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 their national reports.

1. Developments in the Member States
   1.1. Changes to national competition legislation

**Belgium**

In 2005 a Bill was drawn up to amend the Act on the Protection of Economic Competition, as coordinated on 1 July 1999.

The main thrust of the Bill concerning the Protection of Economic Competition, which is currently being debated, is threefold:

1. to integrate the modernisation of European competition law rules;
2. to increase the capacity of the Competition Council to deal with restrictive practices;
3. to elevate the Competition Council to the status of the body hearing appeals from decisions of sectoral regulators in the area of economic competition.

The main change brought about by 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 of the Treaty concerns the abolition of the system of notification as applied since 1962.

Since 1 May 2004, undertakings must themselves assess whether their agreements fulfil the conditions of Article 81 taken as a whole. Although there is no obligation to abolish national notification systems, maintaining the notification and exemption rules would not be in keeping with the objectives underlying the modernisation exercise. Moreover, it would unduly complicate the application of competition law by national courts. The Bill proposes, therefore, that the provisions on notifications and exemptions be abolished.

The Bill also provides for the possibility for the Belgian competition authority to adopt guidelines, thereby enabling it to map out the broad lines of its policy.

In view of the decentralisation of the European competition rules, a section has been devoted to cooperation with the European Commission and the competition authorities of the other Member States, reproducing the principles governing such cooperation set out in Article 11 of Regulation (EC) 1/2003.

In the field of merger control, the procedure introduced by the new Bill, along the lines of Regulation (EC) No 139/2004, includes the possibility for undertakings to submit commitments as early as phase I of the investigation.

At the institutional level, it is proposed that the composition of the Competition Council be modified by increasing the number of full-time members (from four to six), and that the Competition Council be relieved of some of its responsibilities by transferring them to the “Auditorat”. This body, which has been set up alongside the Competition Council, itself replaces the ‘Corps des Rapporteurs’ and sees its staff complement increased to a maximum of 10.
The “Auditorat” is entrusted with the task of closing the file on complaints and applications for interim measures on grounds of inadmissibility or lack of substance. It also has the power to clear certain merger operations between undertakings using a simplified procedure.

This shifting of responsibilities, combined with a raising of the merger notification thresholds, stems from the fact that the Competition Council used to devote much of its time to merger operations which had little or no competitive impact on the Belgian market.

Henceforth, the Competition Council should be able to concentrate more on cases involving restrictive practices and abuses of dominant positions.

In order to strengthen the fight against restrictive practices, the Bill also provides for the possibility of granting leniency to undertakings which help to establish the existence of a prohibited practice by furnishing evidence to the competition authority.

Lastly, the Competition Council hears, in cases laid down by law, appeals against decisions handed down by sectoral regulatory authorities. These include the Institut belge des Postes et Télécommunication (IBPT), the Commission bancaire et financière et des Assurances (CBFA), the Commission de Régulation de l'Electricité et du Gaz (CREG) and the rail infrastructure manager.

It is for each organic law to specify which decisions may be appealed against to the Competition Council.

**Czech Republic**

The Czech national competition rules are enshrined in Act No. 143/2001 Coll., on the Protection of Competition. In 2005 this act was amended by Act No. 361/2005 Coll., which entered into force on 1 October 2005. In particular, it incorporates the Community block exemptions in Czech competition law so that they would be applied to agreements with no effect on trade but which are caught by the national competition rules. Furthermore, the Act on the Protection of Competition was amended by the Act No. 127/2005 Coll. with regard to its application in the electronic communications sector, as outlined below.

**Summary of new provisions :**

- **Implementation of the possibility** to seal business premises in the course of a dawn raid (Art. 21 par. 5)
- **Article 22 – sanctions :**
  - for procedural delicts a fine up to 1 % of the turnover may be imposed
  - a new type of fine is introduced for the breach of seals.
- **Community Block Exemptions** will be applied to agreements without a European Community dimension (Article 4)
- Another amendment to the Act on the Protection of Competition issued in 2005 concerns the application of the Act to the electronic communications sector. It was introduced by Act No. 127/2005 Coll. (Act on Electronic Communications) which entered into force as of 1 May 2005.
Denmark

The Danish Competition Act was amended by law No 1461 of 22 December 2004, and took effect on 1 February 2005. The main legislative changes to the Competition Act consist of the adaptation of the Competition Act to Regulation (EC) No 1/2003. The Danish Competition Act is based on the same principles as EC competition law and it was therefore natural to adapt the Competition Act to the recent changes in the EC competition law regime.

The main amendments of the Danish Competition Act are:

- **Transparency**
To ensure transparency in relation to violations of the Competition Act, the imposition of fines in criminal proceedings is published on the web. This is to facilitate civil lawsuits for damages for the benefit of consumers and undertakings. This concerns both fines imposed in courts and fines imposed or accepted under section 23 (section 13 (2) of the Competition Act). Danish Courts are under an obligation to forward copies of judgments concerning the Competition Act or Article 81 or 82 to the Competition Authority (section 20 (4) of the Competition Act).

- **Access to file**
The amendment limits parties’ access to file. This is in accordance with Regulation (EC) No 1/2003 Article 27 and 28, which also limits access to file with regard to correspondence and documents exchanged between the European Commission and the competition authorities of the Member States (section 15a (1) of the Competition Act).

- **Commitments**
In line with Regulation (EC) No 1/2003 the Competition Council can make commitments provided by undertakings binding, if they fulfil the requirements of section 6(1), section 11(1), Articles 81 or 82 (section 16a (1)). The provision is in line with Article 9 of Regulation (EC) No 1/2003.

- **Inspections**
The amended Competition Act allows the Competition Authority to seal documents and seal business premises for a period of 72 hours. It is also clarified that the Competition Authority can inspect business premises pursuant to Articles 81 or 82 on behalf of the Commission or on behalf of the competition authorities of the Member States (section 18 of the Competition Act).

- **Notification system**
The amendment gives the Competition Council and the Competition Authority a number of new instruments in the administration of the Act. The national notification system, has contrary to the EC rules, been preserved in Denmark. However, the Competition Council or the Authority must refrain from considering notifications, if an agreement or practice appreciably affects trade between EU Member States (section 9(2) of the Competition Act).

- **Dominant undertakings general trading terms**
A new provision in the Competition Act consists of the right of the Competition Council, under certain conditions, to order a dominant undertaking to submit its general trading terms to the Competition Authority (section 10a of the Competition Act). The purpose of the provision is to increase the transparency in a dominant undertaking’s general trading terms for
the benefit of the Competition Council, when it considers whether a dominant undertaking has abused its dominant position.

- **Other issues**

The Danish Competition Authority can now issue decisions in English if the parties so request (section 15c). The Competition Council orders, which were previously limited to one year in duration, can now cover a period of more than one year. Two members have been added to the Competition Tribunal. The Tribunal now consists of a chairperson and four members with expertise in either law or economics. The chairperson must be a judge at the Danish Supreme Court (Højesteret) (section 21 (1)).

As a result of the modernisation of the EC competition rules, the jurisdiction of the Danish Competition Authority has been broadened. The Danish Competition Authority can now deal with cases under Articles 81 and 82 where undertakings are situated in Denmark, but where the competitive effects concern markets outside Denmark but within the European Union (section 23a of the Competition Act).


**Germany**

On 1 July a law comprehensively amending the Law prohibiting Restraints of Competition (GWB) entered into force. The purpose of the amendment was to bring German law into line with European law, and in particular with Regulation (EC) No 1/2003. Under the new law, the notification and approval system for anticompetitive agreements previously existing in German law is replaced by a legal exception system and parallel application of European and national law is provided for. In order 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. Under the amendment, fines may now also be imposed for infringements of European law. The rules governing the imposition of fines on undertakings have also been aligned very closely on the European rules. However, 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 have been maintained. In addition, under the amendment civil law sanctions for infringements of antitrust law have been improved so as to give more weight to private law enforcement. And besides the Federal Cartel Office, the regional cartel authorities are now authorised to apply European law. The law as amended also contains rules on the exchange of information between authorities and on the transposition of Article 15 of Regulation (EC) No 1/2003 (amicus curiae).

In 2005 the Federal Government agreed that a further amendment was necessary as regards control of abuses. It was felt that the existing prohibition on powerful undertakings making offers below cost price more often than only “occasionally” should be strengthened in the case of foodstuffs. Even occasional sales below cost price are therefore prohibited in the case of foodstuffs, except where there is an objective justification. The Federal Government hopes thus to strengthen the position of small and medium-sized commercial undertakings, which are unable to stand up to the low-price strategies of the large retailers and are often squeezed out of the market as a result. It is planned to pass the amendment in 2006.
**Estonia**

In 2005, there were two major legislative developments: firstly, key amendments to the Estonian Competition Act have been drafted and secondly, the Chief Public Prosecutor has been preparing leniency guidelines.

The amendments to the Competition Act focus on abolishing the exemption notification system. The notification system was found to be unnecessary as it was very rarely used by undertakings. The draft amendment has been submitted to the Parliament and will hopefully enter into force on July 2006.

With respect to the preparation of leniency guidelines, according to the Penal Code, agreements, decisions and concerted practices which restrict competition are regarded as criminal offences. Criminal proceedings can be terminated by the court upon the Prosecutor’s Office's request in the event of lack of public interest in proceedings and in case of negligible guilt (Code of Criminal Procedure art 202). The Public Prosecutor's Office may also, by its order, 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 such assistance, the detection of the criminal offence and collection of evidence would have been precluded or would be especially complicated (Code of Criminal Procedure art 205).

The abovementioned provisions are the main legal basis for the adoption of leniency guidelines in the cases of anti-competitive cooperation of the undertakings. In order to ensure the effective implementation of the leniency program, the Chief Public Prosecutor has been working extensively on drafting the leniency guidelines. The Competition Board has submitted to the State Prosecutors’ Office its proposals in this regard.

