Act lays down the legal interpretation of certain key words and expressions used throughout the Act. Certain of these definitions have been amended to reflect the decentralized investigation and application of Articles 81 and 82 EC by the Office for Fair Competition and the Commission for Fair Trading respectively. Some of the most important changes are mentioned below, the altered part being underlined and italicized:

- “relevant market” means the market for the product whether within Malta or limited to any particular area or locality within Malta, or outside Malta, and whether or not restricted to a particular period of time or season of the year;

- “restrictive practice” means an agreement between undertakings, a decision by an association of undertakings or a concerted practice prohibited under article 5 of this Act or Article 81 of the EC Treaty and, or an abuse by one or more undertakings of a dominant position prohibited under article 9 of this Act or Article 82 of the EC Treaty;

Furthermore, new definitions have been added to Article 2 of the Act for: ‘EC Treaty’, ‘European Commission’, ‘Member States’ and ‘National Competition Authority’.
Amendment of Substantive Provisions (Articles 5 and 9)

Article 5 of the Act, sub-article (1) whereof prohibits
“any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta…”

now includes two new sub-articles (5) and (6) which implement Article 3 of Regulation 1/2003. These read as follows:
“(5) Article 81 of the EC Treaty shall also apply where any agreements between undertakings, any decision by an association of undertakings or any concerted practice may appreciably affect trade between Malta and any one or more Member States.

(6) The application of sub-articles (1), (2) and (3) shall not be deemed to include the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the EC Treaty or which fulfil the conditions of Article 81(3) of the EC Treaty, or which are covered by a Regulation for the application of Article 81(3) of the EC Treaty.”

Article 9, which previously merely prohibited the abuse of a dominant position within Malta or any part of Malta, now also includes a new sub-article (5) which provides that:
“Article 82 of the EC Treaty shall also apply where any abuse by an undertaking may affect trade between Malta and any one or more Member States”

Amendment of Procedural Provisions

Articles 7 (which provided for individual exemptions) and 10 (which provided for negative clearances) have been deleted; consequently, undertakings now need to undergo a self-assessment in order to determine whether they satisfy the conditions for exemption under Article 5 (3).

The undertaking or association of undertakings claiming the benefit of Article 5(3) shall bear the burden of proving that the conditions of that sub-article are fulfilled (Article 5(4)).

Widening of Powers of Investigation (Article 12)

Amendments to Article 12(1) have widened the powers of the Director of the Office for Fair Competition to initiate investigations. Thus, investigations shall be carried out:
- Of his own motion, or
- At the request of the Minister responsible for Commerce, or
- Upon a reasonable allegation in writing of a breach of the provisions of the Act by a complainant, or
- At the request of a designated NCA, any Member State or the European Commission

Article 12A (1) sets out the power of the Director, upon the conclusion of an investigation, to issue a reasoned decision finding an infringement under Articles 5 and/or 9 (where these are limited to the local scenario). However, in case of a serious infringement of Article 5(1) and/or 9(1), Article 12A (2) obliges the Director to make a report of his findings to the Commission
for Fair Trading. Article 12A(3) has been added by Act III of 2004 to extend this obligation of the Director with regard to alleged breaches of Articles 81 and/or 82. In either case, therefore, it is the Commission for Fair Trading which shall determine whether there has been an infringement.

Article 33(2), which provides for the power of the Minister responsible for Commerce to make regulations in relation to certain matters under the Competition Act, has also been amended to provide for the power to make regulations to enable the application of Regulation 1/2003. In particular such regulations may provide for:

(i) the power to the Office for Fair Competition to conduct joint investigations, to co-operate, and to exchange information with other National Competition Authorities.
(ii) the procedure for co-operation between the Commission for Fair Trading, the European Commission, the national courts and competition authorities;
(iii) the power to waive or reduce the applicable fine in cartel investigations.

**Remedies for Infringement**

Article 13 has been entirely substituted by Act III of 2004 to provide for the power of the Director of the Office for Fair Competition, at his own discretion, to issue Cease and Desist Orders and/or Compliance Orders, upon issuing a decision finding an infringement of Article 5(1) and/or Article 9(1) of the Competition Act. In case of serious infringements of Articles 5(1) and 9(1) of the Act, and infringements of Articles 81 and 82 EC, it is solely the Commission for Fair Trading which has the power to issue a cease and desist order and/or a compliance order.

- A Cease and Desist Order is defined as an order to cease and desist immediately from participating in such agreement, decision, practice or conduct;
- A Compliance Order sets behavioural or structural remedies (proportionate to the infringement committed) addressed to the undertaking or undertakings concerned for the purpose of bringing the infringement to an immediate and effective end.
  - Structural remedies may be imposed only where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

**Amendments reflecting the 'Direct Effect' of Article 81 EC**

Prior to Act III of 2004, the previous Article 16 (1) of the Competition Act provided that, where the Commission for Fair Trading declared that any agreement, decision or practice was in breach of the provisions of Article 5, any person who after such decision had been published made any act pursuant to such agreement, decision or practice would be guilty of an offence against that article. The new Article 16(1) now provides that:

“Any person who acts in breach of articles 5 and/or 9 of this Act, and/or articles 81 and/or 82 of the EC Treaty, shall be guilty of an offence under this Act.”

Consequently, penal sanctions (see below) may now be imposed for infringements committed even prior to the relevant decision of the Office for Fair Competition or the Commission for Fair Trading finding an infringement, and notwithstanding that the infringement may have ceased following such decision.
Exchange of Information

Article 33(2), which provides for the power of the Minister responsible for Commerce to make regulations in relation to certain matters under the Competition Act, has been amended to provide, *inter alia*, for “the power to the Office for Fair Competition to conduct joint investigations, to co-operate, and to exchange information with other National Competition Authorities” as well as for “the procedure for co-operation between the Commission for Fair Trading, the European Commission, the national courts and competition authorities”.

Sanctions

The Competition Act has provided for penal sanctions for infringement of its provisions since its enactment in 1995. Such penalties are pecuniary in nature and, in the case of infringements of Articles 5 and/or 9 of the Act, consist in a fine ranging from 1 to 10% of the turnover of the undertaking responsible for the infringement, provided that such fine shall not be less than 3,000 Maltese Liri.

Rules of Procedure relating to the Commission for Fair Trading

The Schedule to the Competition Act, which lays down certain procedural rules relative to the Commission for Fair Trading, has also been amended by Act III of 2004 to reflect Malta’s accession to the EU.

Rule 8 (c) of the Schedule concerns the European Commission’s possibility, in all cases involving the application of Articles 81 and/or 82 EC, to make submissions on any matter before the Commission for Fair Trading, as well as to present any documents or other evidence that may be relevant to the matter. Moreover, the wording of rule 13 has been amended in order to clarify that, in the interpretation of the Act, the Commission for Fair Trading shall have recourse to judgements of the Court of First Instance and the Court of Justice of the European Community, as well as relevant decisions and statements of the European Commission, including interpretative notices and secondary legislation relative to competition.

Netherlands

Application of European Community Competition Rules (Chapter 10 Competition Act, section 88)

The Director-General is designated as the competition authority for the Netherlands, as referred to in Regulation 1/2003, and as the authorised authority, as referred to in Regulation 139/2004, and shall exercise the existing powers, pursuant to the regulations based on Article 83 EC, to apply Article 81 EC and Article 82 EC, as well as the existing power, pursuant to Article 84 EC, to determine the admissibility of competition agreements and the abuse of a dominant position on the common market.

Sanctions / Increase of the maximum fine on a party that infringes the obligation to cooperate (art. 69 Competition Act)

The Director-General may impose on a party that acts in contravention of section 5:20(1) of the General Administrative Law Act in respect of the officials, as referred to in section 50(1), section 52(1) or section 89g(1), a fine not exceeding € 450,000 or, if this relates to an undertaking or an association of undertakings, and if this amount is greater, a fine not exceeding 1% of the turnover of the undertaking or, respectively, the joint turnover of the undertaking comprising the association of undertakings, in the financial year preceding the decision.
Other issues
Abolition of the notification system for agreements (art. 17 Competition Act) and introduction of a legal exception system (art. 6.3 Competition Act)

Austria
In 2004, draft laws were drawn up with a view to amending the Competition Act and adopting a new Cartel Act; the introduction of the assessment procedure (public consultation) was scheduled for the winter 2005.

After the last reform, which was essentially an institutional one, substantive Austrian competition law must now be aligned more closely on Community law. The introduction of the legal exception system and of provisions modelled strictly on Articles 81 and 82 EC is the focal point of the reform; the express laying-down by statute of the possibility of conferring principal witness status should further improve the effectiveness of enforcement.

Poland
In Poland, competition rules are provided by virtue of the act of 15th December 2000 on competition and consumers’ protection (‘act on competition and consumers’ protection’, ‘Polish competition law’) which came into force on 1st April 2001. This act corresponds with EU legislation particularly with Articles 81 and 82 EC. Article 5 of the act on competition and consumers’ protection\(^4\) provides for the prohibition of competition restricting agreements, whereas Article 8 prohibits the abuse of dominant position on the market.

The prohibition enshrined in article 5 is not applicable if the joint market share of parties of the agreement does not exceed 5% for horizontal agreements and 10% for vertical agreements in case where the infringement did not include on fixing prices, controlling or limiting the production, sharing the market or fixing the conditions of offers made for public procurement procedure.

The Council of Ministers may issue block exemption regulations on the basis of article 7. Currently, there are 5 such regulations in force. The system of notifications of individual exemptions has never existed in Poland.

By virtue of the Polish competition law the responsibilities of the antimonopoly authority have been entrusted to the President of the OCCP. The explanatory and antimonopoly proceedings might be initiated by the President of the Office upon complaint or on ex officio bases. The President of the OCCP has also the power to order inspections being conducted.

Investigatory powers of Polish competition authority
The President of the Office may request undertakings or association thereof to provide all necessary information. The authorized employee of the OCCP or the Trade Inspection („inspector“) may:

\(^4\) If not stated otherwise all articles quoted in Polish contribution are articles of the act on competition and consumers’ protection.
• enter the premises, buildings, rooms or other quarters and means of transportation belonging to the controlled entrepreneur and request to render documents related to the subject of inspection and also to make notes;
• request from the controlled entrepreneur oral explanations relevant for the subject of inspection;
• search the premises pursuant to the warrant of the court of competition and consumers’ protection, issued upon request of President of the Office The search may be performed by the inspector or (upon instruction of the President of the Office) by the Police;
• seize the documents, which may serve as the evidence in the case.

The President of the Office may also summon and hear witnesses and hold hearings for which he has a power to summon parties and witnesses as well as ask for expert opinion.

If the information submitted by an undertaking in the course of an investigation is false, misleading or if the undertaking refuses to submit the information requested by the authority in the course of an investigation or refuses to cooperate with the authority during the inspection, the President of the Office may impose on undertaking concerned a fine of up to EUR 50,000,000.

Information gathered by the President of the Office in the course of proceedings may only be used in other proceedings conducted by the competition authority or in criminal proceedings.

Should the antimonopoly investigation confirm the existence of an anticompetitive practice, the President of the OCCP adopts a decision prohibiting the agreement or practice and sanctioning the entrepreneurs participating in the infringement (fines of up to 10% of the turnover from the preceding business year might be imposed). By virtue of the Polish competition law, antimonopoly decisions issued by the President are subject to an appeal before the Court for Competition and Consumers’ Protection.

Merger control rules provided in the 2000 act are very closely aligned with the provisions of the EC Merger Regulation. In cases where the turnover of the parties participating in merger exceeds EUR 50,000,000, there is an obligation of notification, before the merger is consumed (Article 12). Article 13 provides a list of exemptions from the obligation to notify the merger. In the Polish rules on control of concentrations, the test of significant impediment to effective competition is applicable. In addition, the Polish competition law provides grounds for the issuance of conditional approvals by the President of the OCCP, should the need arise.

Short description of main legislative developments
On 1 May 2004, the act amending the act on competition and consumers’ protection came into force. The aim of the abovementioned amendments was to harmonize the Polish rules on competition policy with EU provisions, particularly with the recently adopted Regulation 1/2003 and Regulation 139/2004. By virtue of the amendments in question, the President of the Office for Competition and Consumers Protection has been designated as the competition authority competent for applying Articles 81 and 82 EC. New measures which existed in EU legal system, such as interim measures, commitments, leniency programme were introduced into the Polish legal system.

In order to make Polish competition rules fully in line with Regulation 1/2003 procedural rules concerning rejection complaints, suspension of proceedings and termination of
proceedings were modernized. New provisions on information exchange, inspections and searches were also included into the act on competition and consumers’ protection.

The *test of dominance* has been replaced by the *test of significant impediment to effective competition* – according to article 17, the President of the Office for Competition and Consumers’ Protection approves a concentration if it would not result in a restriction of competition on the market particularly by the creation or strengthening of a dominant position on the market. Following the recommendation and comments of the EU and OECD institutions, article 13.2 has been removed from the Polish competition law. It stated that the undertaking was not obliged to notify a merger if the joint market share of the parties did not exceed 20%. Another provision removed from the act was article 94.4, which means that, as of 1 May 2004, there is no possibility in Polish law of an *ex post* merger notification.

As regards the judiciary proceedings in competition cases:

- an additional court instance for competition cases has been introduced – the judgments of the Court of Competition and Consumers’ Protection may now be appealed to the Court of Appeal (previously, the parties could only bring the cassation from the judgment of Court of Competition and Consumers’ Protection to the Supreme Court), as the amendment to the Civil proceedings code came into force on 18 August 2004;
- following the amendment of Civil proceedings code, which is applied since 1 May 2004, *amicus curiae* procedure in competition cases is provided in Polish legal system.

**Designated Competition Authorities**

Since 1 May 2004, the President of the Office for Competition and Consumers’ Protection has been entrusted with the enforcement of Articles 81 and 82 EC. Article 24(1a) of the Polish competition law provides the grounds for such designation.

**Leniency Programme**

New provisions on lenient treatment of the undertaking coming forward with information on cartel were included in the amendment of the Polish Competition Act (article 103a and 103b). The undertaking participating in cartel which is the first to submit to the competition authority information sufficient for an initiation of proceedings in a cartel case or evidence enabling the adoption of a decision on cartel existence may be granted total immunity from fining – provided that certain conditions are fulfilled (cooperation during the investigation, immediate refraining from participation in the cartel, the applicant may not be initiator or instigator of the cartel, information or evidence submitted by the applicant should not already be at the disposal of the authority). Under the Polish leniency programme, a reduction of fine is possible for those undertakings participating in cartel, which provide the President of the OCCP with evidence on a cartel existing but fail to satisfy all the conditions required for obtaining full immunity. The rules on proceedings with leniency applications are provided in Regulation of Council of Ministers of 18 May 2004, which came into force on 22 June 2004.

**Inspections**

According to the Article 22 of Regulation 1/2003, the President of the Office for Competition and Consumers Protection may authorize the participation of the employee of the NCA in an inspection.

As of 1 May 2004, by virtue of article 61a of the act on competition and consumers’ protection, the Polish competition authority may without commencing a separate investigation conduct inspections, including searching, in case the undertaking opposes to the inspection
conducted by the Commission or the national competition authority on the basis of Regulation 1/2003 or Regulation 139/2004. It may also conduct inspections without initiation of separate proceedings when applying Article 22 of Regulation 1/2003 or Article 12 of Regulation 139/2004.