**Greece**

**Main provisions of Law 703/77 (the Greek Antitrust Legislation) and its principal recent amendments**

Law 703/1977\(^1\) on the control of monopolies and oligopolies and the protection of free competition was enacted shortly before Greece became a Member of the European Community. The main provisions of the Law remain similar to that of Articles 81 and 82 of the EC Treaty. In 2005, Law 3373/2005, amending law 703/1977, was adopted by the Greek Parliament, which to a large extent aligned the Greek legislation with Council Regulation (EC) No 1/2003 and introduced several major modifications to Greek antitrust law; (i) it provided the legal basis and the legislative authorization for a leniency program; (ii) it enhanced the powers of investigation of the Hellenic Competition Commission (“HCC”), as well as the latter’s powers in case of infringements of Law 703/1977; (iii) it reintroduced the prohibition on the abuse of a relationship of economic dependence; (iv) it empowered HCC to take regulatory interventions in sectors of the economy; and (v) it reinforced the internal structure of the HCC (inter alia, by providing the HCC with a distinct legal personality and by increasing the number of HCC’s members and its employees).

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It should be noted that the HCC is expected to issue Notices\(^2\), *inter alia* on the issues of leniency and of access to file, in the immediate future.

**Summary of new provisions**

- **Leniency Programme**
  Law 3373/2005 introduced the legal basis for the Greek leniency programme (addition of a new par. 4 to art. 9 of Law 703/77). The introduction of the leniency programme is imminent. Participation of an undertaking in the leniency programme will exempt the natural persons concerned from criminal prosecution. The programme will not apply to undertakings abusing their dominant position.

- **Inspections – Investigations**
  According to Law 3373/2005, the powers of investigation of the HCC are significantly enhanced, in line with Regulation (EC) No 1/2003

- **Amicus Curiae**
  By virtue of the insertion of a new element #14 in par. 2, article 8b of Law 703/1977, the HCC, on its own initiative, may issue a written (or, with the permission of the competent court, oral) opinion addressed to the courts with regard to the application of Articles 81 and 82 EC and may request any document necessary for the issuance of such opinion (with the exception of the procedure before the Athens Administrative Court of Appeal and before the Council of the State).

Pursuant to new paragraph 3 in article 18 of Law 703/1977 it is expressly provided that any court applying Articles 81 and 82 EC may request from the European Commission the transmission of information in the latter’s possession or it may request the European Commission’s opinion on issues concerning the application of the EC competition legislation.

- **Sanctions**
  According to article 9 of Law 703/77, the powers of the HCC in case of infringements of Law 703/1977 have been enhanced.

- **Other issues:**
  
  a. *Prohibition of Abuse of Economic Dependence Relationship*
  
  **Article 2a of Law 703/1977: Prohibited Abuse of a relationship of economic dependence**

  Law 3373/2005 re-introduced article 2a (abolished by the amendment to Law 703/77 in August 2000), which governs relationships of economic dependence between one or more undertakings and a customer or supplier, where the customer or supplier has no equivalent alternative source of supply or demand of the product or service in question. Under those circumstances, it constitutes an abuse of the relationship of economic dependence to impose arbitrary trading conditions, or discriminate, or unexpectedly and unjustifiably terminate the long-lasting commercial relationship.

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\(^2\) In the form of decisions.
b. Regulatory Intervention in Sectors of the National Economy

Law 3373/2005 introduced a new article 5 on the possibility of regulatory intervention in sectors of the economy.

Upon request by the Minister of Development or ex officio, the HCC may examine a specific sector of the Greek economy and if it confirms that in the said sector the conditions for effective competition do not exist and at the same time considers that the application of articles 1, 2, 2a and 4 ff. does not suffice for the creation of conditions of effective competition it may, by virtue of a justified decision, take any absolutely indispensable measure of conduct or structure for the creation of conditions of effective competition in that specific sector of the economy.

c. Alignment with various provisions of Regulation (EC) No 1/2003

Art. 8b of Law 703/1977, is amended, as follows:

- Without prejudice to the competences of other authorities appointed by virtue of a pertinent legislative provision, the HCC is deemed to have exclusive competence with regard to the provisions of the present law and Articles 81 and 82 EC.

- The HCC may withdraw the benefit of an exemption according to para 2, art. 29 of 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 of the Treaty.

- The HCC must apply the Community competition rules in close cooperation with the European Commission and the Competition Authorities of other Member States of the EU.

According to the new art. 11b of law 703/1977, the initiation by the European Commission of proceedings for the adoption of a decision under Chapter III of Council Reg. (EC) No 1/2003 shall relieve the HCC of its competence to apply Articles 81 and 82 EC. Where a competition authority of another Member State has received a complaint or is acting on its own initiative under Articles 81 or Article 82 of the Treaty against an agreement, decision of an association or practice of one or more undertakings, the HCC may for this reason suspend or terminate the proceedings initiated on its initiative or reject the complaint, or proceed normally and issue a decision on the substance of the case.

d. Joint Ventures

According to Law 3373/2005 all full function joint ventures are considered to be concentrations subject to merger control provisions. However, to the extent that the creation of a joint venture has a cooperative dimension, it is examined under the criteria of article 1 par. 1 and par. 3 of Law 703/1977. In the course of such an evaluation, the HCC shall take into account: a) whether the two or more parent undertakings exercise, to a significant degree, activities in the same market as the joint venture or in an upstream, downstream or neighbouring, closely related market and b) whether the cooperative effects arising directly from the creation of the joint venture provides the undertakings involved with the possibility to eliminate competition in a substantial part of their markets.
**Spain**

In 2005 no new legal provisions amending domestic competition law have been adopted. Nevertheless, there has been intense activity with the aim of reviewing the current Spanish Competition System.

**Government proposals for new legislation**

1. **White Paper on the Reform of the Spanish Competition System**

   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 review of the legislative and institutional competition framework in Spain to ensure that the best instruments and structures 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 Authorities, the fight against anticompetitive practices, the merger control system, the control of State aid and the advocacy role of the Competition Authority. These measures provide for greater independence for this Authority, the strengthening of enforcement powers in particular by means of the introduction of a leniency program, the speeding up of judicial review procedures, better coordination with industry regulators and, possibly, the direct application of national competition rules by courts.

   The White Paper was subject to a public consultation process via the website of the Competition Service, and many contributions and comments have been received.

2. **Preparation of the Draft law**

   The main proposals of the White Paper are included in the draft Competition Act currently under preparation. The draft has been sent for consultation to the Competition Tribunal. The Competition Tribunal has made several observations, some of which are included in the draft.

   Furthermore, the Consejo de Defensa de la Competencia, which is the body in charge of mutual collaboration, co-ordination and information between the State and the Autonomous Communities to promote uniform application of the legislation on competition, has issued a favourable report.

   The draft is to be submitted to the Parliament in the course of 2006

**France**

A first decree (No 2005-1668), dated 27 December 2005, fleshes out the conditions of application of the competition rules which were brought into line with Regulation (EC) No 1/2003 in 2004. It specifies the procedures for providing assistance pursuant to Article 22(1) of the Regulation. It lays down new rules of procedure for examining cases before the Competition Council with an eye to the effectiveness of public action and in conformity with
the rights of the defence. It establishes both the framework for the compulsory transmission of judgments delivered pursuant to Articles 81 and 82 (pursuant to Article 15(1) of Regulation (EC) No 1/2003) and for requests for opinions or information made by courts to the European Commission further to Article 15 (2) of Regulation (EC) No 1/2003.

A second decree (No 2005-1667), also dated 27 December 2005, lays down rules governing the representation of the Competition Council before the appeal court.

A third decree (No 2005-1756), dated 30 December 2005, establishes civil and commercial courts specialising in disputes relating to the application of national and Community competition rules.

Summary of new provisions

Inspections

Decree No 2005-1668 lays down rules governing the assistance that may be provided by officials of other national competition authorities to the authorised inspectors of the Directorate-General for Competition, Consumer Affairs and Fraud Control (DGCCRF): the report must mention the name and the presence of the assisting inspector and refer to the decision of the Minister authorising the assistance.

Amicus Curiae

Decree No 2005-1668 provides that the Competition Council will be represented before the court hearing appeals from its decisions by its President or a person appointed by him.

Decree No 2005-1667 extends the possibility for the Competition Council to produce written observations before the appeal court by permitting it to intervene orally at hearings in the same way as other independent administrative authorities. The same possibility of oral intervention had already been offered to the Minister for Economic Affairs.

Access to file

With regard to business secrets, the Decree of 27 December 2005 sets out the procedure to be followed by businesses when indicating business secrets and asking that they be classified as such. It sets out the conditions governing the refusal of such a request where it is made out of time or where it is abusive or unfounded, and lays down new rules governing access to the file in conformity with the rights of the defence and with the principle of good administration of the public interest.

Commitments/Sanctions

Decree No 2005-1668 lays down the procedures for processing commitments proposed to the Competition Council by businesses and the conditions governing the payment of any penalties imposed by the Competition Council.

Private enforcement
Decree No 2005-1756 lists the eight civil and commercial courts specialising in disputes relating to the application of national and Community competition rules, namely the courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes. The Paris Court of Appeal has been chosen as the only court with jurisdiction to hear appeals.

**Ireland**

In 2005 there was no substantive change to national competition legislation apart from the repeal of retention orders.

**Repeal of Retention Orders:**

Under Section 45 (3) of the Competition Act 2002 the Competition Authority could seize, under warrant, original books, documents and records. Subsection (6) stated that “*Any books, documents or records which are seized under subsection (3) may be retained for a period of 6 months or such longer period as may be permitted by a Judge of the District Court ...*” This meant that where the Competition Authority sought to retain any book/document/record seized pursuant to warrant beyond a 6 month period that retention had to be approved by the District Court.