The newly adopted article 58.1a of the act on competition and consumers’ protection states that in urgent cases if there is reasonable suspicion that a serious infringement occurs, the court order for the inspection may be issued before formal initiation of proceedings by the Polish competition authority.

The raison d’être for re-adopting the rules on inspections and searches was to give the Polish competition authority more efficient tools in the fact-finding process – that is why the catalogue of documents and non-business premises which are subject of search has been extended.

Amicus curiae
The 2004 amendment of the Polish competition law introduced amicus curiae procedure to the Polish legal system. Article 479.6a of the Civil procedure code allows for the submission, by competent competition authorities, of written or oral observations on issues relating to the application of Articles 81 and 82 EC.

Exchange of information
In order to harmonize the Polish law with the provisions on information exchange included in Regulation 1/2003, article 65 was amended – paragraph 3 was added, according to which it is allowed to use (on the basis of Regulation 1/2003) information gathered by the President of the Office for Competition and Consumers’ Protection in the course of proceedings. Information received by OCCP on the basis of Article 12 of Regulation 1/2003 may only be used during the proceedings with the regard to the conditions on which it was transmitted including a non-sanctioning obligation.

Access to file
Since 1 May 2004, the limitation of right of access to file might be justified; not only because of the risk of disclosure of business secrets or other legally protected secrets, but also because of the need to protect public interest, as follows from the amendment of article 62 of the act on competition and consumers’ protection. That limitation can be applicable to everyone and not only to the parties of the proceedings.

New procedural rules
The investigation of a competition case shall be terminated within 5 months from the date of its initiation (previously, it was 4 months). The President of the Office for Competition and Consumers’ Protection shall terminate the proceedings or reject the complaint if the European Commission is dealing with the case. If a competition authority of another Member State is dealing with the case, the President of the Office may terminate or suspend proceedings or reject the complaint.

Sanctions
The provision stating that a fine imposed on undertaking which infringed competition rules in Poland might not exceed EUR 5,000,000 has been removed by virtue of the aforementioned amendment. As of 1 May 2004, the sanctions for breach of the substantive rules on competition are calculated only with reference to the turnover of the undertaking during the
preceding business year (the fines may not exceed 10% of the turnover). It means that the fine imposed on an entrepreneur may be far bigger than the EUR 5,000,000 cap in the previous version of the Polish competition law.

**Portugal**
No legislative developments/changes to the Portuguese competition rules took place in 2004.

**Slovenia**
The new system for the application of Articles 81 and 82 EC within the European Union required some adaptation at the national level in Slovenia, mainly concerning procedural matters. Amendments to PRCA\(^5\) were needed in the year 2004 with reference to Regulation 1/2003. The notification system for agreements has been abolished and a legal exception system has been introduced. According to the recent amendments, the Competition Protection Office was designated as competent authority for the application of Articles 81 and 82 EC. In addition, some new types of decisions have been introduced, including commitment decisions.

**Slovakia**
The Antimonopoly Office of the Slovak Republic prepared the amendment of the Act No. 136/2001 Coll. on Protection of Competition – Act No. 204/2004 which came into force on 1 May 2004 introducing the following changes:

**Leniency Programme**
The amendment of the Act extended the possibility to use the leniency programme by distinguishing two different situations in two independent provisions of the Act – non-imposing a fine and imposing a fine lowered by 50%. Conditions to enforce the subjected provision have been determined. Only two conditions are required to apply the 50% reduction of a fine imposed on an undertaking participating in a horizontal agreement restricting competition:

- **a)** the undertaking will provide, on its own initiative, significant evidence, which, in combination with information and documents already available to the Office, enables the Office to prove a violation of the prohibition pursuant to Article 4 or special legislation;
- **b)** the undertaking will terminate the participation in an agreement restricting competition at the time when it provided evidence according to (a) at the latest.

The Office expects that the changes will simplify the application of the leniency programme in practice.

**Inspections**
Based on Regulation 1/2003, the amendments introduced the possibility to realize an inspection in the private premises of undertakings; both for the Office and for the Commission based on the approval of the court. The Office has a new competence to submit the draft to the court to have issued an inspection approval. When realizing an inspection, the rights of the employees of the Office have been extended:

a) to seal the information or documents or to seal, for a specified time period, the buildings and premises in which an inspection is carried out and to the extent necessary for the Office to conduct the investigation;
b) to take away the information and documents for the time necessary with the aim of making copies or gaining access to information – if the Office is unable, primarily for technical reasons, to gain access to the information or make copies of the documents during the course of the inspection. The Office shall make a record of this in the form of minutes.

Following an unsuccessful request for entry, Office employees are entitled to force an entry into all buildings, premises and means of transport. During an inspection, Office employees are entitled, following an unsuccessful request for information and documents, to inspect the buildings, premises, or transportation means and force access to information and documents by breaking down resistance or a created obstacle. The Office is entitled to invite other persons able to ensure the overcoming of the obstacle. The Office shall make a record of this in the form of minutes.

Amicus curiae
Also the Civil Court Rule has been amended by Act No. 204/2004 Coll. pursuant to which the Commission and the Office may submit written statements on the legal facts directly connected with the subject matter of proceedings where the court enforces the provision of the special regulation. The court may comply with the request of the Commission or the Office for the oral statement.

For the purposes of the preparation of the statement in question, the Court is obliged to enable the Commission and the Office to consult the file and to make extracts and copies of it. Based on the request of the Commission and the Office, the court is also obliged to deliver copies of any documents connected with the subject matter that are necessary for the preparation of the statement.

Exchange of information
As the obligation to inform the Commission or the European Court of Justice follows directly from the Treaty and from Regulation 1/2003 no provisions connected with the exchange of information were included.

Designated Competition Authorities
Amendment of the Act on Protection of Competition introduced several significant changes in this field.

Article 22, par. 1, letter b) of the Act provides the Office with the general right to issue a decision that an undertaking's conduct or activity is prohibited pursuant to the Act on Protection of Competition (national legislation) or pursuant to the special legislation (Articles 81 and 82 EC); it decides on imposing the obligation to refrain from such conduct and the obligation to remedy the unlawful state of affairs. It means the Office is competent to conduct proceedings in case of breach of European Competition Law.

At the same time the amendment of the Act determined that both the procedural provisions of the Act on Protection of Competition and the provision enabling it to impose fines (Articles 22 to 40 of the Act) shall also apply to the Office's procedure where the Office assesses activities and actions of undertakings pursuant to special legislation (Regulation1/2003).
Sanctions
The mentioned amendment introduced several significant changes in the terms of imposing fines and their amount. Above all, the possibility to sanction an undertaking for not fulfilling a decision of the Office is extended significantly. The Office may impose a fine on an undertaking that fails to fulfil a condition, an undertaking that violates an obligation or commitment imposed by a decision of the Office, an undertaking that fails to fulfil a decision of the Office, or an undertaking that has violated the prohibition to exercise the rights and obligations ensuing from a concentration, unless the Office has granted an exemption, up to the amount of 10% of the undertaking’s turnover.

A new feature is also the possibility to impose a fine on state administration authorities which, during the performance of state administration, local self-administration authorities during the performance of self-administration and transferred performance of state administration, and special interest bodies during the transferred performance of state administration, provide evident support giving advantage to certain undertakings or otherwise restrict competition up to SKK 2,000,000 (approximately 50,000 EUR). Prior to the amendment, it was only possible to warn the authority or to ask for the remedy and to inform the superior authority.

The Office may also impose a fine of up to SKK 5,000,000 (approximately 125,000 EUR) on an undertaking or legal entity that fails to fulfil the obligation to submit requested documents or information to the Office within the specified time limit, or submits false or incomplete documents or information, or does not allow their examination or entry to its business or non-business premises. Changes in the leniency programme may also be viewed amongst the sanction policy changes.

Other issues
In harmony with Regulation 1/2003, the Office may end proceedings in the matter of abuse of a dominant position and agreements restricting competition by means of a decision imposing on an undertaking the requirement to fulfil the commitments submitted by the undertaking to the Office for the purpose of elimination of possible restrictions of competition. The Office may issue such a decision for a specific time period.

The Office may also modify or reverse such a decision on its own initiative if:
   a) the conditions that were decisive for issuing the decision substantially changed after the issuance of the decision;
   b) the undertaking fails to fulfil the commitments imposed by the Office's decision; or
   c) information provided by the undertaking, which was decisive for issuing the decision, was incomplete or false.

Finland
The government bill amending the Finnish Act on Competition Restrictions (Competition Act) was brought before the Parliament on 19 February 2004. The amended Competition Act has been enforced since 1 May 2004. The changes in the Competition Act follow to a large extent from the reform of the enforcement system of the EC competition rules. The harmonisation mostly affects the assessment of competition restraints related to supply and delivery agreements. The harmonisation also implies extension of the scope of the prohibition principle in the Finnish competition legislation.
The Competition Act now includes rules corresponding to Articles 81 and 82 EC. Similarly to Article 81(1) EC, the new Article 4 prohibits competition restrictions based on agreements. Like Article 82 EC, Article 6 prohibits the abuse of a dominant position. Article 4 concerns both horizontal agreements between competitors and vertical agreements related to supply and distribution agreements. Furthermore, Article 4 replaces the former Article on the prohibition of resale price maintenance (RPM) and Article 9 previously applied to supply and distribution agreements. Notwithstanding the ban on RPM, competition restraints regarding supply and distribution agreements were allowed if they did not have harmful effects on competition. Now, all the competition restrictions related to distribution channels are covered by the prohibition principle in Article 4, and Article 5 of the Competition Act contains the legal exception corresponding to Article 81(3) EC. As part of the reform, the national exemptions and negative clearance system was abandoned and a change was made to direct application of the exemption rule contained in the law. Since the Competition Act is applied concordantly with the EU competition rules, the Commission de minimis-notice as well as the Commission Block Exemption Regulations and related Notices are referred to as interpretative guidance.

In the context of the reform, the provisions on the size of the infringement fines were also revised and a system on the non-imposition of fines in cartel cases was introduced. The first company to disclose the existence of a cartel will, under Article 9, be granted immunity from any fine, if the company: 1) supplies information of a competition restraint to the Finnish Competition Authority (FCA) which allows it to intervene with the restraint, 2) supplies the information before the FCA has obtained it from anywhere else, 3) delivers to the FCA all the information and documents in its possession, 4) cooperates with the FCA during the whole investigation of the competition restraint and 5) has ceased or ceases its participation in the restraint as soon as it has submitted the information. If these conditions are met, the FCA shall not make a proposal to the Market Court on the imposition of a competition infringement fine on the company in question. The first member to disclose the cartel hence receives immunity from fines. Only one cartel member may be granted immunity. The fines to other cartel members may also be reduced under the new Article 8, if these assist the FCA considerably in the investigation of the cartel. Under Article 8, the reduction or non-imposition of fines is possible with regard to all competition restraints. The maximum amount of the fine shall not exceed 10 per cent of the total turnover of the business undertaking or an association of business undertakings concerned in the preceding year.

The designated national competition authorities are the FCA and the Market Court. The powers of the competition authorities were revised in the reform. The decision to terminate a forbidden practice will now be made by the FCA and not the Market Court. The FCA’s decisions are appealable to the Market Court, and the Court has the competence to impose competition infringement fines. The Market Court’s decisions may be appealed to the Supreme Administrative Court. The authorisation for Commission’s decision ordering an inspection of non-business premises may be granted by the Market Court. The FCA has the necessary powers to assist the Commission.

**Sweden**

Adjustment of the Swedish legislation to Regulation 1/2003 was done on 1 July 2004. The main changes in the Swedish Competition Act related to the application of Regulation 1/2003 are listed below.
To comply with the information obligation from the courts, a Regulation has been issued stating the following: “When a general court or the Market Court passes a judgment or gives a final decision concerning the application of Article 81 or 82 EC, a copy of the judgment or decision shall the same day be sent to the Competition Authority.”

Changes have also been made in the Swedish Competition Act to adjust the application of the national rules to the new EC application system. Undertakings no longer can receive negative clearance or exemption from the Swedish Competition Authority for their agreements and practices. The possibility of receiving an individual exemption from the Competition Authority has been replaced by a “legal exception” from the prohibition against anticompetitive co-operation between undertakings provided that the conditions therein are fulfilled. Negative clearance granted pursuant to national law prior to 1 July 2004 continues to apply. An exemption decision pursuant to national law issued by the Competition Authority granted before 1 July 2004 continues to apply until the date stipulated in the decision. The system of national block exemptions will be maintained until further notice.

Competition Authorities
The Government determines which courts and other authorities shall be competition authorities in accordance with Regulation 1/2003, if this is not stipulated in this Act (Article 5 of the Competition Act).

Obligations to supply information and investigations pursuant to Article 45(1) of the Competition Act
The obligations for undertakings set out in Article 45(1) of the Swedish Competition Act has been extended to apply also to situations where the Swedish Competition Authority examines at the request of a competition authority of another Member State in the European Union (Article 45 (2) of the Competition Act).

Applications for inspections
Upon application by the Swedish Competition Authority, the Stockholm City Court may decide that the Authority may carry out an inspection on the premises of an undertaking to establish whether it has infringed any of the prohibitions contained in Article 6 or 19, or Article 81 or 82 EC (Article 47 (1) of the Competition Act). The first paragraph also applies to an application which the Swedish Competition Authority makes at the request of a competition authority of another Member State in the European Union (Article 47 (2) of the Competition Act).

Prior authorisation
Questions concerning a prior authorisation pursuant to Article 21(3) of Regulation 1/2003 are examined by the Stockholm City Court at the request of the Swedish Competition Authority (Article 53 a of the Competition Act).

Application of Article 15 of Regulation 1/2003
Observations submitted by the European Commission or the Swedish Competition Authority in application of Article 15 of Regulation 1/2003 may be taken into account by the court without the plea of a party. The parties shall be provided the opportunity to comment on them (Article 70 of the Competition Act).
**United Kingdom**

In 2004, important changes were made to the Competition Act 1998 in order to provide the Office of Fair Trading (“the OFT”) and other UK NCAs (hereinafter, the term “the OFT” shall be taken to include all UK NCAs in relation to their respective industries) with the powers necessary effectively to operate in the post-modernisation era as well as to align, as appropriate, aspects of domestic competition law with the post-modernisation EU regime.

These changes include the repeal of the notification provisions of the Competition Act 1998, which when in force, allowed undertakings to apply for decisions as to whether the Chapter I prohibition (modelled on Article 81) or Chapter II prohibition (modelled on Article 82) had been infringed.

The parts of the Competition Act 1998 relating to the OFT’s investigative powers have been amended to allow those powers to be used for Article 81/Article 82 investigations. New provisions have been added to the Competition Act 1998 allowing the OFT to apply for warrants on behalf of the European Commission for the purposes of Article 21(3) inspections as well as to allow the OFT conduct Article 22(2) investigations on behalf of the European Commission and to conduct Article 22(1) investigations on behalf of other NCAs. UK NCAs can also impose directions and financial penalties for infringements of Articles 81 and 82. Article 81 or Article 82 infringement decisions can be appealed to the Competition Appeal Tribunal, in addition to Chapter I or Chapter II infringement decisions.

The Competition Act 1998 was also amended to allow the OFT to take binding commitments in both Chapter I/Chapter II and Article 81/Article 82 cases.

Adjustments have also been to the maximum financial penalty that can be imposed for infringements of the Chapter I/Chapter II prohibitions or Article 81/Article 82. Previously, the maximum penalty that could be imposed was 10% of the UK turnover of an undertaking for a maximum of the past three business years preceding the infringement (depending upon the length of the infringement). The maximum penalty that can be imposed is now 10% of the worldwide turnover earned in the business year preceding the Article 81/Article 82 or Chapter I/Chapter II infringement decision.

The United Kingdom leniency programme has been expanded to allow the OFT to grant leniency, in appropriate cases, in Article 81 as well as Chapter I cases.

The OFT in December 2004 also issued 12 guidelines and 2 sets of statutory guidance explaining inter alia how the OFT expects the Chapter I and Chapter II prohibition and Article 81 and Article 82 to operate in the UK in the post-modernisation era.

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6 I.e., the Office of Communications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Energy Regulation, the Director General for Water Services, the Office of Rail Regulation and the Civil Aviation Authority. All of these regulators have the power, along with the OFT, to apply the Competition Act 1998 and Article 81 and Article 82 in their respective regulated sectors.
1.2. Enforcement of EC Competition Rules by National Competition Authorities

The decisions reflected in this section are the decisions taken in 2004 and referred by the national competition authorities applying Articles 81 or 82 EC. In 2004, the European Commission was informed of 33 envisaged decisions under Article 11(4) of Regulation 1/2003. Not all of these reached the state of decision in 2004 and they are thus not reported in the text below.

**Denmark**

On 29 September 2004, the Danish Competition Council adopted a decision concerning the alleged abuse by Post Danmark A/S of its dominant position on the market for distribution of unaddressed items and local weeklies. The Competition Council concluded that Post Danmark had infringed Article 82 EC and section 11(1) in the Danish Competition Act by using discriminating prices.

On 24 November 2004, the Danish Competition Council adopted a decision, whereby the Council found that Post Danmark A/S had not abused its dominant position by predatory pricing on the market for distribution of unaddressed items and local weeklies.

**Germany**

During the reporting period the Federal Cartel Office applied the EC competition rules in the following cases:

1. Small and medium-sized manufacturers of precast concrete products notified the formation of a cartel in north-west Germany. Having examined the agreement, the Federal Cartel Office came to the conclusion that the effects of the cartel made themselves felt also in the neighbouring Netherlands and that the contractual provisions contained hardcore restrictions which were not covered by Article 81(3) EC. The notified cartel was therefore prohibited. An appeal has been lodged against the decision.

2. Following notification of the extension of the duration of a rationalisation cartel which had been exempted until September 2005, the Federal Cartel Office informed the concrete paving stone manufacturers involved in the cartel of its concerns about the compatibility of the price and quota rules laid down in the agreement with Article 81 EC. The notification was accordingly withdrawn.

3. A proposal by Henkel KgaA and the US Lord Corporation to set up a 50:50 joint venture in the area of bonding agents and coatings was abandoned after the Federal Cartel Office’s antitrust concerns were set out. The proposal would have had to be prohibited on account of its infringing Article 1 GWB and Article 81 EC.

4. The quality and test provisions of the quality assurance body Acrylwanne e.V. for boards and acrylic baths made of cell-cast sanitaryware acrylic were examined by the Federal Cartel Office *inter alia* for their compatibility with Article 81 EC. Objections were raised to a provision whereby only manufacturers of cast acrylic were able to become members of the quality assurance body. Since hitherto in the absence of the relevant quality label no substantial impact was to be noted on market success in the sale of plastic baths, in the end no prohibition was imposed on the further application of the quality provisions.
In a proceeding concerning notification of discontinuance of the POZ method (a method for cash-free payment at point-of-sale terminals using the “ec card”) on 1 July 2005, the Federal Cartel Office used its influence to secure an extension of the time limit until 31 December 2006. The notification was examined in the light inter alia of Article 81 EC.

The Federal Cartel Office terminated proceedings against a sun bed marketing company for infringement of Article 81 EC. The offending clauses in the agreements between the marketing company and its suppliers were amended.

A purchasing cooperation agreement in the area of household products which was extensively examined in connection with a merger control exemption under Article 81 EC fulfilled, in the opinion of the Federal Cartel Office, the conditions of Article 81(3) EC.

The Federal Cartel Office examined a cooperation agreement concluded between bus companies for the purposes of carrying out instructions from the responsible authorities within the meaning of the Law on Passenger Transport and taking part in invitations to tender in the area of local passenger transport with a view to assessing its compatibility with Article 81 EC. In the opinion of the Federal Cartel Office, the conditions of Article 81(3) EC were fulfilled.

The establishment of marketing cooperation in the area of wholesale delivery of dairy products and other foodstuffs, the so-called out-of-house market, was cleared from a merger control viewpoint. An examination of the cooperation aspects showed that, in the opinion of the Federal Cartel Office, the cooperation fulfilled the conditions of Article 81(3) EC.

The rationalisation cartel set up by the Fleurop association was examined for its compatibility with European law (Article 81 EC). As long as Fleurop AG continues to meet the conditions for exemption under domestic competition law, the Federal Cartel Office proceeds on the assumption that its activities do not call for enforcement action under European competition law.

In response to complaints from a number of competing postal service providers, the Federal Cartel Office instituted against Deutsche Post AG abuse proceedings under Article 20 GWB and Article 82 EC on account of suspected unfair hindrance and objectively unjustified unequal treatment in connection with the granting of partial access to services pursuant to Article 28 of the Postal Law. The above proceedings were brought against Deutsche Post AG by the Federal Cartel Office under Article 82 EC on account of the latter’s refusal to grant partial access to its network for letters below the weight limits of the exclusive licence. As a matter of work sharing in the ECN, the European Commission did not act in this case.

In response to complaints from several newspaper publishers, the Federal Cartel Office opened a preliminary investigation into Deutsche Post AG’s pricing of its “Einkauf Aktuell” product. The investigation was closed after it became clear that there were insufficient grounds for suspecting abuse in the form of a predatory pricing strategy under Article 82 EC.

Following the takeover of Duales System Deutschland AG by a financial investor, the previously cartel-like shareholder structure of DSD was dissolved. All large-scale retail and industrial companies were removed from the circle of shareholders. The proportion of shareholders from retailing and industry was reduced to below 5%. As a result of this restructuring, the proceedings against DSD could be closed. The case was examined inter alia in the light of Article 81 EC.
(14) In proceedings pursuant to Article 81 EC concerning the setting-up of a countrywide system for the recovery of one-way drink packages on which there is a compulsory deposit and for the payment of deposits on disposable packaging, the Federal Cartel Office raised no objections under competition law to the parties concerned, Lekkerland-Tobaccoland GmbH & Co. KG, Spar Handels-AG and VfW AG.

(15) The formation of a joint venture for the rental of hotel bedrooms in conjunction with the 2006 football world championships was granted exemption as part of a merger control procedure. Although the merger constituted a restriction of competition under Article 81(1) EC, the Federal Cartel Office did not see grounds for action against the joint venture as, in its opinion, the conditions of Article 81(3) EC were met.

(16) According to a judgment of the European Court of Justice, groups of sickness funds are not undertakings within the meaning of Article 81 EC where they determine fixed maximum amounts up to which they bear the costs of medicines. On the basis of this decision, several sets of proceedings for the examination of the “fixed amount” rule were terminated.

Spain

Rulings of the Competition Tribunal –
Cases prior to 1 May 2004
Case ASTEL/TELEFÓNICA: Competition Service No 2340/01, Competition Tribunal No 557/03
On 29 November 2001, ASOCIACIÓN DE EMPRESAS OPERADORAS Y DE SERVICIOS DE TELECOMUNICACIONES (ASTEL) lodged a complaint with the Competition Service against TELEFÓNICA DE ESPAÑA SAU (TELEFÓNICA) for restrictive practices prohibited in Article 6 of the Competition Act and Article 82 EC. The applicant alleged abuse of a dominant position consisting of discriminatory treatment of requests for pre-assignment, provision by TELEFÓNICA of certain services only on condition that customers had no pre-assignments with its competitors, and the use of commercial practices to win back customers that confused users.

On 17 February 2003, after investigating the complaint, the Competition Service sent a report to the Competition Tribunal recommending finding of an infringement and imposition of a fine.

On 1 April 2004, the Competition Tribunal handed down Decision 557/03 finding TELEFÓNICA to be in infringement of Article 6 of the Competition Act and Article 82 EC by abuse of a dominant position consisting in providing certain services only on condition that customers had no pre-assignments with its competitors, and unfair advertising campaigns that were offensive to its competitors and confused users. The Tribunal ordered TELEFÓNICA to pay a fine of €57 million and to stop these practices.

Cases subsequent to 1 May 2004
Case ASEMPRE/CORREOS: Competition Service No 2353/02, Competition Tribunal No 568/03
On 21 January 2002, ASOCIACIÓN PROFESIONAL DE EMPRESAS DE REPARTO Y MANIPULACIÓN DE CORRESPONDENCIA (ASEMPRE) lodged a complaint with the Competition Service against SOCIEDAD ESTATAL CORREOS Y TELÉGRAFOS (CORREOS) for infringement of Article 6 of the Competition Act and Article 82 EC. The
applicant claimed that CORREOS signed contracts with large clients for joint provision of postal services provided in competition with other operators and those reserved by law to CORREOS, and applied predatory pricing policies through cross-subsidies.

The Competition Service commented on the alleged predatory pricing practices in another case (Competition Service No 2353/02) and, on 10 September 2003, sent the Competition Tribunal a report recommending finding of an infringement and imposition of a fine on CORREOS for abuse of dominant position, signing exclusive contracts and contracts for joint provision of reserved and unreserved postal services, and applying different conditions for equivalent services.

On 15 September 2004, the Competition Tribunal handed down Decision 608/04 finding CORREOS to be in infringement of Article 6 of the Competition Act and Article 82 EC by abuse of its dominant position in the regulated postal services market through the signing of exclusive contracts with great rebates for joint provision of postal services reserved by law to CORREOS and other deregulated services. The Tribunal ordered CORREOS to pay a fine of €15 million and to stop these practices.

Case SPAIN PHARMA / GLAXO WELLCOME S.A.: Competition Service No 2023/99, Competition Tribunal No R 611/04.
This case arose as a result of a complaint lodged in 1999 with the Competition Service by SPAIN PHARMA against LABORATORIOS ALTER (ALTER) and GLAXO WELLCOME (GLAXO), which gave rise to two different files. This one relates to ALTER and GLAXO’s refusal to supply certain pharmaceutical products prior to April 1998.

On 16 March 2004, the Competition Service decided to close the file on the grounds of lack of evidence of abuse of a dominant position as defined in Article 6 of the Competition Act and Article 82 EC. On 2 April 2004, SPAIN PHARMA appealed against this decision to the Competition Tribunal, which dismissed it in Decision R 611/2004 on 13 October 2004, since it agreed with the Competition Service’s conclusions regarding the definition of a product market and the absence of a collective or individual dominant position and considered that the refusal to supply products was justified since the requests for supply by SPAIN PHARMA increased by 400% with respect to the previous period.

Case EDICIONES MUSICALES: Competition Service No 2420/03, Competition Tribunal No R 609/04
On 25 October 2002, UNIVERSAL MUSIC PUBLISHING S.A., EDICIONES MUSICALES BMG ARIOLA S.A., SONY ATV MUSIC PUBLISHING HOLDINGS LLC S. EN C., EMI MUSIC PUBLISHING SPAIN S.A. and PEERMUSIC ESPAÑOLA S.A. lodged a complaint with the Competition Service against SOCIEDAD GENERAL DE AUTORES Y EDITORES (SGAE) for abuse of a dominant position and unfair competition in management of copyrights in contravention of Articles 6 and 7 of the Competition Act and Article 82 EC. On 26 June 2003, the complainants extended the complaint to include a decision by the SGAE’s AGM.

After investigating the facts, on 19 February 2004 the Competition Service decided to close the case on the grounds that there was insufficient evidence of the alleged infringements and that many of the contested activities were primarily private in nature.

The complainants appealed against the Competition Service’s decision to the Competition Tribunal, which, in decision R 609/04 handed down on 16 December 2004, upheld it on the
grounds that the investigations carried out by the Competition Service do not show any abuse of a dominant position. The Tribunal also considered that the contested practices were largely civil disputes arising from the internal relations between SGAE’s partners, which included the five companies which brought the complaint.

Case UNI2 TELECOMUNICACIONES (UNI2) and MCI WORLDCOM / TELEFÓNICA MOVILES, AIRTEL MOVIL and AMENA: Competition Service No 2421/02, 2435/02 and 2436/02, Competition Tribunal No 571/03, 572/03 and 573/03.

On 31 October 2002, UNI2 TELECOMUNICACIONES (UNI2) and MCI WORLDCOM SPAIN S.A. (WORLDCOM), two fixed telephone operators, lodged two complaints with the Competition Service against the mobile telephone operators TELEFÓNICA MOVILES DE ESPAÑA, AIRTEL MOVIL and AMENA for abuse of a dominant position in the call termination market in their mobile networks. The alleged practices were price discrimination in the wholesale call termination service in the network itself and price squeeze between the wholesale price of the call termination service offered to competitors and the retail price of the fixed to mobile telephone service offered by mobile operators to companies.

The Competition Service investigated three case files (one for each of the mobile operators) and sent its reports on them to the Competition Tribunal, recommending finding of an infringement and imposition of a fine on the grounds that the alleged offences constituted abuse of a dominant position, which is prohibited in Article 6 of the Competition Act and Article 82 EC.

However, in decisions 571/03 and 572/03 handed down on 22 December 2004 and 573/03 handed down on 20 December 2004, the Competition Tribunal did not find sufficient evidence of the alleged infringements.

France

Decision No 04-D-32 of 8 July 2004

More Group France lodged an application with the Competition Council complaining that, after More was awarded the contract for the supply of advertising-funded street furniture by the municipality of Rennes in July 1997 that was formerly held by JC Decaux, the Decaux Group abused its dominant position by preventing it from commercially exploiting the contract it had just won. In 1998 the Decaux Group held almost 80% of the market in local authority advertising-funded street furniture. In addition the Council considered that the Decaux Group held a dominant position on that market. It also found that the Decaux Group had abused its dominant position and infringed Article 82 EC and Article L 420-2 of the Commercial Code by the following behaviour:

- improperly challenging the dates when the contract for advertising-funded street furniture concluded with the municipality of Rennes terminated;
- threatening the immediate total dismantling of town bus shelters in the middle of winter with a view to postponing the dismantling of its other furniture;
- refusing to cooperate with the new contractor to improve coordination of the replacement of bus shelters;
- maintaining its furniture on site and exploiting it commercially after the end of the contract;
- offering major advertisers free poster space for publicity campaigns in Rennes, thus preventing More Group France from marketing the advertising space on street furniture;
- adopting discriminatory tariffs only in the municipality of Rennes to discourage advertisers from dealing with its competitor, More Group France.

The Council considered that such behaviour contributed to the Decaux Group’s maintenance of its quasi-monopoly on the national market in advertising-funded street furniture and fined it €700 000.