This requirement was repealed under Section 76 of the “Investment Funds, Companies and Miscellaneous Provisions Act 2005”. This means the requirement that the Competition Authority must apply to the District Court for permission to retain or extend the retention period on documents seized is now repealed. However provisions of the old requirement under Section 45(6) still apply to evidence seized before 30th June 2005. Subsection 76 (3) “Investment Funds, Companies and Miscellaneous Provisions Act 2005” provides:

"*Notwithstanding the repeal by this section of subsection 6 of Section 45 of the Competition Act, that subsection 6 shall continue to apply to any books, documents or records seized or obtained under that section before commencement of this section.*"

**Italy**

Law no. 262 of 28 December 2005 repealed article 20 of the Competition Act which entrusted the Bank of Italy with the enforcement of competition rules on agreements, abuses of dominant position and mergers in the banking sector. Therefore, as of 2006, the Italian Competition Authority has full and exclusive competence to apply (national and Community) competition rules across all economic sectors.

**Cyprus**

In 2005 there were no legislative developments to the national legislation of Cyprus.

**Latvia**

In 2005 there were no legislative developments to the national legislation of Latvia.

**Lithuania**

In 2005 there were no legislative developments to the national legislation of Lithuania.
**Luxembourg**

There has been no change in legislation relating to competition as such, since the adoption of the law of 17 May 2004 relating to competition.

**Hungary**

In 2005 many provisions of the Competition Act (CA) were amended. The rationale behind the modifications was the following: firstly, several provisions of the CA had to be brought in line with the new Hungarian rules governing administrative procedures, which are complementary to the competition provisions; secondly, certain CA rules were amended to facilitate the application of European Community law and cooperation within the ECN; thirdly, experience gathered in the application of competition rules also gave rise to the amendment of certain provisions. In a further legislative development, since 1 September 2005, bid rigging in public procurement procedures or in procedures for the award of concessions is assessed, depending on the contract value, as a lesser or more severe crime punishable by an imprisonment of up to two or five years (Criminal Code, § 296/B.)

**Summary of new provisions**

The individual exemption system was abolished.

Unlike the rules under the previous régime, any person may now make a complaint or an informal complaint alleging the infringement of the competition rules to the Competition Office. Complaints can be submitted to the Competition Office on a properly completed form issued by the Competition Office. If the information provided is qualitatively sufficient to initiate a competition supervision proceeding, the Competition Office will treat the form submitted as a complaint, otherwise it will deal with it as an informal complaint. The reason for the distinction between a complaint and an informal complaint is essential because a person making a “real” complaint has additional rights: he may have limited access to documents and he may make an appeal against a decision of the Competition Council which finds that the conditions for the opening of an investigation are not fulfilled, before a judicial court. The advantage of the new system is that through the appropriate filling out of the form, complainants provide more detailed information about the alleged infringement, facilitating the investigation of the authority. On the other hand, persons not well enough informed about the market situation can only submit informal complaints relieving the authority from the administrative burden caused by the great number of unfounded complaints and the appeals against decisions rejecting such complaints.

Prior to the amendment introduced 2005, parties suffering damages were not expressly entitled under Hungarian law to turn directly, i. e. without obtaining a prior decision from the competition authority, to court. The amendments recognise the direct effect of EC law and explicitly authorise courts to decide on the infringement of the antitrust rules, and to reach decisions to this effect. The amendments to the CA have inserted detailed rules for regulating the procedures of private enforcement of antitrust law. For example, if the Competition Office or an administrative court of appeal establishes the unlawfulness of an agreement or conduct in a certain case, the civil court is indeed bound by that part of the decision. Civil courts are also obliged to inform the Competition Office about the submission of claims in order to facilitate its appearance in the judicial proceedings as *amicus curiae*. 
More detailed rules were also introduced for sector inquiries. The initiation of those inquiries and the procedure to be followed are more clearly regulated.

Commitment decisions were also introduced into the CA. The Competition Office could apply this form of decision only in cases where the investigation was based on EC law. It was considered that this possibility should be extended to national law.

The new amendments also affected to some extent the investigative powers of the Competition Office. According to a new provision of the CA, physical back-up copies of data carriers acquired with IT forensic means qualify as any other data and therefore the Competition Office has access to them. Legal privilege also became regulated in the Act, based on the principles of EC competition law.

**Malta**
In 2005 there were no legislative developments to the national legislation of Malta.

**Netherlands**
On 7 December 2004, Dutch Parliament approved the bill which transformed the Netherlands Competition Authority into an independent administrative authority. As of 1 July 2005, the Netherlands Competition Authority is no longer an agency of the Ministry of Economic Affairs, but has acquired a Board with the status of an independent administrative authority. The Board of the Netherlands Competition Authority consists of three members. The most important amendment to the Competition Act is that the Minister of Economic Affairs ceased to have the power to issue directives in individual competition cases. The Minister remains responsible, however, for competition policy and may issue the Netherlands Competition Authority with general directives. The Amendment Act (Independent Administrative Authority) [Wet tot wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan] provides for the full integration of the Office for Energy Regulation (DTe) into the Netherlands Competition Authority. Acquiring the status of an independent administrative authority has no consequences for the legal position of the Netherlands Competition Authority’s employees. They continue to be employed by the Ministry of Economic Affairs.

**Summary of new provisions**

**Sanctions:**
Specific guidelines concerning fining in the construction sector (available in Dutch at the Netherlands Competition Authority’s website www.nmanet.nl)

- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Road Construction and Infrastructure Construction Sector (GWW) - 13 October 2004
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Installation Engineering Sector - 21 April 2005
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Housing and Utility Construction Sector -1 September 2005 (Rectification of
the Publication on the Application of Fines in respect of Certain Anticompetitive Activities in the Housing and Utility Construction Sector - 11 October 2005
- Guidelines on Fines in respect of cables and wires – 17 November 2005
- Guidelines on Fines in respect of green areas – 24 November 2005
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Manufacture of Concrete Products (mortar, concrete paving stones, prefabricated concrete piles, concrete floor elements) - 24 November 2005

Other issues

Guidelines for informants

In December 2005 the Netherlands Competition Authority enacted guidelines for informants. The purpose of these guidelines is to inform individuals who have information concerning possible violations of the Competition Act about the possibilities and conditions for disclosing information to the Netherlands Competition Authority.

By giving insight into the way the Netherlands Competition Authority deals with informants (and their anonymity), the Netherlands Competition Authority expects more informants to come forward with information. This is important since information provided by individuals can be crucial for enacting the tasks entrusted by law to the Competition Authority. It can lead to new investigations or give more insight into specific market sectors.

One of the central aspects in the guidelines is the possibility for informants to remain anonymous. If a person whose identity is unknown to the Netherlands Competition Authority comes forward with information, it will refrain from taking steps to find out the identity of the individual and as a result this person can be sure that his identity will not be revealed. If, on the other hand, the Netherlands Competition Authority knows the identity of the informant, their anonymity cannot be guaranteed because it can be ordered by a court to reveal the identity of the informant if this should be deemed necessary in a specific case.

The guidelines for informants set out different possibilities for informants to give their information to the Netherlands Competition Authority. To ensure that individuals effectively provide the information they hold, the Netherlands Competition Authority has made an agreement with a national contact point for reporting crime anonymously. Naturally, individuals can also call the direct information line of the Netherlands Competition Authority or send an email. Another possibility to give information to the Netherlands Competition Authority is through a third person who functions as an intermediary.

Most importantly the Netherlands Competition Authority wants to encourage informants to contact it if they think they may have interesting information.

Austria

After lengthy and exhaustive preparatory work, the proposals for a Cartel Act and an amended Competition Act were submitted for debate in January and were adopted in June by
Parliament (2005 Cartel Act, BGBI 61/2005; 2005 amended Competition Act, BGBI 62/2005). The key points of the two amendments are the transposition of Community law (Articles 81 and 82 EC) into Austrian cartel law, the abolition of the notification and registration systems, the introduction of a leniency programme plus some changes to aspects of centralised merger control (higher intervention thresholds, transfer of notification from the Cartel Court to the Federal Competition Authority (BWB) and bringing cooperative joint ventures under centralised merger control).

**Summary of the main new rules**

The essential elements of the reform that entered into force on 1 January 2006 are:
- Prohibition of cartels and abuses of dominant positions in line with Articles 81 and 82 EC
- Repeal of the authorisation requirement for cartels and of the notification requirement for vertical distribution agreements and non-binding recommendations of associations in favour of a legal exception system
- Procedures in accordance with Regulation (EC) No 1/2003 (in particular termination decisions and commitments)
- Legal authorisation to adopt a leniency programme (see BWB's manual on its website: www.bwb.gv.at)
- Merger notifications to the BWB instead of the Cartel Court
- Marked raising of several thresholds for the notification requirement
- Bringing cooperative joint ventures under merger control

**Poland**

In 2005 there were no key changes to Polish competition law.

**Portugal**


As a follow up to the Portuguese Competition Authority’s Recommendation to the Government concerning the functioning of the motor vehicle fuel market, two legal measures were issued in 2005 in order to promote more competition in this market.

The first of these is intended to prevent regulations on security from constituting a barrier to the entrance of new operators, particularly the hypermarkets. Apart from seeking to ensure a more competitive fuel market, consumer protection is also envisaged. The Decree also imposes an obligation on retailers to display their pricelists in large panels placed along highways allowing consumers to make their choice of supplier before entering in the premises of the fuel station.

*Recommendation nº 1/2005 - Gas sector*

The introduction of natural gas in Portugal required a new legal framework on installation security norms as well as on the creation of the inspection bodies.
The Portuguese Competition Authority recommended that the Government revoke the decision granting to the “Instituto Tecnológico de Gás” (ITG) the right to act as a Gas Facilities Inspector and as a Certifier. As the ITG is a non-profit making public utility, whose main associates are gas undertakings, its activity as a gas supplier certifier could lead to distortions of competition.

The Portuguese Competition Authority also suggested further clarification of the obligations for different operators in this area and measures to reduce the strong information asymmetries between operators and consumers.