**Decision No 04-D-48 of 14 October 2004**

Following an application lodged by Tenor, an association representing telecommunications operators, the Competition Council imposed fines of €18 million and €2 million respectively on France Télécom and SFR. The Council considered that those operators, who are vertically integrated on the fixed and mobile telephony markets, were applying price-scissors tariff practices, making medium-sized companies and major customers retail "fixed-to-mobile" offerings at prices that were incompatible with the call-termination charges prevailing in their mobile telephony sector (the companies in question were FTM, which became Orange, and SFR). The offerings were thus at tariffs that did not cover the variable costs of providing these services. Moreover, these practices were applied in the period between April 1999 and the end of 2001, when alternative solutions, such as international rerouting and mobile box, were not, or were not yet, significantly available. This meant that entrants to the fixed telephony market were unable to offer companies competitive prices for fixed services to Itinéris or SFR mobile phones or through a direct interconnection to the FTM or SFR network without incurring losses. Since Bouygues Télécom did not hold a dominant position on the markets in routing calls from fixed to mobile telephones, it was not subject to the prohibition. This decision of the Conseil de la concurrence has been reviewed and reformed by a ruling of the Court of Appeals of Paris on April 12, 2005. The plaintiff, the ETNA association (ex Tenor), has lodged an Appeal against this Court of Appeals ruling before the French Civil Supreme Court ("Cour de cassation").

**Decision No 04-D-49 of 28 October 2004**

Artificial insemination centres had adopted practices to prevent cattle breeders from freely selecting the service provider who would introduce semen into cattle in bovine artificial insemination. These practices were intended, *inter alia*, to prevent customers selecting the veterinarian to provide this service, which would then be provided by the specialist of the approved centre covering the customers. Each of the centres involved, which held a dominant position in its geographical area, engaged in one or more of the following practices:

- refusing without proper reason to issue veterinarians with the certificate allowing them to provide artificial insemination services;
- rendering issue of that certificate conditional on giving anticompetitive undertakings, such as customer approval clauses;
- establishing restrictions on therapeutic insemination services provided by veterinarians;
- introducing an exclusivity clause as regards semen supply;
- fixing rates that fail to distinguish between the price of the semen and the charge for the service provided;
- applying an agreement promoted by the National Union of Agricultural Breeding and Artificial Insemination Cooperatives (UNCEIA) that recommended members to sign agreements containing anticompetitive clauses, particularly those intended to restrict the numbers of veterinarians’ customers.

The National Association of Veterinarians in Private Practice (SNVEL) lodged an application with the Council. The Council imposed fines ranging from €300 to €71 200 on the centres and the UNCEIA for infringement of Article L. 420-1 of the Commercial Code and Article 81 EC
and Article L. 420-2 of the Commercial Code and Article 82 EC and ordered them to bring an end to their behaviour and to publish the decision in an agricultural review.

**Decision No 04-D-65 of 30 November 2004**

On 10 April 2001 the Competition Council, delivering its opinion on an application lodged by the Minister of Economic Affairs, pointed out to Groupe La Poste that certain discounts for major customers granted in its commercial contracts impaired competition. On 1 July 2002 the Council, since it considered that La Poste had failed to have regard for all of its recommendations, began to investigate the contracts of its own motion. The outcome was Decision No 04-D-65, in which the Council found that, although La Poste had amended some of its commercial contracts since 1 January 2002, linkage discounts and loyalty discounts continued to be granted until 1 January 2003 in the area of mail-order sales, which account for a very significant part of its business. In accordance with its consistent rulings the Council treated these practices as abuses of a dominant position. However, since La Poste wished to engage in a “plea-bargain”, it opted not to defend its position and gave specific undertakings that in future it would desist from all behaviour impairing competition. In consideration of these undertakings the Council decided to reduce the fine imposed by 90%.

**Decision No 04-D-74 of 21 December 2004**

This case involved an application lodged with the Competition Council on the basis of practices identified between 1993 and 1996 on the market in ferry links between France and Jersey and Guernsey. The practices affected trade between Member States in that transport to the Channel Islands involved European customers and the principal competitors were a French company and a UK company.

The Council considered that the companies, Emeraude Lines and Condor Ferries, had engaged in a concerted practice aimed at preventing the determination of prices by market forces. The practices were principally aimed at excluding a new entrant to the market in question.

Nevertheless, the Council did not impose any fine because, on the one hand, Emeraude Lines forms the subject of collective proceedings and generates only a small amount of turnover in France and, on the other, Condor Ferries does not generate any turnover in France. When the facts in question took place, penalties could not be imposed under French law on the basis of national turnover alone: it was only after 2001 that worldwide turnover could be taken into account.

**Decision No 04-D-05 of 24 February 2004**

Phoenix Pharma, a wholesale distributor of pharmaceutical products, lodged an application with the Competition Council on the merits and sought interim relief concerning purchasing quotas established by the main pharmaceutical laboratories on the French market.

Regarding the existence of a restrictive practice, the Council invoked the ruling of the Court of First Instance in *Bayer/Adalat* and found that there was no evidence of concurrence of wills on an agreement between the laboratories in question, or between those laboratories and one or more wholesalers. It also pointed out that each of the laboratories had an interest, irrespective of the measures adopted by other laboratories, in unilaterally applying measures intended to allow it, on the one hand, to fulfil its undertakings given to public authorities to match the consumption of medicinal products and, on the other, to avoid shortages arising through large-scale exports of medicinal products.

Since this involves abuse of a dominant position, the Council considers that it cannot exclude, at this stage of its investigation, that the operation of laboratories’ quota systems restricts competition in the market for the wholesale supply of medicinal products, particularly by
creating a barrier to entry. The Council therefore ruled that Phoenix Pharma’s case was admissible. However, since the conditions for granting interim relief had not been met it refused Phoenix Pharma’s application on this point.

**Decision No 04-D-73 of 21 December 2004**

Grolier Interactive Europe/Online Groupe (Club Internet) lodged an application with the Competition Council concerning abuse of a dominant position by France Télécom and its subsidiaries in the provision of Internet access. It complained that France Télécom had cross-subsidised its subsidiary, Wanadoo Interactive, at the expense of competitors, had denigrated partners and had used data it held in its capacity as a supplier of fixed telephony services to assist tenders submitted by Wanadoo.

By Decision No 04-D-73, the Council found in favour of France Télécom and rejected the complaint against its practices in the provision of Internet access. The Council did not uphold the claim that cross-subsidisation was being practised because there was no evidence that the difference between the commissions paid by Wanadoo and France Télécom's real costs was covered by surplus income from the operation of its virtual monopoly of the local loop and not by funds accumulated by the historic operator in its other competitive activities. Likewise, the Council did not uphold the complaint of predatory pricing or permanent disturbance of the market and rejected the other complaints on procedural grounds.

**Decision No 04-D-76 of 22 December 2004**

Digitechnic lodged an application with the Council concerning Microsoft complaining that Microsoft's practices included a refusal to license the software suite Pack Office Pro (from January 1995 to June 1996) and a subsequent discriminatory price policy (from June 1996 to May 1998). By Decision No 04-D-76, the Council rejected the complaint because the applicant had not established that Microsoft had between 1995 and 1998 followed practices limiting sales of Pack Office Pro which had as their object or effect the restriction of competition in the market for computer sales.

**Ireland**

In 2004, the Competition Authority instituted proceedings in one matter involving Article 81/82: *The Competition Authority and John O’Regan and Ors* [2003 No 8608P]. The case involved alleged infringement of both Articles 81 and 82 EC and their domestic equivalents, Sections 4 and 5 Competition Act 2002.

In *Competition Authority v. John O’Regan and Ors.* (“ILCU”), the Competition Authority argued that the ILCU had abused its dominant position, by refusing to allow access to its Savings Protection Scheme to non-affiliated credit unions. It was argued that the refusal amounted to an abuse of the ILCU’s dominant position, as it was the only provider of a savings protection scheme for credit unions. Further, the Competition Authority argued that the ILCU’s activities amounted to an anticompetitive tying agreement.

The Competition Authority initially sought an interlocutory injunction to restrain the ILCU and the individual defendants from introducing or implementing any scheme or arrangement which had the object or effect of supporting the rules and/or decisions of ILCU relating to the loss of access and lack of refund from the SPS on the disaffiliation of a credit union. Following an undertaking given by the ILCU to the same effect, however, the interlocutory injunction was not required.
The Court found that the ILCU had breached S.4 (anticompetitive agreement) and S.5 (abuse of dominance) of the Competition Act 2002 and that the ILCU’s activities had infringed both Articles 81 and 82 EC as the activities complained of would have the potential to affect interstate trade. The ILCU’s activities did not satisfy the requirements of Article 81(3) and could not be objectively justified under Article 82 EC.

Following the decision of the Court, the Court ordered that the Defendants allow non-affiliated credit unions based in the State to participate in the Savings Protection Scheme on the same terms and conditions as affiliated credit unions. The High Court decision is now under appeal by the ILCU to the Supreme Court.

Netherlands

North Sea Shrimps

The decision concludes a procedure of administrative appeal in which the Netherlands Competition Authority (“NMa”) had to reconsider its decision of 14 January 2003 on the basis of an Advice by independent experts. The new decision upholds the imposition of fines on four Dutch producer organisations, three German (associations of) producer organisations, one Danish producer organisation and three wholesale trading companies in the fishery sector, who were found to have violated both Article 6 of the Dutch Competition Act and Article 81 EC. All parties were involved in agreements in the framework of the so-called Trilateral Consultations on limitations of catches and minimum prices for North Sea shrimps (*crangon crangon*) during 1998-2000. Only the Dutch producer organisations and undertakings were also involved in a boycott action to prevent a new trading company from buying North Sea shrimps at the Dutch fish auctions in autumn 1999. The fines take into account effects on the Dutch market only and total EUR 6,176,000 (a considerable reduction in comparison to the 2003 decision). The 2003 decision is reversed with regard to the five smaller trading companies: reconsidering the evidence of their particular role the NMA considered that they did not take part in either infringement in such a way as to establish an agreement of coordinated behaviour in the sense of Article 81 EC.

The involvement of Dutch multinational trading companies and Dutch, German and Danish producer organisations in the Trilateral Consultations (both covering a big share in demand and supply of North Sea shrimps) together with the hard core nature of the agreements (catch quota and price fixing) establish a sure case of effect on trade. As to the second infringement, only Dutch parties were involved in the boycott action and the action was limited to purchases at the Dutch auctions. However, the undertaking that was the target of the boycott was exporting Dutch fishery products to other Member States. Foreign trading companies could have been frightened away from buying shrimps on the Dutch market as a consequence. In the decision of 14 January 2003, only fined the parties involved for a violation of Dutch competition law. In view of Regulation 1/2003 the present decision on the administrative appeals does establish interstate effect and hence a violation of Article 81 EC as well, without increasing the fine (since substantive Dutch and European competition rules converge).

The parties’ objections on the grounds of the Common Fisheries Policy of the EC are rejected. It is found that the kind of market interventions agreed upon in the Trilateral Consultations is not contributing to the objectives of Article 33 EC. They are not justified by the common market organisation and not safeguarded by Regulation No. 26. Regulation 1767/2004 (amending Regulation 2318/2001) on the (procedure of) recognition of trans-national
associations of producer organisations (which came into force 21 October 2004) does not lead to a different assessment.

Mobile operators
The present decision concludes an administrative appeal procedure against the decision of the director-general of the NMa of 30 December 2002 in which fines were imposed on the five operators of mobile telephony networks in The Netherlands (KPN Mobile, Vodafone Libertel, Orange (formerly Dutchtone), Telfort (formerly O2) and T-Mobile (formerly Ben)) for infringing Article 6 of the Competition Act (national equivalent of Article 81 EC). The infringement consists of a concerted practice and/or agreement between the operators on adjusting/lowering the standard connection fee (bonus) that they pay to dealers for concluding prepaid and post-paid subscriptions for mobile telephony. On the basis of written documentation and statements of commercial directors of the mobile operators it is concluded that coordination took place and/or agreement was reached during a meeting in the summer of 2001. The operators concerned had the intention to influence each others conduct and/or disclosed their intended conduct as regards the connection fees for dealers and the timing of (substantially) lowering these fees. Furthermore, it is concluded that they put the concerted practice and/or agreement into effect by lowering the standard connection fees for dealers around the same range and around the same time. This was qualified as a very serious infringement and fines were imposed of EUR 6,000,000 to EUR 31,300,000.

All five operators appealed to the decision. After having obtained the advice of a designated independent advisory committee, the director-general upholds the (material) breach of Article 6 Competition Act, except that it is now qualified (only) as a concerted practice. Furthermore, as a consequence of Regulation 1/2003 taking effect as from 1 May 2004, the conduct of the five operators described in the decision of 30 December 2002, is also qualified as an infringement of Article 81 EC. The assessment under Article 81 EC is equal to that under Article 6 Competition Act except for the concept of effect on trade between Member States. With regard to the latter it is concluded that the conduct concerned could have an appreciable effect on interstate trade as it indirectly affects the sale of mobile telephony subscriptions (prepaid and post-paid) and therefore mobile telephony traffic (both national and international), and investment and establishment decisions of dealers (including dealers with head offices outside The Netherlands).

The fines, however, were (substantially) lowered to EUR 4,492,000 to EUR 14,828,000 because the turnover concerned with the infringement (on which the basic amount of the fine is determined) was insufficiently accurate determined in the primary decision. The parallel application of Article 81 EC next to Article 6 Competition Act does not lead to an increase of the fines as in this case they are considered sufficient for fining both infringements. Substantive Netherlands’ and European competition rules converge and effect on trade does not in itself justify an increase of fines. Besides the effects of the infringements are limited to the Netherlands’ market and the turnover concerned is realized in The Netherlands.

Temporary and contract staffing
The NMa fined the Stichting Financiële Toetsing (SFT) EUR 10,000 for infringement of Article 81 EC and its equivalent in Dutch law (Art. 6 of the Dutch Competition Act) between October 1998 and September 2001. SFT is a company that has a register in which temporary employment agencies can be registered if they fulfil certain financial criteria. The aim of the register is to provide, to a certain extent, a “guarantee” to the customers of temporary employment agencies that the registered agencies are bona fide.
Regularly, temporary employment agencies do not have the staff their customer wants. Therefore, they employ personnel from other agencies to provide that personnel to their customer. According to SFT’s rules, registered agencies (approx. 67% of all Dutch agencies are registered) are not allowed to employ personnel (and then provide that personnel to their customers) from agencies that are not registered. Agencies without a branch in the Netherlands were not allowed to be registered. Also, SFT’s rules forbade registered agencies to employ personnel (and then provide that personnel to their customers) from agencies that were registered in a register which provided equivalent guarantees if those agencies did not have a branch in the Netherlands. Thus, there was a lack of openness in SFT’s system and at the same time SFT failed to accept equivalent guarantees offered by another system. As a result, agencies without a branch in the Netherlands were not be able to employ personnel to agencies registered with the SFT, which set foreign agencies at a disadvantage opposed to agencies which are established in the Netherlands.

**Sweden**

**ADSL**

In December 2004, the Competition Authority submitted a summons application to the Stockholm City Court concerning the national incumbent telecom operator. According to the Competition Authority the company has abused its dominant position by limiting competition in the Swedish market for ADSL-services. The company owns the fixed public telephone network encompassing all households in the country. It uses the network to sell its own telecommunications services to consumers, but also offers other operators access to it.

Due to several complaints from other telecom operators, the Competition Authority investigated the market situation and found that the company’s competitors had been subjected to a margin squeeze. This means that the margin (the difference between the retail price and the wholesale price) is insufficient to operate on the downstream market. The margin between the retail and the wholesale price did not cover the company’s incremental costs for retail sales.

According to the Competition Authority the company has abused its dominant position on the wholesale market in order to strengthen its position on the downstream market. This has impeded competition on the market. The Competition Authority has found that the company abused its dominant position from April 2000 up to and including January 2003. The Authority asked the court to impose a fine in the amount of SEK 144 million.

**Car rescue services**

In October 2004, the Competition Authority submitted a summons application to the Stockholm City Court concerning a parent company (a non-profit association) and its wholly owned subsidiary in the car rescue services industry. The members of the non-profit association are undertakings which carry on car rescue activity. The association does not carry on any car rescue activity of its own. The members of the non-profit association undertake by the membership to sign a co-operation agreement with the wholly owned subsidiary. The ground for the application for a summons was that the parent company and its wholly owned subsidiary in a decision by an association of firms in November 2000, intentionally or through negligence, had infringed the prohibitions in Article 6 of the Swedish Competition Act and Article 81 (1) EC by agreeing on or in any case recommending prices for certain car rescue services concerning the period 1 January 2001 to 31 December 2001.
Car rescue companies which are members of the non-profit association shall be considered as competitors as they are active at the same level of commerce. Hence the price agreement is a horizontal price agreement. The non-profit association and its wholly owned subsidiary were considered as an integrated economic unit from a competition law point of view. The Competition Authority asked the court to impose fines in the amount of SEK 20,000 for the non-profit association and SEK one million for its wholly owned subsidiary for prohibited price co-operation.

**Bitumen I**

In December 2004, the Competition Authority submitted a summons application to the Stockholm City Court concerning two oil companies for prohibited co-operation in the market for bitumen (the binding agent for asphalt). The co-operation between the companies began in 1999 when one of the companies sought entry to the Swedish bitumen market, which is dominated to a great extent by the other company. The entering company had no need to compete over prices and other factors as it had an agreement with the other company. Under the agreement this company guaranteed the entering company a certain volume of sales and customers. Price competition in the market was thereby avoided, and the companies were able to keep up prices.

Besides allegedly engaging in an unlawful cartel, one of the oil companies is also accused by the Competition Authority of having abused its dominant position in the market by applying business conditions that discriminate against other companies and thus limit market access. The Competition Authority asked the court to impose a fine in the total amount of SEK 394 million; of which one company should pay SEK 205 million and the other company SEK 189 million.

**Bitumen II**

In October 2004, the Swedish Competition Authority in a decision accepted commitments from the parties in a case concerning an infringement that was related to a clause in a rental agreement from 1997 between the parties regarding the largest bitumen depot system in Sweden. A depot in a Swedish city has until 1997 been used by several oil companies. During the time of the rental agreement between the parties, other oil companies have expressed their interests in renting a bitumen depot in the relevant area.

The clause has had the effect that the depot with the largest sales volume in Sweden has not been available to the actual and potential competitors within a reasonable period of time. The clause was therefore an impediment for potential entrants and to the possibility for established competitors to expand on the market. The agreement was therefore considered as an infringement of Articles 81 and 82 EC. The effect of the infringement was perceptible in all the relevant markets due mainly to the market shares of the parties on their respective markets.

The Swedish Competition Authority found that the limitation of competition affects trade between member states since bitumen is suitable for trade between member states, the products turnover is considerable, the parties have significant market shares and the agreement prevents access to the most significant bitumen depot in Sweden. Due to the significance of the depot system the abuse has affected a substantial part of the common market in accordance to Article 82 EC. Therefore the Swedish Competition Authority found that Article 81 and 82 EC are applicable.
After having received a Statement of objection the parties have deleted the condition under the clause and replaced it with a new condition. The Authority has, in accordance with Article 23 a of the Swedish Competition Act, accepted this commitment from the parties.
2. Application of the EC Competition Rules by National Courts

The competition authorities of the Czech Republic, Estonia, Greece, Ireland, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Poland, Portugal, Slovenia, Slovakia and Finland have not reported any decisions by their courts applying the EC competition rules. Decisions of that nature were reported by the competition authorities of the following Member States:

Belgium

1. Brussels Court of Appeal, judgment of 28 September 2004 (Lodiso v SPRLU Monde)

Under Article 42 bis of the Act on the Protection of Economic Competition, as coordinated on 1 July 1999, where the settlement of a dispute depends on the legality of a competitive practice, the court to which the case has been submitted has to stay judgment and refer the matter to the Court of Appeal in Brussels.

In its judgment of 28 September 2004, the Brussels Court of Appeal gave a ruling on a reference for a preliminary ruling submitted by the Court of First Instance in Tournai (Hainaut).

The question put by the Court of First Instance was as follows: “Are Ethical Standard No 2 of the Architects’ Association and in particular Article 4 thereof contrary to Articles 81 and 82 of the Treaty of Amsterdam (formerly Articles 85 and 86 of the Treaty of Rome) and to the provisions of the Act of 1 July 1999 on the Protection of Economic Competition and must they therefore be deemed to be automatically void?”

This question arose in a dispute between an architect and the company SPRLU Monde (Monde) about payment of the architect’s fees. The Council of the Architects’ Association had established a minimum scale recommended for architects' fees. The scale is known as "Ethical Standard No 2". The contract on the work to be performed by the architect included a number of provisions referring to Ethical Standard No 2. Monde claimed that Ethical Standard No 2 and, hence, the agreement between it and the architect were null and void.

In its Decision of 24 June 2004, the Commission found that “from 12 July 1967 to 21 November 2003 the Belgian Architects’ Association infringed Article 81(1) of the Treaty by adopting, in a decision of 12 July 1967 amended in 1978 and 2002, and making available a minimum fee scale known as Ethical Standard No 2”. The Architects’ Association was fined EUR 100 000.

Consequently, in view of that Decision, in reply to the question raised in the reference for a preliminary ruling, the Court of Appeal held (in the absence of any appeal against the Commission’s Decision) that Ethical Standard No 2 was automatically void pursuant to Article 81 EC.
2. *N.V. MSA v Koninklijke Gilde van Vlaamse Antiquairs: Application for temporary measures*

Under the first subparagraph of Article 35(1) of the APEC\(^7\) the following requirements must be met to allow the Chairman to take temporary measures intended to suspend restrictive competitive practices:

- the existence of a complaint, so that the restrictive competitive practice is the subject of an investigation. There must also be a direct and immediate interest on the part of the applicant party;
- the apparent existence of a prohibited restrictive competitive practice, in this instance an anticompetitive agreement in breach of Article 2 of the APEC;
- the urgent need to avoid a situation that may lead to serious, imminent and irreparable damage to the undertakings whose interests are affected by the practice or harm the general economic interest.

N.V. MSA is a company which operates an advertising and public-relations business, including the organisation of trade fairs. Twice a year it organises an “International Art and Antiques Fair”, one in Knokke in August and the other in Bruges at the end of October and beginning of November. The Royal Guild of Flemish Antique Dealers is a trade association which organises antiques fairs in Knokke and Ghent. When the Guild decides to end its own antiques fairs in Knokke, it prohibits its members from participating in any fair in Knokke or Bruges that is not organised by the Guild. MSA lodged a complaint against this on 24 June 1998 with the Competition Council and asked the Chairman of the Competition Council to take temporary measures.

Decision No 2002-V/M-38 of 27 May 2002 by the Chairman of the Competition Council to take temporary measures requested by N.V. MSA/Guild of Flemish Antique Dealers

The Chairman of the Competition Council was asked to order the Guild, as a temporary measure, to suspend its decision imposing the ban and to inform its members of such suspension. The Chairman of the Competition Council took the view that the complaint submitted by N.V. MSA was sufficiently detailed and described the relevant competitive practice sufficiently clearly, and, in contrast to what the Competition Service had argued in its opinion, he declared, in a decision issued on 27 May 2002, that the application for the taking of temporary measures was admissible. Before giving a ruling on the soundness of the application, the case was referred back to the Competition Service for further investigation. It was therefore ordered that a supplementary investigation report should be drawn up on the application for temporary measures, and in particular that the following two conditions should be investigated further:

- the existence of a prima facie infringement of the APEC;
- the existence of a situation that might lead to serious, imminent and irreparable damage to the undertaking whose interests were affected by the practices or were harmful to the general economic interest and which had to be prevented as a matter of urgency.

Decision No 2002-V/M-95 of 24 December 2002 by the Chairman of the Competition Council on the taking of temporary measures requested by N.V. MSA/Guild of Flemish Antique Dealers

On 24 December 2002, the Chairman decided, as regards the existence of a prima facie infringement of the APEC, that the Guild was an association of undertakings and that its decisions had to be regarded as decisions taken by an association of undertakings within the

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\(^7\) APEC: Act on the Protection of Economic Competition, as coordinated on 1.7.1999.
meaning of Article 2(1) of the APEC. The relevant decisions were regarded as anticompetitive, since the members were prohibited from participating in the fairs organised by N.V. MSA. As far as the second condition was concerned, the Chairman concluded that the damage was serious, imminent and irreparable, that the damage was clearly associated with the practice complained against and that the urgency requirement was also met. The Chairman of the Competition Council accordingly declared the application for the taking of temporary measures well founded and ordered that the decision of the Guild of Flemish Antique Dealers be suspended. Furthermore, the Guild was ordered to make this decision of the Competition Council known to all its members by registered letter and by posting the operative part of the judgment on the Guild’s website.

Brussels Court of Appeal, judgment of 29 September 2004
The Guild lodged an appeal against the decisions taken by the Chairman of the Competition Council on 27 May 2002 and 24 December 2002 regarding temporary measures pursuant to Article 35 of the APEC. Since both the decisions were cited in the same application regarding the taking of temporary measures, the Court gave its ruling in a single judgment.

The appeal against the decision of 27 May 2002 regarding temporary measures pursuant to Article 35 of the APEC was declared inadmissible, since the Guild could not prove that notice of the appeal had been served on the other parties.

The appeal against the decision of 24 December 2002, also regarding temporary measures pursuant to Article 35 of the APEC, was, however, declared admissible.

The Brussels Court of Appeal exercises full jurisdiction when it gives judgment on appeals against decisions taken by the Competition Council or by its Chairman. However, this does not necessarily mean that the case is definitively withdrawn from the Competition Council or its Chairman.

The Guild argued in its appeal that the prohibition being objected to was withdrawn at the general assembly held on 7 December 1999, but that no explicit decision along such lines could be found in the minutes of the meeting.

The Court concluded that the Chairman was right in deciding that the prohibition was on the face of it an infringement of the ban on cartels laid down in Article 2 of the APEC. However, the Court noted that, since the issuing of the disputed decision, account had to be taken of the first sentence of Article 3(2) of Regulation 1/2003, which states:

“The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty”.

In other words, the Appeal Court took the view that the application of Belgian national law may not lead to the prohibition of decisions by associations of undertakings which are permitted under European law. If the disputed decision taken by the Guild is not caught by the cartel prohibition laid down in Article 81 EC, the apparent infringement of Article 2 of the APEC may not, according to the Court, be prohibited and the measures ordered may not be maintained.

The Court then examined whether the disputed decision is caught by Article 81 EC and decided that it cannot be assumed that the effect of the disputed prohibition on intra-Community competition is appreciable. The Court held that the disputed prohibition is therefore not a decision by an association of undertakings that is prohibited by Article 81(1) EC.
Since national competition law may not result in the prohibition of something that is not in conflict with Article 81 EC, the Court ruled that the disputed decision by the Chairman could not be maintained.

The appeal against the decision taken by the Chairman of the Competition Council on 27 May 2002 was declared inadmissible by the Court of Appeal. The appeal against the decision taken by the Chairman of the Competition Council on 24 December 2002 was declared admissible and well founded.


In its judgment of 29 September 2004, the Brussels Court of Appeal ruled on the admissibility of an application for temporary measures submitted by Gema Plastics to the Belgian Competition Authority.

The request was directed against the new Belgian ‘Benor application regulation (TR 1401)’, which lays down the minimum depth at which PVC sewerage components must be inserted in order to be able to use the ‘Benor’ mark. This Belgian standard, however, stipulates greater depth than the European standard (‘EN 1401-1 and NBN EN 1401-1’). According to Gema Plastics, the purpose of the Belgian standard is to eliminate competition on the Belgian market from manufacturers or suppliers of components which do not have to be inserted at such a depth, and it therefore violates Article 2(1) of the Belgian federal Law on the Protection of Business Competition and Article 81(1) of the EC Treaty. The President of the Belgian Competition Authority ruled that the application for temporary measures was inadmissible, as the applicant did not meet the requisite condition, i.e., that it should have an immediate and genuine stake within the meaning of Article 35 of the Belgian Law on the Protection of Business Competition. The Court of Appeal, however, ruled that the President of the Competition Authority was applying too restrictive a definition and that Gema really did have an immediate and genuine stake. However, the requisite conditions – that the case must involve serious, immediate and irremediable harm and require urgent action – were not met. The Court of Appeal therefore decided that the application for temporary measures was admissible, but unfounded.


S.P.R.L. Lust Automobiles (Lust), an independent reseller of Mercedes vehicles, brought proceedings against DaimlerChrysler A.G. Stuttgart (DCAG) and S.A. DaimlerChrysler Belgium Luxembourg (DCBL) for breach of the Community competition rules.

Lust accused DCBL and DCAG of restricting:

(1) parallel imports, in particular by preventing Lust from obtaining supplies from foreign Mercedes dealers,

(2) sales through an authorised intermediary, in particular by putting pressure on the Mercedes dealer in Charleroi, Car & Truck Charleroi, to cancel orders where Lust was acting only as the agent for a final customer.
As regards the restriction on parallel imports, although sales by an authorised distributor to a non-authorised reseller were prohibited in the context of distribution contracts between DCAG's national subsidiaries and dealers or agents established in the various countries of the European Union, the Mons Commercial Court found that this type of clause was authorised by the three EU regulations concerning motor vehicle distribution (Regulation 123/85 - Article 3(10), Regulation 1475/95 - Article 3(10) and Regulation 1400/2002 – Article 4(1)(b)(iii)) and therefore that the clause was in line with Community law.

As regards the restriction on sales through an authorised intermediary, the Court asked DaimlerChrysler Belgium Luxembourg to produce a copy of the currently applicable dealership agreement signed with the Belgian dealers belonging to the Mercedes network, accompanied by all documents or means establishing the date on which it entered into force and the fact that it is effectively binding on dealers, and ordered the hearing of witnesses to establish whether:

"S.A. Car & Truck Charleroi cancelled orders 1168 and 1169 of 29 May 2000 on the instructions of DaimlerChrysler Belgium Luxembourg and/or DaimlerChrysler A.G. Stuttgart or on the basis of circulars or written instructions issued by them".

**Denmark**

On 18 August 2004, the Danish Competition Appeal Tribunal adopted a judgment whereby the Danish Competition Council’s decision of 24 September 2003 in the case concerning the Danish Book Association was annulled. The Danish Competition Council’s annulled decision concluded that the Danish Book Association infringed Article 81 EC, as they administrate a trading agreement in the Danish book industry that prevents booksellers in other countries from selling Danish books to consumers in Denmark without complying with the fixed prices in Denmark.

Denmark and other countries within the EU have fixed prices on books (based on agreement or based on law), whereas other countries have free prices. This situation implies certain problems for trade between countries with fixed book prices and countries with free prices.

The Danish Competition Council had ruled that according to the practice in EC law, fixed prices in intra-EU book trade can only be accepted in cases where the contracting party, who claims compliance of the fixed prices, can prove that the subsequent re-import is solely motivated by circumvention of the fixed price system. Thus, the Danish Competition Council concluded, that a general enforcement of fixed prices by re-import is in conflict with Article 81 EC.