*Recommendation nº2/2005 – Mobile telephony services*

The Portuguese Competition Authority presented a Recommendation to the Government on the form and the places in which the prices of services provided by mobile telecommunication operators are to be presented. It proposes measures that will facilitate choice of the most efficient tariff for consumers and promote tariff competition among mobile communications operators.

Comparing tariffs is a highly complex matter and involves taking a vast number of variables into account. This makes the choice of the most suitable tariff for each consumer more difficult. The Portuguese Competition Authority has therefore decided to submit a recommendation to the Government, proposing that it should pass legislation enabling consumers to calculate monthly expenditure and compare tariff plans among operators or within the same network, as well as other loyalty and penalty conditions, by means of standard simulators on every operator’s website.

The Authority considers that this instrument will provide consumers with the “minimum cost” option by enabling them to compare the different tariffs offered by operators for a given consumption profile. This will allow them to select the most favourable alternative on the basis of price.

*Summary of new provisions*

*Draft proposal of Decree-Law on Leniency Programme*

Portugal currently does not have a leniency programme. However, the Portuguese Competition Authority presented to the Government a draft proposal which would create a leniency programme providing for full immunity or the reduction of the fines applicable in case of practices caught by article 4 of the Portuguese Competition Act (very similar to Article 81 of the EC Treaty), imposed either on undertakings or on natural persons/individuals. The proposed regime will benefit only the first two undertakings that come forward, and sets two levels of fine reduction –up to 50% and over 50% - and includes the possibility of “leniency plus”.

The Portuguese Competition Authority has presented a draft proposal to the Government which aims to give full effect to Article 15 of Council Regulation (EC) No 1/2003 on cooperation with national courts, as it considers that its enforcement could be jeopardized in the absence of the adequate legal procedures at national level. This draft proposal aims to clarify the framework for presenting “amicus curiae briefs” by the Commission or by the Portuguese Competition Authority to national courts, as well as for opinions requested by national courts from both agencies. It also establishes the legal channel for the communication of judicial decisions referring to Articles 81 and 82 of the EC Treaty to the Commission.

**Slovenia**

In 2005 there were no legislative developments to the national legislation of Slovenia.

**Slovakia**

There were no legislative developments in 2005. The Office is currently working on new guidelines relating to Inspections, Leniency and Sanctions.

**Finland**

The Parliament approved a bill in December concerning payments such as bribes and sanctions, including competition infringement fines, so that they shall no longer be tax-deductible as this undermines their deterrent effect. The law shall be enforced for the first time in the 2006 taxation year (360/1968).

**Sweden**

**Summary of new provisions**

- **Inspections:**
  Amendment to Article 48 of the Competition Act: a decision by the Stockholm City court concerning inspections may cover homes and other premises used by members of the board and employees in the undertaking which is subject to investigation (Act 2005:598)

- **Sanctions:**
  Amendment to Article 33 of the Competition Act: right to claim compensation for damages caused by undertakings which, intentionally or negligently, have infringed the Competition Act or Articles 81 or 82 of the EC Treaty (Act 2005:598).

**United Kingdom**

In 2005 there were no legislative developments to the national legislation of the United Kingdom.

1.2. Enforcement of EC competition rules by national competition authorities

*The following decisions have been reported by the Member States:*
Belgium

Case summaries

Abuse of dominant positions

On 30 November 2005, the Belgian Competition Council handed down, at the end of a proceeding initiated to examine an abuse of a dominant position, a decision accepting the commitments proposed by the undertaking Coca-Cola Enterprises Belgium (CCEB). The decision supplements the decision adopted by the European Commission on 22 June 2005 (Case COMP/39.116) in view of the fact that the objections were different. The same product market definition was used.

In the absence of an express provision for the possibility of accepting commitments under Belgian law, the Competition Council based its decision on Article 45 of Regulation (EC) No 1/2003, which states that the Regulation is binding in its entirety (including, therefore Article 5) and directly applicable in all Member States.

The commitments offered were assessed and further developed by the competition authority. They were forwarded to the leading operators on the market for their comments. Applying the same logic as the 13th recital to Regulation (EC) No 1/2003, the decision finds that the commitments given by CCEB suffice to meet the Competition Council's concerns and answer adequately the objections raised without its being necessary to establish whether there has been or still is an infringement. The commitments will help to intensify competition on the Belgian market for carbonated soft drinks. CCEB commits itself to applying equal conditions to all its customers in an equivalent situation. This principle of non-discrimination forms the basis for all the clauses of these commitments and of CCEB’s commercial and operational policy.

The decision became final in the absence of an appeal within the time limits.

Agreements and concerted practices

On 29 July 2005, the Belgian Competition Council handed down, at the end of a proceeding which began as an own-initiative investigation by the ‘Corps des Rapporteurs’ in response to a complaint, a decision concerning the granting by the Belgian Professional Football League (Ligue belge de football professionnel - LBV) of retransmission rights in first and second division Belgian football championship matches for the seasons 2005-2006, 2006-2007 and 2007-2008. On 9 May 2005, the LBV had, on behalf of first and second division football clubs, allocated all such rights to Belgacom Skynet.

Such a joint sale of their retransmission rights constituted, on the part of the football clubs, an agreement the lawfulness of which had to be verified in the light of Article 81. Article 81 was applicable because the criteria set out in the Commission notice containing guidelines on the effect on trade were met.

The Competition Council considered that the granting by the LBV to Belgacom Skynet of all television retransmission rights was not contrary to Article 81 EC. The Council took into account, inter alia, the fact that Belgacom, the former incumbent telecommunications operator, was a new entrant to the market for pay-TV services, which had hitherto been dominated by other channels.
This decision by the Competition Council has been appealed against before the Brussels Court of Appeal. The Court’s judgment is expected during the second half of 2006.

**List of decisions taken by the national competition authority applying Articles 81/82**

- **Decision 2005-I/O-40 of 29 July 2005:** Combined sale of the retransmission rights in the Belgian football championship (LBV).
  - Full text of the decision (in Dutch only):
    - Revue trimestrielle de jurisprudence du Conseil, p. 28 on the Competition Council’s website at the address:
  - Text of the press release (in French):
  - Text of the press release (in Dutch):

- **Decision 2005-I/O-52 of 30 November 2005:** Distri-One SA / Coca-Cola Enterprises Belgium SPRL
  - Full text of the decision (in French only):
    - Recent Competition Council decisions on the Council’s website at the address:
  - Text of the press release (in Dutch):

- **Decision 2005-P/K-58 of 21 December 2005:** G. Delandes Diffusion / Federauto
  - Full text of the decision (in French only):
    - Moniteur Belge (M.B.) 27.2.2006 (p. 10503-10506)
    - Raad voor de Mededinging. Driemaandelijkhs Tijdschrift van Rechtspraak, 2005, No 4, p. 94:

**Czech Republic**

In 2005, the Office issued the following two decisions applying Article 82 of the EC Treaty:

*Abuse of Dominance by State Owned Forestry Company*
In 2005, an investigation was initiated with respect to a possible breach of the Competition Act and the Article 82 EC by the state-owned company Lesy České republiky, s.p. (the Forests of the Czech Republic, hereinafter referred to as LCR). LCR terminated contractual relationships with its suppliers concerning forestry works by declaring some contracts invalid and requiring a change to a system based on individual orders.

The Office for the Protection of Competition established that LCR had a dominant position on the market for growing activities, exploitation activities in the forest and on the market of raw timber. It concluded that LCR caused factual detriment to its contractual partners consisting of a temporary interruption of the forestry activities as well as non-material detriment, resulting from uncertainty about further possibilities of cooperation with LCR, which was to the prejudice of the investments already implemented by the affected companies.

LCR proposed to the Office the adoption of measures and commitments, which the Office for the Protection of Competition found would eliminate any further possible negative impact of LCR’s activities on its contractual partners. A decision was adopted by the Office under which LCR was obliged to reinstate its former contractual relationships. Furthermore, a duty was imposed on LCR to perform the selection of all its contractual partners for the complex supply of growing and exploiting activity exclusively on the basis of transparent and undiscriminating tenders, the principles of which had been negotiated with the Office. In line with the Act, the Office ceased its investigation on the basis that the behaviour in question had not resulted in a substantial distortion of competition. LCR complied with the abovementioned remedial measures.

*Abuse of dominant position by telecoms operator*

Since 2002, the incumbent telecoms operator ČESKÝ TELECOM, a.s. (hereinafter referred to as ČTc) had offered price plans intended for households and small entrepreneurs, containing call credits or free minutes as a part of a monthly flat rate. The abuse of the dominant position of ČTc consisted in bundling services together, i.e. the monthly flat rate offered on markets where it has a substantially dominant position together with the services offered on the above mentioned markets where the competitive environment is continually developing. The customers of ČTc, by purchasing a price plan containing a call credit or free minutes, obtained certain calls “for free”. In case a customer telephoned less than the amount of the call credit or free minutes, he or she still had to pay the full monthly flat rate, and the amount of payment did not reflect the fact that the call credit (free minutes) had not been fully used. The structure of the price plans in question did not enable the break down of the payment into the call charges and the lease of the telephone line. Customers were for this reason less willing to call through other operators, because they did not want to lose something they obtained “for free” as part of the monthly flat rate. Customers of ČTc were not informed when they had used up their free minutes, or call credits. Customers were also unable to make a comparison on the basis of cost with the services offered by other telecoms operators due to the non-transparent price conditions.

However, harm was caused primarily to the competitors of ČTc who could only compete on an insignificant level. Thus, the development of a sound competitive environment, from which consumers would ultimately have profited, was impeded. It was proven during the procedure that the conduct of the incumbent had an unfavourable impact on the structure of competition on the common market and on trade between the Member States of the European
Community. For the breach of Article 82 EC a penalty of CZK 205,000,000 (approximately EUR 7.5 million) was imposed on ČTc.