In the appeal case, the Danish Competition Appeal Tribunal based its judgment on a letter of 12 November 1998 from the Commission to the Cultural Ministers of the EU concerning the Commission’s view on the compliance between Article 81 EC and the national systems of fixed prices on books within the EU. The Danish Competition Appeal Tribunal ruled that pursuant to this letter, the Danish agreement concerning fixed prices on books had no significant impact on trade between Member States, and that the agreement accordingly was not covered by Article 81 EC. Thus, the Danish Competition Appeal Tribunal adopted a judgment whereby the Danish Competition Council’s decision was annulled.
Germany

Berlin Regional Court, 13.01.2004, 102 O 122/03 (Kart), P-120/03
No nullity of the service station distribution agreements on grounds of anticompetitive long-term exclusivity; as agency contracts, they are not caught by Article 81 EC; for want of any restriction of competition under Article 18 GWB, old version, they are not caught by Article 34 GWB, old version.
(Article 81 EC; Articles 134 and 138 Civil Code)

Mainz Regional Court, 15.01.2004, 12 HK O 56/02, P-136/03
No action for damages lies for payment of excessive prices for vitamins by reason of the defendant’s participation in a worldwide vitamins cartel as established by the Commission with binding force on the court, inasmuch as, as a customer, the plaintiff is not included in the scope of protection of the cartel prohibition in Articles 1 and 33 GWB and Article 823(2) Civil Code, read in conjunction with Article 81 EC, for lack of “targetedness” of the price cartel.
(Article 81 EC; Articles 1 and 33 GWB, Article 823(2) Civil Code)

Berlin Higher Regional Court, 15.01.2004, 2 W 25/03 (Kart), P-239/03
Dominant position of the mobile telephony network operator on the market for the termination of fixed network calls in its mobile telephony network; no abuse due to the fact that the plaintiff prevents the defendant from using SIM cards and creating mobile telephony links because the plaintiff uses the SIM cards for the commercial rerouting of calls from the fixed network (risk to network integrity).
(Articles 19 and 20 GWB, Article 82(1)(2)(b) and (c) EC, Article 1 UWG)

Mainz Regional Court, 15.01.2004, 12 HK O 52+55/02, P-131+135/03
No action for damages lies for payment of excessive prices for vitamins by reason of the defendant’s participation in a worldwide vitamins cartel as established by the Commission with binding force on the court, inasmuch as, as a customer, the plaintiff is not included in the scope of protection of the cartel prohibition in Articles 1 and 33 GWB and Article 823(2) Civil Code, read in conjunction with Article 81 EC, for lack of “targetedness” of the price cartel.
(Article 81 EC; Articles 1 and 33 GWB, Article 823(2) Civil Code)

Berlin Higher Regional Court, 15.01.2004, 2 U 28/03 (Kart), P-203/03
No action lies against a mobile telephony network operator to force it to make its network available to other undertakings for the termination of calls from fixed networks through GSM gateways inasmuch as those undertakings wish to become active, not on the upstream or downstream market, but on the market itself (point 4 of Article 19(4) GWB); nor does refusal of network access otherwise constitute discrimination or a restraint as the restriction is not unreasonable.
(Article 19(4) point 4 GWB, Article 19(1) and (4) point 1 GWB, Article 20 GWB, Article 82 EC, Article 1 GWB)

Berlin Higher Regional Court, 22.01.2004, 2 U 17/02, P-219/02
Action for a finding that the termination by the defendant on 31 December 2002 of the Chrysler Automobile authorised dealer agreement concluded between the parties is ineffective on grounds of abuse of rights; no right to continue to be supplied with Chrysler motor cars and parts; regarding extension of the application by cross appeal: finding that the termination on 31 December 2002 is effective and in particular infringes neither the prohibition on
discrimination provided for in Article 20(1) and (2) of the Law prohibiting Restraints of Competition (GWB) nor Article 81(1) EC (lack of appreciable effect).
(Article 20(1) and (2), first sentence, GWB; Article 81(1), (2) and (3) EC; Article 5(2), point 2, Regulation (EC) No 1475/95; Article 10 Regulation (EC) No 1400/2002; Articles 242 and 315(3), second sentence, second main clause, Civil Code; Article 9 Law on General Conditions of Sale)

Düsseldorf Higher Regional Court, 27.01.2004, W (Kart) 9/01, P-243/01
Rejection of an application for legal aid in an action for damages and for fixing the level of compensation for an anticompetitive boycott and abusively high selling prices for bricks on grounds of non-fulfilment of the requirements of point 2 of Article 116(1) of the Code of Civil Procedure.
(Articles 81 and 82 EC; Articles 823(2) and 249 Civil Code; Article 116(1) point 2 Code of Civil Procedure)

Karlsruhe Higher Regional Court, 28.01.2004, 6 U 183/03, P-54/04
Application for a declaration inadmissible, moreover no compensation for the other side of the market to the vitamins cartel as no damage (comparison between hypothetical profit margin and actual profit margin, not comparison between hypothetical purchase price and actual purchase price).
(Article 33 GWB, Article 81 EC, Article 823(2) Civil Code)

Federal Court of Justice, 10.02.2004, KZR 6+7/02, P-41+69/00
An official payment authorisation procedure (for telecommunications links) does not rule out the actual possibility of a firm submitting a tariff by which it abuses its dominant position and obtaining an authorisation for that purpose because the abuse is not covered by the examination procedure (obiter dictum).
(Article 86 EEC (Article 82 EC); Articles 24, 25, 35 and 39 Telecommunications Law)

Munich Higher Regional Court, 26.02.2004, U (K) 5585/03, P-289/03
Effectiveness of the termination of the dealership agreement with the plaintiff by the defendant on 30 September 2003 on account of the entry into force of the new Community automotive block exemption Regulation 1400/2002 on 31 October 2003 and the resulting need for the defendant to restructure its distribution network throughout Germany and Europe.
(Leave to appeal granted).
(Community automotive block exemption Regulation 1400/2002; Article 307 Civil Code)

Munich Higher Regional Court, 26.02.2004, U (K) 5664/03, P-295/03
Effectiveness of the termination of the dealership agreement with the plaintiff by the defendant on 30 September 2003 on account of the entry into force of the new Community automotive block exemption Regulation 1400/2002 on 31 October 2003 and the resulting need for the defendant to restructure its distribution network throughout Germany and Europe.
(Community automotive block exemption Regulation 1400/2002)
Düsseldorf Higher Regional Court, 03.03.2004, U (Kart) 32/99, P-21/99
Action for disclosure of how many consignments addressed to German recipients and of what format, weight and content they handed in or caused to be handed in to the Netherlands Post Office in 1997; in particular, no ruling-out of this action on grounds of abuse of a dominant position by the plaintiff.
(Article 25(3), first and second sentences, old Universal Postal Convention; Articles 86, 90 and 59 EC, old version; Article 242 Civil Code)

Düsseldorf Higher Regional Court, 24.03.2004, VI U 35/03 (Kart), P-292/03
Dominant position of the mobile telephony network operator on the market for the termination of fixed network calls in its mobile telephony network; no abuse due to the fact that the plaintiff prevents the defendant from using SIM cards and creating mobile radio links because the plaintiff uses the SIM cards for the commercial rerouting of calls from the fixed network (risk to network integrity).
(Articles 19 and 20 GWB, Article 82(1) and (2)(b) and (c) EC, Article 1 UWG)

Düsseldorf Higher Regional Court, 24.03.2004, U (Kart) 43/02, P-12/02
No nullity of a service station agreement on account of a long-term exclusivity clause inasmuch as Article 85(1) EEC (= Article 81(1) EC) and Article 15 GWB, old version (= Article 14 GWB, new version) are not applicable to the service station agreement as an agency contract and the plaintiff has not demonstrated the existence of a substantial market-partitioning effect in accordance with the cumulative effects theory; no infringement of the written form requirement laid down in Article 34 GWB, old version.
(Article 85 EC; Articles 15 and 34 GWB, old version; Articles 125 and 138 Civil Code)

Federal Court of Justice, 30.03.2004, KZR 24/02, P-197/98
If a retailer of brand new motor vehicles who does not belong to the selective distribution system of a manufacturer is unable, on account of the refusal of foreign authorised dealers to supply new vehicles to retailers outside the system, to execute orders from his customers for new cars, he may have a right of action for damages for loss of profit under Article 823(2) of the Civil Code, read in conjunction with Article 81(1) EC, if at the material time the effects of the exemption of the ban on authorised dealers supplying new vehicles to retailers outside the system from the prohibition laid down in Article 81(1) EC did not apply pursuant to Article 6(1) of Regulation (EC) No 1475/95.

Unilateral “black conduct” on the part of the manufacturer and a sustained call for price discipline results, pursuant to Article 6(3) of Regulation (EC) No 1475/95, in the loss of exemption (only) for the period during which the objectionable conduct is likely to influence authorised dealers and only for those distribution agreements which apply to the territory in which competition is distorted by the prohibited conduct. So-called black conduct on the part of its foreign authorised dealers pursuant to Article 6(1), points 6 to 12, of Regulation (EC) No 1475/95 cannot be attributed automatically to the manufacturer.
(Article 81 EC; Regulation (EC) 1475/95, Article 6(1))

Dortmund Regional Court, 01.04.2004, 13 O 55/02 (Kart), P-152/02
Claim for damages by the plaintiff for having paid the defendant excessive prices for vitamins owing to the defendant’s belonging to a vitamins cartel.
(Article 81 EC; Articles 1 and 33 GWB, Article 823(2) Civil Code)
**Kiel Regional Court, 16.04.2004, 14 O (Kart) 8/04, P-24/04**
Effectiveness under competition law of a contractual clause prohibiting SIM cards from being used in transmission systems to feed in connections from one third party to another third party.
(Articles 19 and 20 GWB, Article 82(1) and (2)(b) and (c) EC, Article 1 UWG)

**Dortmund Regional Court, 16.04.2004, 13 O 79/02 (Kart), P-150/02**
After settling the main action, there remains the issue of costs: a prohibition on competition between partners laid down in a partnership agreement is unobjectionable from a competition-law point of view for a period of two years after the resignation of a partner.
(Article 1 of the Law prohibiting Unfair Competition (UWG), Article 1 GWB, Article 81 EC)

**Düsseldorf Higher Regional Court, 21.04.2004, U (Kart) 12/03, P-171/99**
No action lies for pre-contractual liability with respect to a franchise agreement ("Pizza Hut"), inasmuch as, on account of an effective choice of law, the law of the State of Kansas, USA, applies to all claims asserted by the plaintiff; no nullity under Articles 15 and 18 GWB, old version. No compensation for breach of the FTC Franchise Regulations.
(Articles 11, 27, 29, 31 and 34 of the Civil Code Introductory Law; Articles 15, 18, 34 and 98 GWB, old version; Article 85 EC, old version; Article 3 Regulation 4087/88)

**Düsseldorf Higher Regional Court, 21.04.2004, U (Kart) 7/03, P-202/00**
No nullity of the franchise agreement ("Pizza Hut") for infringement of German or European competition law; no action lies because the choice of law is effective and the law of England/Wales applies to all claims asserted.
(Article 11, 27, 29, 31 and 34 of the Civil Code Introductory Law; Articles 15, 18, 34 and 98 GWB, old version; Article 85 EC, old version; Article 3 Regulation 4087/88)

**Düsseldorf Higher Regional Court, 21.04.2004, U (Kart) 14/03, P-149/03**
Validity of the franchise agreement ("Pizza Hut"), since the law of the State of Kansas, USA, applies to all claims asserted by the plaintiff. No compensation for breach of the FTC Franchise Regulations.
(Articles 11, 27, 29, 31 and 34 of the Civil Code Introductory Law; Articles 15, 18, 34 and 98 GWB, old version; Article 85 EC, old version; Article 3 Regulation 4087/88)

**Munich Higher Regional Court, 22.04.2004, U (K) 1582/04, P-94/04**
No action lies for the unlocking of certain SIM cards and for reversal of the refusal to create mobile telephony links because the use of the ceded SIM cards in GSM converters is contractually forbidden.
(Articles 19, 20 and 33 GWB, Article 82(2)(b) and (c) EC, Article 1 UWG)

**Düsseldorf Regional Court, 28.04.2004, 34 O (Kart) 7/04, P-44/04**
Action by the plaintiff for the payment of telephone charges for the making available of SIM cards and the use of its mobile telephony network; effectiveness of the extraordinary annulment of the mobile telephony contracts by the plaintiff because the defendant uses the SIM cards, contrary to agreement, in connection with a GSM gateway to carry outside calls in the plaintiff’s mobile telephony network; no nullity of the corresponding contractual restriction on use.
(Articles 19 and 20 GWB, Article 82(1) and (2)(b) and (c) EC, Article 1 UWG)
Ingolstadt Regional Court, 11.05.2004, 1HK O 1933/03, P-209/04
Termination of a dealership agreement following the adoption of Regulation 1400/2002 valid where there is a corresponding contractual clause (incidentally: Article 81(1) EC, Regulation 1400/2002)

Düsseldorf Higher Regional Court, 23.06.2004, VI-U (Kart) 29/04, P-111/04
Prohibition on offering "Budweiser Budvar" beer for sale independently in a certain territory to the applicant’s customers or on advertising it on the basis of a sole right of distribution until such time as a final decision has been reached on the import agreement concluded between the parties; no appreciable effect on trade between Member States. (Articles 1 and 3 UWG, Article 81(1) EC)

Federal Court of Justice, 13.07.2004, KZR 10/03, P-66/00
On the effectiveness of standard clauses in a motor vehicle dealership agreement (multi-branding, minimum sales, warranties, notice of termination, winding-up of agreement). (Article 307 Civil Code; Article 81 EC, Regulation 1475/95, Regulation 1400/2002)

Stuttgart Higher Regional Court, 22.07.2004, 2 U 202/03, P-30/03
Obligation on the defendant to pay compensation for losses incurred by the plaintiff as a result of the late conclusion of a renewed workshop agreement following adaptation of the distribution system to take account of the new Community automotive block exemption Regulation; unequal treatment of the plaintiff compared with other workshops with which the contractual relationship was continued. (Articles 33 and 20(1) and (2) GWB; Regulation (EC) No 1475/95; Article 81 EC)

Stuttgart Regional Court, 03.08.2004, 41 O 67/04 KfH, P-110/04
No action lies for damages for infringement of the plaintiff’s exclusive distribution right through the appointment of a further authorised dealer because, upon the expiry of Regulation (EC) No 1475/1995, the territorial protection agreement was no longer exempted from the prohibition provided for in Article 81(1) EC. Question of the invalidity of the exclusivity clause owing to the entry into force of the new Community automotive block exemption Regulation. (Article 81 EC, Community automotive block exemption Regulation 1400/2002, Community automotive block exemption Regulation 1475/1995)

Frankfurt am Main Regional Court, 20.08.2004, 3-12 O 40/04, P-95/04
The plaintiff is not entitled to the conclusion of a service contract with the defendant even if the plaintiff fulfils the selective distribution criteria, because the defendant was allowed to terminate the contract vis-à-vis the car dealership without notice and the plaintiff’s trading and workshop businesses constitute an operating entity from a commercial point of view. (Articles 823(2) and 249 Civil Code, Article 81 EC, Community automotive block exemption Regulation 1400/2002, Articles 20 and 33, first sentence, GWB)

Munich I Regional Court, 07.09.2004, 9HK O 3863/04, P-25/05
No right of retention for the defendant against a pecuniary claim for non-activation of SIM cards. (Articles 19 and 20 GWB; Article 82 EC; Article 1 UWG)
Munich I Regional Court, 13.09.2004, 17HK O 23320/03, P-5/05
No right of retention for the defendant against a pecuniary claim for non-activation of SIM cards.
(Articles 19 and 20 GWB; Article 82 EC; Article 1 UWG)