**Denmark**

*Abuse of dominant position*

**TV2’ prices and conditions for TV-commercials**

The Competition Council concluded that parts of TV2’s rebate system constitute infringements of Article 82 of the Treaty and section 11(1) of the Danish Competition Act. The relevant market is defined as the market for TV advertising in Denmark. The state owned national TV-company TV2 has a dominant position on this market with a market share above 50%, during the period of 2001-2005. The geographic market is Denmark.

Because of TV2’s penetration of nearly 100% of the TV market and its large share of the viewing audience, advertisers who wish to run national TV advertisement campaigns with high coverage need to place most of their TV advertisement campaign budget with TV2. In effect, competition on the TV advertising market mainly takes place with respect to the marginal part of advertisers’ TV advertisement budgets. When concluding annual agreements with advertisers, TV2 offers an annual rebate, the size of which depends on the advertiser’s annual budget. TV2’s annual rebate is a progressive retroactive rebate with several volume thresholds. The percentage granted ranges from 4.7% to 19.7%.

An economic analysis was made of the effects of the rebate scheme. It was found that TV2’s annual rebate allowed TV2 to charge a high price on the first part of an advertiser’s annual budget and a low price on the marginal part of an advertiser’s budget. Because of TV2’s position on the market and the fact that competition mainly takes place concerning the allocation of the marginal part of advertisers’ TV advertisement campaign budgets, TV2’s annual rebate was capable of having an exclusionary effect on the market. TV2 was ordered to abandon the rebate scheme. The case was based on a notification from TV2.

**Elsam’s use of abusive pricing**

The Competition Council decided that the energy company Elsam had abused its dominant position on the market for wholesale of electricity (spot and OTC). Elsam is a Danish energy company active in the production and sale of electricity at the wholesale level. The abuse consisted of excessive pricing of electricity on the wholesale market on Nord Pool, cf. Article 82 (1)(a) EC. The geographic market comprised the Western part of Denmark.

The Competition Council considered that in the period 1 July 2003 – 31 December 2004 Elsam abused its dominant position over a total period of 900 hours by submitting excessive price bids for the supply of electricity to Nord Pool. The Competition Authority considered that Elsam’s pricing behaviour resulted in a loss for the consumers (private and businesses) of EUR 25 million. Due to the particular circumstances on the wholesale electricity market, the Competition Council had to take the unusual step of ordering Elsam to follow a certain pricing scheme for Elsam’s submission of bids to Nord Pool. The pricing scheme prescribes
the use of a certain formulas. This limits the prices Elsam can submit to Nord Pool’s spot market.

Agreements and concerted practices

Carlsberg’s standard agreement in the Horeca-sector

In October 2005, the Danish Competition Council adopted a decision that renders commitments from Carlsberg concerning its beer agreements with Danish hotels, restaurants and cafés legally binding. In its preliminary assessment, the Danish Competition Authority found that certain business practices of Carlsberg in the supply of beer relating to exclusivity requirements were of concern under section 6 of the Danish Competition Act/Article 81 EC and section 11 of the Danish Competition Act/Article 82 EC. In order to remedy the competition concerns identified, Carlsberg offered to abide by a set of commitments. The Competition Authority found that Carlsberg’s commitments met the aforementioned competition concerns.

The Danish Competition Authority investigated Carlsberg’s practices in the following areas: (1) equipment exclusivity and (2) outlet exclusivity. The relevant product market concerned the sale of branded beer to the horeca-sector. The geographic market comprised Denmark. With a market share of around 70% of the horeca-sector, Carlsberg had a dominant position on the relevant market.

Carlsberg’s commitments reduced the termination period for its installation and cooperation agreements. Carlsberg also made a commitment, which will enable the installation of a second beer barrel installation at bar counters. The commitments furthermore concern the possibility of an outlet owner to buy existing beer installations from Carlsberg, at a pre-determined price. In addition, Carlsberg made various commitments regarding the right to switch supplier, a limit to the overall use of sponsorship agreements etc.

List of decisions taken under Article 81/82

Competition Council meeting 23 February 2005
Post Danmark
Commitment decision following the 2004 Article 82 decision
English press release:
http://www.ks.dk/english/competition/national/2005/postdanm/

Competition Council meeting 27 April 2005
Kriterier for optagelse i Rørforeningens vvs-nummersystem og vvs-katalog Article 82
English press release:
http://www.ks.dk/english/competition/national/2005/roerforen/

Competition Council meeting 22 June 2005
DBC Medier Article 82
English press release:
http://www.ks.dk/english/competition/national/2005 dbc/

Dansk Reklame Film Article 81/82 – commitments
**Competition Council meeting 26 October 2005**
Carlsberg standardaftaler med horeca-sektoren  
Article 81/82 - commitments

English press release:
http://www.ks.dk/english/competition/national/2005/carlsberg/

**Competition Council meeting 30 November 2005**
ELSAM A/S misbrug af dominerende stilling i form af høje priser  
Article 82

English press release:

**Competition Council meeting 21 December 2005**
DONG’s aftale med HNG/MN af 7. marts 2003  
Article 81/82 - commitments

English press release:
http://www.ks.dk/english/competition/national/2005/dong/

**Germany**

**E.ON Ruhrgas**

The Federal Cartel Office prohibited E.ON Ruhrgas AG from concluding long-term gas supply contracts. Through its practice of tying to itself in the long term a large part of its regional and local gas customers by requiring them to obtain more than 80% of their supplies from it, E.ON Ruhrgas infringes European and German competition law (Articles 81, 82 EC, Section 1 GWB). Binding distributors by long-term supply contracts has a foreclosure effect because it prevents the market entry of newcomers and deprives third-party suppliers of supply opportunities for years to come.

The decision has been appealed against before the Düsseldorf Higher Regional Court. At the same time, the undertaking has applied for annulment of its immediate enforceability.

Press releases:
17.01.2006
13.12.2005
27.09.2005
Edeka/ALIDIS

The Federal Cartel Office investigated the acquisition by EDEKA Zentrale AG & Co. KG of a shareholding in the purchasing and marketing cooperative ALIDIS/Agenor both under the merger control rules and from the point of view of Article 81 EC. It considered that the conditions of Article 81(3) EC were met. The investigation was carried out in connection with the takeover of SPAR Handels AG and Michael Schels & Sohn GmbH & Co. OHG by the grocery chain EDEKA. EDEKA will in future operate the cooperative jointly with ITM Entreprises S.A. and Centros Comerciales Ceco S.A. (EROSKI).

Press release:
29.8.2005

Deutsche Post

In response to complaints, the Federal Cartel Office prohibited Deutsche Post AG from hindering or discriminating against rival small and medium-sized providers of postal services in the area of “mail preparation services” and it ordered the immediate enforcement of the decision. Deutsche Post appealed against both the decision and the order of immediate enforceability. The Düsseldorf Higher Regional Court upheld the immediate enforceability order. A judgment on the main issue is still pending.

Mail preparation services involve mainly collecting and pre-sorting letters as well as feeding letters weighing less than 100 grams into Deutsche Post’s sorting centres.

Deutsche Post currently grants discounts for such services of between 3 and 21% to its own large customers, but also to PostCon Deutschland as a registered cooperative society. Through this discounting, however, Deutsche Post prevents competitors (known as “consolidators”) from entering the market for the collection, pre-sorting and feeding-in of letters. Small and medium sized enterprises do not as a rule generate the minimum quantities of mail prescribed by Deutsche Post in order to qualify for the above discounts. It is only through the activities of consolidators that such enterprises are able to reduce their mailing costs.

In its examination of the case, the Federal Cartel Office came to the conclusion that this practice of Deutsche Post infringed German and European competition law (Article 82 EC). In a parallel proceeding, the European Commission found that the German Postal Act infringed EU law.

Press releases:
Lottery companies

The plan of three lottery companies to jointly acquire a majority shareholding in a company which, as a commercial lottery agent, provides lotteries and sports betting over the Internet, raised, in the view of the German Cartel Office, competition concerns in respect of both the merger control rules and Article 1 GWB and Article 81 EC. The parties concerned abandoned the project.

Industrial insurance

In 2005 the Federal Cartel Office imposed fines totalling some EUR 150 million on ten private and seven public insurance companies and the directors involved. The infringement of competition law (Article 81 EC) had a nation-wide and cross-industry effect on, in particular, the industrial property insurance sector (fire, consequential loss, EC and all-risk insurances, and technical insurances) as well as the transport insurance and the buildings/monopoly insurance sector. According to the Federal Cartel Office’s findings, in the middle of 1999 the relevant insurers agreed to put an end to the intense competition at that time in premiums and conditions and thus cause a turnaround in the market. The cartel was based on the agreement between the directors of the companies represented in the Special Committee for Industrial Property Insurance (FIS) of the German Insurance Association (GDV) on the principles governing their future competitive behaviour in regard to the renewal of contracts (the so-called “FIS principles”). The FIS principles were adapted over time to take account of current market conditions so as to be able to enforce a uniform level of premium increases, excesses payable by policyholders as well as other changes to contract terms. This was ensured by a gentlemen’s agreement to the effect that companies would not interfere with competitors’ premium adjustments when renewing contracts by making favourable offers themselves and that they would not charge less than a minimum premium for new business. In the area of transport insurance the parties to the gentlemen’s agreement came to an understanding at least from 2001 onwards that they would impose premium increases and adaptations to conditions on policyholders and that in so doing they would not undercut or interfere with each other (agreed principle: “respect the lead”). The decisions imposing the fines are not yet final, the parties concerned having appealed against them. The appeals are being heard by the Düsseldorf Higher Regional Court.

Press releases:
15.09.2005
23.03.2005
Estonia

Decisions taken under Article 81/82 in 2005

Decision no. 24-L of 5 May 2005 (Article 82).
An abuse of dominant position was alleged to have been committed by Estonian Air with respect to the application of dissimilar pricing conditions with regard to independent travel bureaus and its own retail outlets. The Estonian Competition Board considered that an abuse of dominance was not established.