Potsdam Regional Court, 23.09.2004, 51 O 204/03, P-150/04
Obligation on the defendant in the cross action to dispose of used tyres through the plaintiff in the cross action to the extent laid down in the operative part and to make payment and provide information to the plaintiff in the cross action to the extent laid down in the operative part; no infringement of Article 81(1) EC by the contract on which the claims are based since any restriction of competition is in any event not appreciable.
(Article 81(1) and (2) EC, Article 138 Civil Code, Article 134 Civil Code, read in conjunction with Article 266 Penal Code)

Düsseldorf Higher Regional Court, 27.10.2004, VI U (Kart) 41/03, P-15/04
Action by the plaintiff to force the defendant to buy all of his beer requirements from it; action for the disclosure of information about beer bought elsewhere; no applicability of Article 81 EC to the beer supply agreement for lack of appreciability of the restriction of competition.
(Article 81(1) EC; Article 138(1) Civil Code)

Leipzig Regional Court, 27.10.2004, 05 O 5659/04, P-211/04
Decision as to costs after agreed settlement: action by the plaintiff for cessation of the infringement of its comprehensive selective distribution system through the illicit purchasing of new motor vehicles for the purpose of resale by the defendant.
(Article 81 EC; Regulation 1400/2002; Articles 19 and 20 GWB)

Munich I Regional Court, 30.11.2004, 9HK O 7696/04, P-6/05
No right of retention for the defendant against a pecuniary claim for non-activation of SIM cards.
(Articles 19 and 20 GWB; Article 82 EC; Article 3 UWG; Article 33 TKG)

Cologne Regional Court, 16.12.2004, 88 O (Kart) 60/04, P-96/04
No action lies for the activation of SIM cards by the defendant; locking was admissible because the plaintiff uses the SIM cards in breach of contract in connection with a GSM gateway in order to enable other undertakings to terminate telephone calls in the plaintiff’s mobile telephony network; no action lies for use of the SIM cards for commercial telecommunications services.
(Articles 19 and 20 Civil Code, Article 82 EC, Article 1 UWG)

Cologne Regional Court, 16.12.2004, 88 O (Kart) 50/04, P-72/05
No action lies for the activation of SIM cards by the defendant; locking was admissible because the plaintiff uses the SIM cards in breach of contract in connection with a GSM gateway in order to enable other undertakings to terminate telephone calls in the plaintiff’s mobile telephony network; no action lies for use of the SIM cards for commercial telecommunications services.
(Articles 19 and 20 Civil Code, Article 82 EC, Article 1 UWG)
Spain

The matters disputed in the legal proceedings between oil companies and service stations have all been similar, and have focused principally on the possible invalidity of the supply contracts, which the courts have classified as either commission agreements (genuine agency agreements) or re-sale agreements (non-genuine agency agreements) that can be compatible with Article 81(1) (general prohibition) since they could qualify for the exception to the prohibition laid down in the exemption regulations No 1984/1983 of 22 June 1983 and No 2790/1999 of 22 December 1999, both of which relate to the application of the current Article 81(3) EC to certain categories of vertical agreements and concerted practices.

Four of these proceedings were appeals against judgments handed down by courts of first instance. The case of Automoción y Servicios La Safor, S.L. against Compañía Logística de Hidrocarburos, S.A. is a complaint brought before Madrid Court of First Instance No 44 in which the complainant has stated its intention to appeal against the judgment handed down against it.

Judgment of Madrid Court of First Instance No 44 handed down on 10 June 2004 on Ordinary Proceeding 965/2002 / Automoción y Servicios La Safor S.L. v Compañía Logística de Hidrocarburos, S.A

Automoción y Servicios La Safor S.L. brought a complaint against Compañía Logística de Hidrocarburos, S.A. in which the complainant asked to be considered as the re-seller in the strict sense. The court dismissed the request since it considered the contract to be a “commission agreement”, i.e. a genuine agency agreement.


The appeals formed part of ordinary proceedings 895/2001 and 556/2001, which were brought by the complainant before the Madrid Courts of First Instance No 8 and No 15, respectively. The initial judgments dismissed the complaint of Melón, S.A., which appealed against the content of the court's ruling in both cases. The High Court dismissed the two appeals of the service stations since it considered the contracts to be “commission agreements”, i.e. genuine agency agreements. In both judgments, Melón. S.A. was ordered to pay the costs incurred.

Judgment of Section 18 of the Provincial High Court of Madrid, No 94/2004 of 2 June 2004 / Caminas S.A. against Repsol Comercial de Productos Petrolíferos, S.A.

This judgment was handed down on appeal No 218/2003 filed by Repsol in relation to small claims procedure No 53/2001 brought before the Madrid Court of First Instance No 20 by Caminas S.A. against Repsol. The initial judgment on 25 October 2002 upheld the complaint filed by Caminas, S.A., declaring the contracts in question to be null and void as a matter of law and ordering Repsol to pay the costs. Repsol’s appeal was upheld and the contracts were considered to be valid on the grounds that they were “commission agreements”.

Judgment of Section 1 of the Provincial High Court of Gerona, No 188/2004 of 10 June 2004 / Clau, S.A. against CEPSA, Estaciones de Servicio, S.A.

This judgment was handed down on appeal No 48/2004 filed by the two parties in relation to procedure No 266/2002 brought before the Gerona Court of First Instance No 1 by Clau, S.A. against CEPSA, Estaciones de Servicio, S.A. The initial judgment found for CEPSA. Both companies appealed, and CEPSA’s appeal on procedural grounds was dismissed. Clau, S.A.’s
appeal was allowed on the grounds that the contract was a “re-sale agreement”. These are non-genuine agency agreements that in this case were invalid since they did not come under the exemption regulations under Article 81(1). The three contracts, which were for the start-up of a service station and the sale of CEPSA’s products under an exclusivity arrangement, were therefore declared null and void on the grounds that they were contrary to a legal requirement or prohibition and that the price was not determined, which means that no contract existed. The court ordered the parties to reimburse each other for the services supplied under the contract between them under Article 1303 of the Civil Code, after deduction of the full amounts already amortized. The court ordered payment of the defendant’s costs.

Judgment No 1235/2004 of the Supreme Court (Civil Division, Section 1 of 23 December in relation to the proceeding brought by L’Andana S.A. and Estación de Servicio L’Andana S.L against Repsol Comercial de Productos Petrolíferos, S.A.
The judgment resolves the appeal lodged by L’Andana S.A. and Estación de Servicio L’Andana S.L as part of the proceeding brought by these companies against Repsol Comercial de Productos Petrolíferos, S.A.

In their initial complaint filed before the Valencia Court of First Instance, the claimant companies asked for the agreements for operation of the service stations, lease of business and exclusive supply signed for a period of 25 years to be declared null and void.

The claimants considered that Article 12(1)(c) of Commission Regulation No 1984/83 of 22 June 1983 had been infringed with respect to Article 81(1) (ex Article 85(1)) of the EC Treaty, and that the prohibition provided for in Article 81(2) therefore applied. They also claimed that the case law of the European Court of Justice (Case C-234/89 Stergios Delimitis v Henninguer Bräu A.G. on the interpretation of the aforementioned Regulation) had been infringed.

The claimants considered that under Regulation 84/1983, agreements of the kind covered by this procedure are temporarily limited to a period of 10 years. The Supreme Court dismissed the appeal on the grounds that the temporary limitation imposed by the aforementioned Article 12(1)(c) of Regulation No 1984/83 had not been infringed since an absolute exception to this limitation is provided for in Article 12(2) of the Regulation. On the same grounds, it did not consider that the Community case law cited had been infringed.

France
Judgment of the Orléans Appeal Court of 15 July 2004 on an appeal by Toyota France against an interim order by the President of the Commercial Court of Orléans issued on 5 March 2004 and ordering it, subject to a financial penalty, to continue contractual relations with Automobile Diffusion 45

The dispute related to a refusal to recognise as a distributor, under the new Motor Vehicle Regulation No 1400/2002, a dealer whose contract had expired following termination under the previous Regulation, No 1475/95. The Orléans Appeal Court considered, at the interim stage, that the dispute was serious, since it originated in the dealer's inability to meet the qualitative selection criteria. The eviction of the dealer was therefore wrong, since the rejection of his application was not based on objective or legitimate criteria. It could therefore constitute a discriminatory decision contrary to the objectives of Regulation No 1400/2002. The Court thus confirmed the interim measure ordering the manufacturer to continue to
deliver vehicles to the distributor pending the final decision on the substance, which should be given in 2005.

**Judgment of the Paris Appeal Court of 21 September 2004 on an appeal by the Syndicat des professionnels européens de l’automobile (SPEA) against the Competition Council decision not to proceed No 03-D-67 of 23 December 2003 (Peugeot)**

The penalty for a breach by the Council of the obligation to give a ruling within a reasonable time limit is not to annul the proceedings but to make good the loss possibly resulting from such a delay.

Splitting the original referral to the Council into three separate files is not a decision that can be appealed under Articles L 464-2 and L 464-8 of the Commercial Code. The grounds for contesting this division of the referral are inadmissible. In accordance with the *audi alteram partem* principle, the rapporteur may, once the parties are able to reply, alter his assessment of the facts of the case in the proceedings before the Council.

The production by one of the parties of a Commission's statement of objections is intended to bring to the court's notice information which might affect the proceedings in progress pursuant to Article 16 of Regulation 1/2003. This may be done at any time in the course of the proceedings. It does not therefore constitute documentary evidence in support of the appeal.

Payment by a manufacturer of commercial assistance to its dealers is not in itself unlawful where the conditions on which it is granted cannot be objected to on the basis of the exclusions listed in a block exemption regulation (Article 6 of BER No°1475/95). Nor, if they are not discriminatory in any way, may such practices be objected to under provisions stipulating withdrawal of the protection of a block exemption regulation. In the case in point, the practices were not only compatible with Article 81(3) but they have also stimulated competition, maintained the density of the distribution network and the quality of the services provided, and led to significant falls in the prices of the products enjoyed by end-users.

**Judgment of the Paris Appeal Court of 29 June 2004 on an appeal by the Syndicat des professionnels européens de l’automobile (SPEA) against the decision of the Competition Council No 03-D-66 of 23 December 2003 (Renault)**

The penalty for a breach by the Council of the obligation to give a ruling within a reasonable time limit is not to annul the proceedings but to make good the loss possibly resulting from such a delay.

Splitting the original referral to the Council into three separate files is not a decision that can be appealed under Articles L 464-2 and L 464-8 of the Commercial Code. The grounds for contesting this division of the referral are inadmissible. In accordance with the *audi alteram partem* principle, the reporting judge may, once the parties are able to reply, alter his assessment of the facts of the case in the proceedings before the Council.

Payment by a manufacturer of commercial assistance to its dealers is not in itself unlawful where the conditions on which it is granted cannot be objected to on the basis of the exclusions listed in a block exemption regulation (Article 6 of BER No°1475/95). Nor, if they are not discriminatory in any way, may such practices be objected to under provisions stipulating the withdrawal of the protection of a block exemption regulation. In the case in point, the practices were not only compatible with Article 81(3) but they have also stimulated competition, maintained the density of the distribution network and the quality of the services provided, and led to significant falls in the prices of the products enjoyed by end-users.
provided, and led to significant falls in the prices of the products enjoyed by end-users. The introduction of anti-discount plans by Renault does not constitute setting fixed minimum prices - a practice banned by Article 6 of BER No 1475/955 - since evidence of the meeting of minds between economic operators, which characterises the notion of an agreement within the meaning of Article 81, has not been established.

**Netherlands**

*Supreme Court of the Netherlands, 7 May 2004, No. 37.375, X-5, overturning the ruling of the Court of The Hague of 1 June 2001 ( cassation)*

The City of Rotterdam's Port Dues Regulations of 1990 [Verordening zeehavengeld 1990] are central to this case. Natural persons and legal entities whose ships use the port are required to pay port dues. The dues for oil tankers discharging their cargoes, however, is three times as high as those for container ships (which load or unload). X-5 demanded restitution of the (excess) amount of the port dues paid, on the grounds that the Regulations were not binding, as they were in conflict with Article 82 EC.

The Court of The Hague ruled (1) that the Regulations did not affect trade between Member States and (2) that the Regulations were not in conflict with Article 82 EC. X-5 appealed to the Supreme Court against this judgment.

The Supreme Court of the Netherlands overturned the judgment of the Court of The Hague due to its failure to provide a justification for grounds (1) and (2) and referred the case to the Court of Amsterdam for further consideration and a decision. In his conclusion, the Advocate-General of the Dutch Supreme court refers to recitals 29 to 45 of the judgment of the Court of Justice of the European Communities of 17 July 1997 (Case No. C-242/95 GT-Link, ECR 1997, p. I-04449). On the basis of these grounds, the Advocate-General concludes that the Court based its ruling on an erroneous legal opinion. The Court had apparently deemed it to be of decisive importance that "the present method of levying Harbour dues has an unfavourable effect on trade between Member States". It appears, however, from the judgment in the GT-Link case that what is at issue is whether the (alleged) abuse by the public undertaking involved can affect trade between Member States. Without further justification, it is not clear how the facts and circumstances justify the conclusion that there was no abuse, in terms of Article 82 (c) EC. "The circumstance alone that different types of ships make different use of the port and benefit in different ways from the facilities provided, without any indication of the extent of these differences and the relationship of these differences to the differences in the dues charged by the municipality do not provide a basis for this judgment, particularly since the Court expressly did not take a decision on whether oil tankers and container ships may be deemed to be the same in this respect ".

*President of District Court of Arnhem of 19 May 2004, 111855 / KG ZA 04-217, Van der Sluijs Retail B.V. v Autobedrijf X v.o.f. et al. (interlocutory proceedings)*

X operates a filling station. On 14 August 1998, X entered into an exclusive purchasing agreement with TOTAL for the purchase of fuels for a period of eight years (hereinafter "the purchasing agreement"). On 12 May 2003, X terminated the purchasing agreement by registered letter in accordance with European regulations. TOTAL did not agree to this and in accordance with its General Terms and Conditions for Sales and Delivery transferred the

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8 The overview does not relate to judgments by the Court of Rotterdam or the Trade and Industry Appeals Tribunal (CBB) in (administrative law) proceedings on decisions taken by the Director-General of NMa. Prior to 1.5.2004, Community competition law was not applied autonomously in these proceedings.
purchasing agreement to Van Der Sluijs Groep. X refused to allow its filling station to be supplied by Van Der Sluijs.

The President of the District Court of Arnhem took into consideration firstly the fact that insufficient insight could be obtained into the effect of the purchasing agreement on trade between Member States. As a result, the possibility that such an affect existed could not be excluded. For this reason, the purchasing agreement had to be tested on the basis of European competition law. The President ruled that the purchasing agreement was not subject to Regulation 2790/1999 in relation to the Block Exemption for Vertical Agreements. Although Van der Sluijs had a market share of less than 30%, the purchasing agreement had lasted for longer than five years, even after Article 12 (2) of the block exemption was applied. With regard to the Community De Minimis Notice, the President ruled that Van Der Sluijs's market share was approximately 7%. The lowest threshold stipulated in the Notice is 5%. Furthermore, on the basis of Article 9 of the Notice, the Commission was of the opinion that agreements do not restrict competition if the thresholds have not been exceeded by more than 2% in the preceding two years. The President was therefore of the opinion that an appeal to the Notice would not a priori be unsuccessful. In his provisional judgment, the President ruled that the purchasing agreement was therefore not in conflict with European competition law.