Greece

Decisions 277/2005 and 284/2005 taken under Article 81/82:

Undertakings involved

a) Greek Supermarkets’ Association (“SESME”)
b) The following supermarkets active in Greece: Veropoulos SA, ATLANTIC SA, Vasilopoulos SA, METRO SA, Massoutis SA, Sklavenitis SA and TROFINO SA

Alleged infringemen:

SESME’s managing board sought the uniform application by all supermarkets, which are members of SESME, of a list which unilaterally set the discount percentage that should be provided by each supplier to all members of SESME. Furthermore, seven of the biggest Greek supermarkets (some of them were also members of SESME’s managing board) arranged and participated in two meetings in February and April 2004. The objective of these meetings was to agree on measures in order to cope with competition from big multinational supermarkets (namely Carrefour) and from big multinational discount stores (namely Lidl and Plus).

Legal assessment

The Hellenic Competition Commission took the view that the recommendation issued by SESME, which set a fixed amount of discount for each supplier amounted to a decision fixing minimum prices. In addition, the Hellenic Competition Commission established that the meetings of seven retailers led to cooperation among the participants on the application of a common policy which aimed to distort and restrict competition in the relevant market.

Decision

The Hellenic Competition Commission concluded in decision 277/2005 that SESME’s recommendation constitutes a decision that infringed article 1 paragraph 1 of law 703/1977 and article 81 (1) EC. It also established in supplementary decision 284/2005 the existence of
a concerted practice among the participants in the two meetings and therefore the infringement of article 1 paragraph 1 of law 703/1977 and article 81 (1) EC. As a result, the Hellenic Competition Commission imposed the following fines:

- SESME EUR 15 000.000 (that is 0.28% of the total turnover of SESME’s members)
- ATLANTIC SA EUR 430 080
- Veropoulos SA EUR 500 713
- Massoutis SA EUR 347 784
- METRO SA EUR 338 201
- Sklavenitis SA EUR 611 844
- TROFINO SA EUR 6 000
- Vassilopoulos SA EUR 721 240

Spain

Abuse of dominant position

_E-S ASEMPRE vs CORREOS_

On 21 January 2002, the 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) alleging the infringement of Article 6 of the Competition Act and Article 82 EC. The applicant claimed that CORREOS signed contracts with large clients for the 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.

During the investigation, the dossier was split into two cases due to the impossibility of obtaining data from the cost accounting system as it was not available at that time.

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

The second dossier was closed in September 2005 by a commitments decision. In this case, the alleged infringements were detected in agreements between CORREOS and entities such as banks for postal services and consisted of the granting of unfair discounts and the setting of predatory prices for big clients.

The market was defined as the market for the liberalised post services and for universal post services which are not reserved, and the market for reserved universal post services, both in the Spanish territory. The commitment decision sets conditions to ensure that discounted prices always cover costs.
T-S GRUPO GAS NATURAL

GRUPO GAS NATURAL (GGN), an integrated natural gas undertaking, has a dominant position in all of the Spanish natural gas markets. On June 2001, two of its subsidiaries, GNC and ENAGAS, signed a contract that reserved certain re-gasification capacity to GNC, the supply branch of GGN.

The Spanish Competition Court adopted a resolution concluding that GRUPO GAS NATURAL (GGN) infringed article 6 of Spanish Competition Act and Article 82 EC. The Court considered that GGN abused its dominant position in the Spanish natural gas markets, including the market consisting of the natural gas basic network to import natural gas to Spain by reserving, by contract, certain re-gasification capacity to GNC. It found that the exclusive reservation of re-gasification capacity to GNC amounts to discrimination vis-à-vis the other agents in the system and constitutes the imposition of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage within the meaning Art. 82(c) of the Treaty. ENAGAS is the owner of the majority of the facilities in the natural gas basic network, including re-gasification plants. It is legally obliged to give access to these plants to all the agents of the system, dealing with requests in chronological order of receipt. The Court imposed a fine of EUR 8 million on GRUPO GAS NATURAL.


Complete list of decisions taken under Articles 81/82 by the Competition Service and the Competition Tribunal in 2005:

- TELEFONICA MOVILES, VODAFONE, AMENA (no grounds for action).
- SOCIEDAD GENERAL DE AUTORES Y EDITORES (no grounds for action-procedure).
- GLAXO WELLCOME S.A. (no grounds for action-procedure).
- COCA - COLA (no grounds for action-procedure; see also COMP IV/ 39.116).

France

Abuse of dominant position
Decision 05-D-12 of 17 March 2005

The companies “20 Minutes” and “Métro”, which publish general-information daily newspapers that are distributed free of charge and are financed exclusively through advertising, complained to the Competition Council about a refusal by the association EUROPQN (which groups together the large national daily newspapers) to include their publications in its study into the size of the readership of national dailies.

They argued that this refusal, which in fact denied them access to the advertising market under normal competitive conditions, stemmed both from an agreement aimed at slowing down their growth and from an abuse of a dominant position. They coupled their complaint with an application for interim relief.

At a meeting devoted to discussing the interim relief applications by 20 Minutes and Métro, EUROPQN proposed commitments designed to meet the competition concerns raised. Taking these factors into account, and after having received comments from interested third parties, the Council held that the commitments offered by EUROPQN provided a satisfactory solution to the competition problem posed. Consequently, it delivered a decision to accept the commitments and closed the file on the case. This is the first time the Council has used the commitments procedure.

Decision 05-D-16 of 26 April 2005

SACD (a company in charge of the collective management of rights for dramatic authors and composers) made it compulsory, through a clause in its statutes, for its members to combine the management of the rights in their theatrical performances with that of their audio-visual rights. Authors were thus forced to entrust to SACD the management of all their rights, without any possibility of splitting them up.

This clause requiring the binding management of all rights thus enabled SACD “to use its monopoly position on the undisputable and inescapable market for audio-visual rights' management to consolidate and maintain its monopoly position on the potentially contestable and open market for dramatic works performance rights' management”. In fact, since they had no other choice concerning the management of audio-visual rights, authors were also forced to entrust their theatrical performance rights' management to SACD even though it was not the same market and they could have had them managed by another collective management society or manage them themselves.

The Council took the view that the commitments entered into by SACD provided a satisfactory solution to the competition problems posed. SACD undertook to amend its statutes at its next general meeting so as to permit authors to divide their works into three different categories: dramatic works, audio-visual works and pictorial works.

However, in order to enable SACD to perform its task of collective management under conditions of reasonable economic equilibrium, this dividing option will be subject to certain restrictions:

- certain categories of work cannot be withdrawn during the author's lifetime until the end of each two-year period calculated from the date of the author's membership or the date of change of his contributions;
- the total or partial withdrawal of a given category of work cannot be effected more than three times during an author’s lifetime;
This balance was considered to comply with the principles laid down by EC case law, according to which the freedom of authors who may wish to manage some rights individually has to be reconciled with the ability of a collective management society to operate satisfactorily for the benefit of its members.

**Decision 05-D-63 of 17 November 2005**

The Competition Council held that the La Poste group had abused its dominant position by failing to uphold the principle of non-discrimination in the application of its charges to the benefit of certain mail senders and of its own subsidiary Datapost. By applying its bulk mailing charges to certain customers in a discriminatory fashion, La Poste distorted competition between mail consolidators inasmuch as they did not obtain the same conditions from one zone to another. In some cases, La Poste itself or its subsidiary Datapost profited from these discriminatory pricing practices.

The Council considered these practices to be serious. Mail consolidation is dependent on La Poste since the company's monopoly on the basic postal service means it transports and distributes all mail. As a company holding a monopoly on the basic postal service and an operator that regulates access to this service unilaterally, La Poste has a special obligation to act with prudence and vigilance and to scrupulously respect prices. This is particularly true since the company is in a position to abuse its dominant position on the adjacent market for mail consolidation, in which it is also present, either directly or via its subsidiaries. However, the Council found that these practices did not form part of a deliberate and global strategy on the part of La Poste to evict consolidators from the market. Several items of correspondence substantiate the fact that La Poste did not seek to encourage this system and that, on several occasions, it actually made clear its wish that it should not continue. For this reason, the Council limited the fine to EUR 1 million.

**Cartels**

**Decision 05-D-10 of 15 March 2005**

The Competition Council imposed fines totalling EUR 45 000 on Cerafel, the economic agricultural committee for fruit and vegetables in Brittany, and a number of producers' associations for engaging in anticompetitive practices in the cauliflower wholesale market in Brittany.

At the time of the facts, France was the second largest producer of cauliflowers in Europe. Between 50 and 60% of the cauliflowers produced were exported to Germany, the UK and the Netherlands.

The cauliflower distribution chain is structured around government-recognised producers' associations. Centralising over 90% of production, these associations are all members of the same regional economic committee, Cerafel.

The main mechanism by which cauliflowers grown in Brittany are put on the market is the clock auction (a type of reverse auction). To access the auctions, dealer-shippers must be officially approved.

In its analysis, the Council emphasised that the conditions imposed upon companies seeking approval for the auctions managed by SICA Saint-Pol-de-Léon, UCPT and SIPEFEL had already been condemned by the European Commission in 1977; this is because they contain
an obligation on companies to purchase exclusively on the markets controlled by Cerafel, to own a packaging store in the auction site's zone and to purchase, work and ship on their own behalf only.

These practices contravene the French and European competition rules in so far as they serve to restrict, prevent or control new shippers' access to auctions in Brittany.

**Decision 05-D-38 of 5 July 2005**
The Competition Council issued a decision penalising the companies Kéolis, Connex and Transdev for entering into a nationwide anticompetitive agreement between 1996 and 1998. The purpose of the agreement was to divide up public transport markets (urban bus services) during calls for tenders launched by local and regional administrations.

It was observed that the directors of these national and international transport companies formed a cartel, with the intention of dividing up the French national market for public passenger urban transport. Under the rules of conduct adopted by the cartel, the three companies in question refrained from competing whenever a contract held by any of them came up for renewal.

These anticompetitive practices enabled the companies to impose their prices on local and regional administrations. Consequently, when granting concessions for the running of their transport networks, the administrations were forced to bear higher costs than if the market had been open to competition.

This national agreement, organized by parent companies which closely monitored the activity of their subsidiaries, clearly affected local public transport contracts in several French towns and cities.

The Council considered that the formation of a cartel in an oligopolistic market, and the resulting monopoly rent (in this case financed by administrations' public funds), is one of the most serious anticompetitive practices. It therefore decided to impose on the three companies concerned fines totalling EUR 12 million.

A national cartel of this kind is, by definition, likely to have a substantial impact on intra-Community trade by virtue of its magnitude and its very purpose: to prevent competitors, whether national or foreign, from winning contracts. This decision by the Competition Council was upheld in its entirety by the Paris Court of Appeal on 7 February 2006.

**Decision 05-D-65 of 30 November 2005**
The Competition Council fined the three mobile telephony operators Orange France, SFR and Bouygues Télécom for engaging in two kinds of anticompetitive agreement that distorted competition in the market. Every month between 1997 and 2003, the mobile operators exchanged detailed and confidential information on the numbers of new customers signed up the previous month, and the numbers of people who opted to cancel their subscriptions.

The Council considered that, although the operators' decision to share this information had no bearing on their future pricing strategies, it was nonetheless likely to reduce competition in the mobile phone market, a market which it is difficult to penetrate.
The Council also found that, between 2000 and 2002, the three operators entered into an agreement aimed at stabilizing the development of their respective shares of the market. It uncovered a number of pieces of serious, specific and corroborating evidence pointing to the existence of such an agreement. These included handwritten documents with explicit references to an "agreement" between the three operators, the "pacification of the market" and the "Yalta of market share" Certain similarities were also observed in the commercial policies implemented by the operators during this period. In the medium term, this collusion served to maintain the three operators' share of new subscription sales at relatively stable levels, and also paved the way for them to alter their strategy from 2000 onwards. Up until then, the mobile operators had relied on acquiring market share to ensure their growth, which required considerable investment. From 2000 onwards, a period which coincided with the end of the race to acquire market share, the three operators simultaneously adopted strategies aimed at consolidating their existing customer bases. This led, among other things, to a hike in prices and the adoption of measures such as giving priority to contracts with commitments over pay-as-you-go cards, or the introduction of billing per 30-second increments after a minimum first minute. The Council considered these practices to be particularly serious as they had caused significant damage to the economy and to consumers. It imposed fines totalling EUR 534 million: EUR 256 million on Orange France, EUR 220 million on SFR and EUR 58 million on Bouygues Télécom.

Decision 05-D-70 of 19 December 2005
The Competition Council issued a decision imposing penalties on the company BVHE (Buena Vista Home Entertainment), the exclusive distributor of Disney video cassettes in France, the retailers Casino and Carrefour and the wholesaler SDO (Selection Disc Organisation), for engaging in a price-fixing agreement on the retail price between 1995 and 1998.

BVHE instigated a vertical agreement with the retailers Casino and Carrefour and the wholesaler SDO, with the aim of fixing the retail price of Disney video cassettes at an artificially high level. This practice was complemented by a common policy on collecting, sharing and monitoring information aimed at consolidating the system. The effect of the agreement was to raise the retail prices of Disney children's video cassettes in all the stores concerned to the same level.

The Council emphasised that the offending practices were particularly serious in so far as they deprived consumers of the opportunity to acquire the products concerned at a lower price, i.e. that which would have resulted from proper price competition between the distribution networks. These practices were all the more serious since they were committed by a major international group (Disney), whose behaviour is likely to set the standard for the sector. The company also occupies a very strong position on the market concerned, since Disney video cassettes are in constant demand.

The fines imposed on BVHE and Carrefour were reduced by approximately 25% and 40% respectively from their actual theoretical amounts, as the companies agreed not to dispute the objections stated against them, and also gave commitments regarding their future behaviour that were likely to restore proper price competition to the market.

Agreements and concerted practices

Decision 05-D-72 of 20 December 2005
Following a referral by several exporting companies regarding practices implemented by 21 pharmaceutical laboratories, the Competition Council handed down that there were no grounds for action (“decision de non-lieu”) on the grounds that the behaviour concerned by the complaint could not be qualified as abuse of a dominant position under French and EC competition law.

"Parallel trade in pharmaceuticals" is based on the existence of different prices for medicines between European countries. It refers to trading in medicines between wholesaler-exporters and importers in different countries, as opposed to the sale of pharmaceuticals in different countries by the laboratories themselves, either directly or via local subsidiaries. The products concerned by parallel trade are mainly patented compounds, for which there is a substantial difference (at least 15%) between the regulated price in force in the State from which the products are exported and the price in force in the countries where they are consumed. The price level of French medicines is close to the European average. However, it is more than 20% lower than those charged in the United Kingdom and Germany, to the extent that France is an export base for both these markets.

A number of French companies have based their business exclusively on exports, purchasing pharmaceuticals from laboratories in France at an "administered" price, and then selling them on abroad at a higher price.

These companies had complained that the pharmaceutical laboratories had subjected them to delivery restrictions, discriminatory conditions and refusal to sell products. The complainants ascribed these practices to two things: firstly, agreements, between the laboratories themselves, and between the laboratories and wholesaler-distributors; and secondly, an abuse of a dominant position by the laboratories.

The Council’s decision only covers the case of pure exporters.

List of decisions taken under Articles 81/82 by the French Competition Council in 2005:

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These decisions and the press releases relating thereto can be consulted on the Competition Council’s website: [www.conseil-concurrence.fr](http://www.conseil-concurrence.fr)

**Ireland**

*Agreements and concerted practices*

**The Competition Authority v. Irish Dental Association**

The Competition Authority accepted settlement terms on 28 April 2005 offered by the Irish Dental Association in the High Court action taken by the Authority. Legal proceedings were initiated by the Competition Authority following allegations of a collective boycott of a private dental insurance scheme being introduced in Ireland by Vhi DeCare contrary to Article 81 EC and Section 4 of the Competition Act 2002. The terms of the final settlement were read out in court by counsel on behalf of the Competition Authority. The full text of the settlement terms is as follows:

“The Competition Authority has brought proceedings alleging a breach of section 4(1) of the Act and Article 81(1) and without admission of liability on the part of the Irish Dental Association Limited (“the Irish Dental Association”) the parties have agreed to the following:

i. The Irish Dental Association is happy to acknowledge and agrees to confirm to its members in writing within 28 days that it is for individual dentists to manage their own commercial affairs on an individual basis with regard to dealings with Vhi DeCare or similar dental insurance providers, and that this supersedes any previous communication by the Irish Dental Association on this issue.

ii. The Irish Dental Association agrees that it will not issue any communications to its members who instruct individual dentists to adopt a policy of non-co-operation with Vhi DeCare or other private dental insurance providers in breach of competition law.

iii. This will be made a rule of court with liberty to both parties to re-enter the present proceedings and/or to apply in respect of the aforesaid ruling.

iv. Each party will bear its own costs in relation to these proceedings.

v. For the avoidance of doubt, the term “Irish Dental Association” where used herein includes servants or agents (including sub-committees) of the Irish Dental Association.”

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Only the national courts may take decisions as to whether a breach of national law and/or an infringement of the EC Treaty have occurred. The Competition Authority is responsible for the investigation of competition cases; The Competition Authority may institute civil proceedings (in which it acts as the plaintiff) and/ the Competition Authority and/or the DPP may prosecute criminal competition cases.

Italy

Cartels

Decision of 12 October 2005 - prices for baby milk

In October 2005, the Italian Competition Authority concluded an investigation into seven suppliers of baby milk in Italy (Heinz Italy, Plada, Nestlé Italy, Nutricia, Milupa, Humana Italy and Milte Italy) by finding that they had engaged in a price-fixing contrary to Article 81 EC. Pursuant to Article 22 of EC Regulation (EC) No 1/2003, the Italian Authority asked the French, German and Spanish antitrust authorities to inspect the premises of some of the firms against whom proceedings had been opened.

The investigation showed: 1) a significant difference between the prices for baby milk in Italy and those observed in other European countries for the same brand/quantity (the prices of baby milk in Italy were in most cases 150% higher than those in other EU Member States: in the case of new born formula, prices were three times higher than those in the lowest-price country, while for follow-on products they were twice as high); 2) the absence of a sound and objective justification for such high prices; 3) the use by all producers of recommended prices for pharmacies and the wide availability of these price lists on the web; 4) the agreement of suppliers to reduce prices upon invitation by the Health Minister; 5) the very limited amount of sales by large-scale distributors; and 6) the absence of any parallel imports from low-price EU countries.

The anti-competitive arrangement had a number of features. First of all, throughout the whole period under investigation, suppliers recommended retail prices to pharmacists (which the latter abided by) and listed these prices on the pharmaceutical wholesalers’ websites, thereby making them available to all suppliers. Furthermore, in 2004, following a request by the Minister of Health to reduce baby milk prices, the companies adopted a common approach aimed at maintaining as far as possible the pre-existing high price regime and making sure that price reductions would be coordinated. Indeed during March and April 2004 in special meetings at the head-quarters of the manufacturers’ Association, following the Health Minister’s initial invitation to reduce prices, the suppliers informed one another of how they intended to react. They then jointly devised the best way to reduce prices, but on condition that this would not disrupt the ‘stability’ of the market. The investigation proved that producers agreed that nobody would reduce prices by more than 10%.