Nevertheless the President ruled that the agreement was null and void on the grounds of national competition law. Section 7 of the Competition Act stipulates turnover thresholds which must be applied in determining whether the agreement constitutes an appreciable restriction of competition. Van Der Sluijs's turnover substantially exceeded the thresholds set out in section 7 of the Competition Act. Since Van der Sluijs had not submitted a request for exemption, pursuant to section 17 of the Competition Act (which ceased to be possible after 1 May 2004), the purchasing agreement was deemed to be null and void in accordance with section 6 of the Competition Act.

President of the Court of The Hague, 27 May 2004, KG/RK 2002-979 and 2002-1617, Marketing Displays International Inc. v VR Van Raalte Reclame B.V. (interlocutory proceedings)

An exclusive licensing agreement was entered into by Marketing Displays International (hereinafter "MDI") and Van Raalte Reclame B.V. (hereinafter "Van Raalte") in relation to interchangeable aluminium frames for billboards. MDI petitioned the Court of Rotterdam to enforce three American arbitration decisions on the grounds of sections 1075 of the Netherlands Code of Civil Procedure, read in conjunction with sections 985-991 of the Netherlands Code of Civil Procedure, and in accordance with the Treaty of New York. Van Raalte protested against the enforcement of these arbitration decisions on the grounds that they were in conflict with the public order. According to Van Raalte, the exclusive agreement, to which the decisions related, was in conflict with Article 81(1) EC. The agreement does not fall under (1) the De Minimis Notice and (2) Regulation 240/96.

Van Raalte appealed to Article 3(4) and (6) of Regulation 240/96 in relation to the Block Exemption for Technology Transfers. The appeal to Article 3(4) was not successful. The President ruled that the clause of the agreement in question did not have the aim of dividing customers amongst the parties. The clause sooner relates to the quality of distributors. The President then ruled that the agreement fell outside the scope of the block exemption due to the applicability of Article 3(6). The obligation to relinquish rights to improvements is a restriction of competition.
Finally Van Raalte argued that these were market sharing agreements which were not justified on the basis of intellectual property rights. The President was of the opinion that MDI had not refuted Van Raalte's claim adequately and ruled that the agreement was in conflict with Article 81(1) EC. The provisional measures requested by MDI were refused.

*President of the Court of Haarlem of 28 September 2004, 103753/KG ZA 04-347, plaintiff v Daewoo Motor Benelux B.V. (interlocutory proceedings)*

Daewoo has opted for a qualitative, selective distribution system as set out in Regulation 1400/2002. This system gives Daewoo the right to select its distributors in the Netherlands in accordance with its own criteria. The plaintiff was of the opinion that the Regulation also obliges Daewoo to recognise all garages (repairers) which meet Daewoo’s standards for Authorised Repairers.

In the interlocutory proceedings, the central question was whether Daewoo was obliged to enter into a Recognised Repairer contract with the plaintiff. The fact that Daewoo had declared that its distribution agreements were subject to Regulation 1400/2002 and, by doing so, had opted for a system of selective distribution was not disputed. However, Daewoo argued that this did not give rise to an obligation to enter into an Authorised Repairer contract if a repairer meets Daewoo’s standards. According to Daewoo, whether or not it enters into a contract depends on the provisions of national contract law. The President took into consideration the fact that Regulation 1400/2002 could not impose restrictions on suppliers with regard to the number of recognised repairer's who meet the quality criteria determined by the supplier. Equally the Regulation cannot stipulate where the recognised repairer's businesses should be located. The President also took into consideration the fact that the Court cannot compel a supplier to enter into an agreement with a repairer who meets all the supplier's after sales standards, even if the supplier has opted for the system of selective distribution, pursuant to Regulation 1400/2002, and does not meet the conditions of the group exemption with regard to authorised repairers. The President decided that such an obligation to enter into a contract cannot be derived from the passage from Regulation 1400/2002 cited by the plaintiff nor from any other provision of the Regulation. If a supplier, who has opted for a system of selective distribution, within the scope of Regulation 1400/2002, fails to comply with its obligations under the block exemption with regard to the selection of its repairers, the only effect of this is that the block exemption ceases to apply to the supplier, with all the consequences of this. According to the President, if the block exemption ceases to apply, this does not result in an obligation on the part of the supplier to enter into a contract with a repairer who meets all the supplier's standards.

*Supreme Court of the Netherlands of 3 December 2004, C03/213HR, plaintiff v Coöperatieve Bloemenveiling FloraHolland U.A., as the legal successor of Coöperatie Bloemenveiling Holland B.A. (cassation)*

Coöperatie Bloemenveiling Holland B.A. (BVH) operates a flower auction. Before the flowers offered for auction can be auctioned, they have to be "processed" (prepared for the auction). Since 1990 the plaintiff has been contracted by BVH to process carnations from Spain for a number of auction seasons. In 1998, the plaintiff noticed that BVH had instructed third parties other than the plaintiff to process carnations from Spain, in breach of the agreement. The plaintiff demanded compensation from BVH.

In essence, the dispute related to the interpretation of the agreement. The plaintiff argued that it had an exclusive right to process all the carnations offered for auction. On the other hand, BVH was of the opinion that the plaintiff had an exclusive right to process all carnations
offered for processing at the auction. The Court of The Hague—contrary to the ruling of the District court in The Hague—concurred, in principle, with the plaintiff’s argument. The Court of The Hague concluded that such an interpretation of the agreement would contravene section 6 of the Competition Act and Article 81 EC and that this would result in (partial) nullification.

The Supreme Court of the Netherlands ruled that the Court of The Hague should have indicated whether, in its opinion, the agreement had already restrained competition due to its object or effect and why the one or the other had occurred. After all, the conclusion that the contract restricted competition could only be drawn on the basis of an extensive investigation of the evidence in the form of a market analysis, which did not appear from the disputed decision to have taken place. The Court of The Hague had also failed to give attention to the unfavourable effect on trade between Member States, to the requirement of appreciable effect and to the possibility that the matter in question is a bagatelle, in terms of section 7 of the Competition Act. The Supreme Court of the Netherlands overturned the ruling of the Court of The Hague and referred the case to the Court of Amsterdam for further assessment and a decision.

Dekker Breeding B.V. v Sunfield Holland B.V (No. 03/1647) and Sunfield Holland B.V. v Dekker Breeding B.V. (Nos 04/87 and 04/1033). (appeal against the decision in the interlocutory proceedings)

Dekker is a company which focuses on the cultivation of chrysanthemum strains. Sunfield’s business is the reproduction of chrysanthemum strains for cultivation purposes (slips) for growers. A sister company of Dekker is also active on the market for the reproduction of chrysanthemum strains. A joint venture of Sunfield and Van Zanten Cuttings B.V. is active on the market for the cultivation of chrysanthemum strains.

Dekker and Sunfield entered into a licensing agreement in 1991, which includes a limit on both Sunfield's sales and its production. Dekker terminated the licensing agreement on 1 January 2004. Sunfield petitioned the Presiding Judge of the Court of The Hague inter alia to order Dekker to retract its notice of termination of the agreement. Dekker's further appeal is partially against the judgment of the Presiding Judge that the termination of the agreement by Dekker constitutes an abuse of rights and that Dekker was required to comply strictly with the licensing agreement with Sunfield, without the limitations with regard to the identity of the growers and the quantity of production material that Sunfield may supply.

The Court of The Hague dealt firstly with the question of whether the limitations with regard to the identity of Sunfield's buyers and the quantities of planting material to be produced by Sunfield, contained in the licensing agreement, are legally valid. According to the Court, the licensing agreement does not fall within the scope of the block exemption pursuant to Regulation 240/1996 (technology transfer). In accordance with Article 3 (preamble) and (4) and (5), the block exemption does not apply to limitations on sales and production, which are provided for in the clause in question. Under Regulation 772/2004 (which replaced Regulation 240/1996 on 1 May 2004), in principle a limit on production imposed on a licence holder in a non-reciprocal agreement is not prohibited. According to the Court, the joint market share of the parties did not exceed the threshold stipulated in Regulation 772/2004, so that the production limit falls under the exemption.

The Court ruled that Dekker was justified in terminating the licensing agreement as of 1 January 2004. It follows from the Court's assessment that Dekker, in the absence of an
individual exemption, pursuant to Article 81(1) EC and section 6 (1) of the Competition Act, was not entitled to impose restrictions with regard to the identity of Sunfield's buyers nor, up until 1 May 2004, with regard to the quantity of planting material to be produced.

**Sweden**

The Swedish Supreme Court in its judgment of 23 December 2004 in Case No. T 2280-02 rejected the complainant’s claim for a preliminary ruling by the European Court of Justice and upheld the judgment of the court of appeal in the part where leave to appeal had been granted. The complainant inter alia argued that a clause in a nation-wide standard agreement implied a prohibited anti-competitive agreement and that it therefore should be void under Article 81(2) and under the corresponding provision in the Swedish Competition Act. The Supreme Court found, however, that it had not been shown that trade between Member States could have been affected and therefore examined the practice only under national competition rules.

In a decision of 9 December 2004 in Case No. Ö 1891-03 the Swedish Supreme Court rejected a complaint of the Swedish Board of Civil Aviation about miscarriage of justice and petition for a new trial. The Supreme Court also decided not to request in the case a preliminary ruling from the European Court of Justice. In its judgment the Supreme Court i.a. commented on the interpretation and application of Article 82 EC.

**United Kingdom**

*Days Medical Aids Ltd v (1) Pihsiang Machinery Manufacturing Co Ltd (2) Pihsiang Wu sub nom Donald PH Wu (3) Chiang Ching-Mung Wu sub nom Jenny Wu (Judgment of Langely J in the Chancery Division of the High Court, 29 January 2004)*

The Claimant brought an action for breach of contract. Under the contract in question, the first defendant in 1996 had appointed the claimant, in consideration of a payment of $1.108US, to be the exclusive distributor in Europe of the first defendant’s mobility scooters for a five-year term. The exclusive contract could be renewed for subsequent five-year terms, subject inter alia, to the Claimant company paying a fee of $100,000 to the first defendant. The Claimant asserted that the first defendant had subsequently breached the exclusivity provisions of the contract by supplying scooters to a company in which a former director of the Claimant was involved and furthermore alleged that the first defendant had ultimately ceased supplying the Claimant with the mobility scooters. In its defence, the first defendant pleaded that that the agreement was void on the grounds that it infringed Article 81(1) and because it was in unreasonable restraint of trade under English law.

The court found that the agreement had neither an anti-competitive object or effect and therefore did not infringe Article 81(1). Therefore, it could not be void under Article 81(2). However, the court also considered that if the agreement had infringed Article 81(1), then it would not have been exempted by the Vertical Agreements Block Exemption regulation (Regulation 2790/1999), as the renewal provisions of the agreement effectively made the contractual exclusivity period exceed five years. In a similar vein, if the agreement had infringed Article 81(1), the court found that the agreement would not have satisfied the criteria in Article 81(3) (though in any event, at the time of the judgment, Regulation 1/2003 had not yet entered into force and the court would therefore have been unable to find that there were no grounds for action on the basis that Article 81(3) applied to the agreement).
The court considered that under English common law, the duration of the exclusivity provision would have meant it was in unreasonable restraint of trade. However, the court considered that it would have to disapply the common law doctrine, since the agreement did not infringe Article 81(1). The court found that using national law to render a contractual provision void in an agreement that did not infringe Article 81(1) would have breached the principles laid down in cases such as Bundeskartellamt v Volkswagen and VAG Leasing (Case C-266/93). Accordingly, the Claimant’s claim for breach of contract succeeded and a base figure for the value of the claim was assessed at £10.2m.

_Bernard Crehan v (1) Inntrepreneur Pub Company (CPC) (2) Brewman Pub Group, (Court of Appeal, judgment of 21 May 2004)_

Mr Crehan appealed against a first instance court ruling dismissing his claim for damages against the first defendant arising from a breach of Article 81(1) EC. Mr Crehan had acquired the leases for two pubs owned by the first defendants. Each of the leases obliged Mr Crehan to purchase beer from Courage, a leading UK brewer. The pubs proved to be serious loss-making enterprises and Mr Crehan surrendered his leases. Courage commenced proceedings for recovery of amounts owed. Mr Crehan counterclaimed for damages as well as for set-off of those damages against any amount owed by him to Courage and he joined IPC as defendants in the proceedings. He claimed that the pub leases to which he had been subjected, including the beer ties, were in breach of Article 81(1) and that his business failure was the result of his inability to compete with nearby pubs, which, free of similar kinds of beer ties, had been able to purchase beer at discounted prices and therefore to re-sell at lower prices.

It was held at first instance that the leases and beer ties did not infringe Article 81(1) and that Mr Crehan could not sue for damages on the grounds of rules of national law which prevented persons from suing under illegal contracts to which they were party.

Mr Crehan appealed to the Court of Appeal which in turn made an Article 234 reference to the European Court of Justice. As a result of the ruling of the European Court of Justice, Mr Crehan’s appeal was allowed by the Court of Appeal and certain issues were remitted for first instance rehearing. At the rehearing, the first instance court found that the beer ties in the leases did not infringe Article 81(1), inter alia on the grounds that they did not satisfy the first limb of the test in Delimitis v Henninger Brau AG (1991) ECR I-935. However, the first-instance court agreed that the failure of Mr Crehan’s business was caused by the beer ties and that, while party to the agreement, Mr Crehan did not share any responsibility for the Article 81(1) infringement.

The Court of Appeal therefore awarded Mr Crehan provisional damages totalling £131,336 plus interest.
In this case the English Court of Appeal considered an appeal against a first-instance judgment striking out a claim for alleged infringement of Article 81(1).

The first instance judge had struck out a claim by Unipart in which it alleged that Article 81(1) had been infringed by the first defendant’s alleged practice of incorporating a margin squeeze policy into its agreements for the wholesale supply of airtime services to independent service providers of mobile telephone services. Unipart in its action had claimed that the prices charged to independent service providers, such as Unipart, for such services were so high as to place them at a significant competitive disadvantage compared to service providers that were owned or controlled by the defendants, especially since the defendants were allegedly cross-subsidising the latter. Unipart had claimed that its agreement to pay such prices was part of an agreement that infringed Article 81(1).

The defendants argued at first instance that even if such a policy had existed and had been adopted (both of which they denied), then it would not have been adopted pursuant to an “agreement” within the meaning of Article 81(1). The defendants’ application for summary judgment to strike out the claim was successful, with the first-instance judge holding that any such conduct would have been unilateral on the part of the defendants. Unipart appealed.

The Court of Appeal held, applying Bayer AG v EC Commission (Joined Cases C-2/0P & C-3/01P) that the essential feature of an agreement under Article 81(1) was a concurrence of wills between at least two parties. Unilateral conduct could only subject to attack under the EC competition rules under Article 82 – and under Article 82, dominance in a market was a necessary condition for liability. The Court of Appeal considered that the defendant’s conduct in setting its prices was not the subject of an agreement between the parties. It found that the first-instance judge had been right to find that the pricing conduct was unilateral and outside the scope of Article 81(1). The Court of Appeal noted, applying Richard Cound Ltd v BMW (GB) Ltd [1997] EuLR 277, that simply because the conduct had contractual effect did not prevent it from being wholly unilateral. According to the Court of Appeal, Unipart did not consent to or acquiesce in the alleged policy of margin squeeze.