The Authority considered that the direct contacts among producers following the Health Minister’s invitation to reduce prices and the fact that they agreed not to reduce prices by more than 10% was direct proof of collusion. Furthermore the fact that in their meetings to discuss how to reduce prices, the baby milk producers referred to the notion of market disruption convinced the Authority that the widespread information on retail prices made
available through the web was an important instrument for monitoring each other’s conduct in order to support the high-price collusive strategy.

The above concerted practices had the effect of keeping baby milk prices in Italy at significantly high levels to the detriment of consumers. Furthermore, producers were able to ensure the stability of their market shares throughout 2003-2004. The Authority ordered the companies to cease and desist from the infringement and imposed on them an overall fine of EUR 10 million. An appeal is still pending.

**Decision of 30 November 2005 - insurance surveyors’ fees**

In November 2005, the Italian Competition Authority concluded enforcement proceedings initiated in July 2004, pursuant to Article 81 EC, against ANIA (the national association of insurance companies) and the six largest insurance surveyors associations in Italy (the surveyor investigates insurance claims to ensure that they are not fraudulent). The investigation concerned two different violations of Article 81 EC:

1) an agreement between ANIA and the six main insurance surveyors associations to fix the fees of surveyors’ services regarding car accidents;

2) various measures which sought to encourage the use by insurance companies of a uniform system for calculating repair costs for damage to property (the agreement envisaged the use of a standard form provided by ANIA and the application of cost parameters defined in an agreement between ANIA and car repairers, such as the price of original replacement parts (if used), the time to repair and replace vehicles, and the cost of labour).

Regarding the first violation, the sector-specific legislation provides that the insurance surveyors’ fees are determined as a result of a complex process which involves the intervention of a public body. However, this process had never been completed and the Authority found that the scope for autonomous behaviour by the parties was sufficiently wide to establish their direct responsibility for the restrictive conduct. For the first violation an overall fine of EUR 202 800 was imposed on ANIA and the relevant surveyors’ associations.

As regards the second violation, ANIA had encouraged the use of a uniform system in order to calculate the repairing costs for property damages. Repair costs account for a significant share of insurance companies’ payments for car accidents, and ANIA’s conduct was thus held to affect one of the most important competitive variables of the car liability insurance market, in violation of article 81. For this second violation, a fine of EUR 2 000 000 was imposed on ANIA. An appeal is still pending.

**Complete list of decisions taken under Articles 81/82 in 2005:**

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Lithuania

Abuse of dominant position

On 22 December 2005, the Competition Council of the Republic of Lithuania took a decision under Article 9 of the Lithuanian Law on Competition and Article 82 of the EC Treaty against AB “Mazeikiu nafta”, the single refinery in three Baltic States, for abusing its dominant position in the Lithuanian fuel market and in the fuel market of Lithuania, Latvia and Estonia. It imposed a fine of EUR 9.275 million on the company as well as ordering it to cease its illegal activities.

The Competition Council concluded that AB “Mazeikiu nafta” had abused its dominant position by grouping customers on a territorial basis and applying discriminatory discounts and rebates schemes; by using discriminatory rebates in agreements with wholesale customers; and by imposing selling conditions and quantity obligations in these agreements with wholesale customers thereby placing them at a competitive disadvantage. The activities of AB “Mazeikiu nafta” affected both imports to the relevant petrol and diesel fuel markets of three Baltic States and cross border trade between Estonia, Latvia and Lithuania, thus influencing the commercial decisions of the main potential importers of refined petrol products operating in the said markets. Consequently, final consumers of the three Baltic States had no possibility to choose between various kinds of imported petrol and diesel fuel.

In the course of the investigation there was close cooperation and exchange of information with ECN competition authorities - Estonia, Latvia and Poland.

Hungary

Agreements and concerted practices

(1) The Competition Office initiated proceedings because the warranty rules applied by Hewlett Packard Magyarország Kft. (“HP”) relating to its printers were alleged to constitute an abuse of dominance under the national Competition Act and Article 82 EC and consumer fraud. According to the warranty rules if the failure of the printer was the result of incorrect use, the warranty did not apply. In the Hungarian version of the rules, however, it was also stated that the application of refilled or remanufactured inkjets qualified as incorrect use, giving the impression that the use of such accessories in itself led to the loss of the warranty. The case was partially reallocated to the European Commission, since the Commission also dealt with certain aspects of the practice and it extended, as a result of the reallocation consultation, the scope of its investigations also to the new Member States. The Competition Office continued its investigations in respect of the Hungary-specific elements of the case.

In its decision, the Competition Office considered that the appropriate interpretation of the rules was that the application of non-HP inkjets was qualified by HP as “incorrect use”. However as it was not “incorrect use” as such but only failures deriving from “incorrect use” which resulted in the termination of the warranty, the warranty rules did not qualify as a tying
of the free repair service to the purchase of HP’s own secondary products. On the other hand, the qualification of the use of competing secondary products as “incorrect” was misleading as consumers could interpret it as meaning they must not buy non HP secondary products. Having regard to the insignificant effect of the fraudulent behaviour on competition, the Competition Office, although it had established the infringement, ordered the suspension of the proceedings for a period of one month. HP was ordered to amend the wording of the warranty by the end of this period and to inform the consumers about the changes and the reasons for them in two national newspapers. After the expiry of this deadline, the Competition Office established that HP had fulfilled its obligations and terminated the proceedings.

(2) Due to their exclusive nature, agreements concluded between Aréna Rt (the controlling company of the Budapest Sport Stadium), Multimedia Light and Sound Kft. (a concert promoter) and Ticketpro Kft. (a ticket distributor) were subject to an investigation initiated by the Competition Office. According to their annual rental agreement, Multimedia received special privileged status from Aréna (e.g. special treatment concerning payments: after 10 cultural events (entertainment) the 11th event was free of charge; Multimedia received the title of “Aréna’s first partner”, etc.). The exclusivity clause in the agreement between Aréna and Ticketpro (in which Multimedia held significant business interests) meant in practice that if any concert promoter intended to organise an event in the Budapest Sport Stadium, Aréna could only sign an agreement with that concert promoter if it could oblige the concert promoter to engage the services of Ticketpro. This arrangement gave Multimedia a further unfair advantage over its competitors in addition to its privileged status. The Competition Office held that the agreements jointly exerted a distorting effect on competition. However, having regard to the fact that the contracts under investigation had been terminated before any decision was issued, and in view of the minor magnitude of the distorting effect, no fine was imposed. In the decision the Competition Office simply declared that the complex contractual arrangements between the above mentioned three undertakings were incompatible with the common market.

(3) The Competition Office initiated two separate proceedings against UNILEVER Magyarország Kft. and Globus Konzervipari Rt for their alleged abuse of dominance. Both firms restructured their distribution system by entrusting the same undertakings with the distribution of their deep frozen products, ice creams and vegetables. After the reshaping of this joint distribution system three undertakings, which were members of the network previously, were no longer supplied. The Competition Office established that there were no grounds for action concerning the alleged abuse as neither UNILEVER Magyarország Kft. nor Globus Konzervipari Rt was dominant on the relevant market. The market was defined according to EC case law and the Commission Notices on the relevant market and on vertical agreements. This led to a definition which took into account the preferences of distributors, rather than merely those of end consumers’. This was due to the fact that the distributors, which were also carriers of the products, could easily substitute in their carrier-capacity, one frozen product with another. Moreover, Unilever and Globus were unlikely to be dominant on the narrower market, namely on that of ice creams and frozen vegetables.

(4) Based on an application for individual exemption under national law (this right still existed at the time the application was submitted), the Competition initiated proceedings against the Rába Group and Integris, and examined whether their entering into a nine-year exclusive agreement restricted competition. A parallel ex officio proceeding was also initiated under Article 81 in order to meet the requirements of Article 3 of Regulation (EC) No 1/2003.
The nine-year period contracted was split up into phases of three years, with the switch to the next phase being subject to renegotiation. This clause was clearly included in order to ensure the agreement did not fall outside the scope of the vertical block exemption Regulation (EC) No 2790/1999 which limits the period of exclusivity to five years. However it was clear from other clauses of the agreement that the renegotiation was intended to be purely formal in nature and that the Rába Group had no real possibility to exit the agreement before the end of the nine-year period. The Competition Office considered that the agreement did not fall within the scope of Regulation (EC) No 2790/1999. On the other hand it was established that under both national competition law and under Article 81(3), the agreement was exempted from the general prohibition. Consequently, the national proceeding was closed by the granting of an individual exemption while the other proceeding based on EC law was terminated, as there was no ground for action.

Netherlands
Cartels
Sanctions in the construction industry

In recent years the Netherlands Competition Authority conducted investigations into infringements of the prohibition on cartels in various subsectors of the construction industry. In response to appeals by the Netherlands Competition Authority and the government to construction companies to “come clean”, a large number of companies voluntarily provided information on cartel activities. In October 2004 the Netherlands Competition Authority concluded its investigations into the civil engineering and infrastructure sub-sector with a report (statement of objections). The investigations into the Installation engineering sub-sector were concluded in April 2005. In both sub-sectors, cartel structures were exposed which involved a general system of bid-rigging. Investigations in other sub-sectors were concluded in Autumn 2005.

The Netherlands Competition Authority developed a special ‘accelerated’ (fast-lane) sanctions procedure specifically for the construction industry in view of the large number of companies involved and the widespread willingness to come clean quickly. This accelerated procedure is only open to companies who do not dispute the existence of the exposed cartel structures and their participation therein. Companies who choose to take part in the accelerated procedure receive a 15% reduction of their fine (the companies involved retain the possibility to appeal). Companies who choose not to participate in the accelerated procedure are subject to the standard sanctions procedure, as set out in sections 59 to 61 of the Netherlands Competition Act.

Civil engineering and infrastructure sub-sector

In the civil engineering and infrastructure sub-sector, 90% of 380 companies chose to participate in the accelerated procedure and received a decision imposing a fine. The accelerated procedure in this sub-sector was concluded in March 2005 with fines of approximately EUR 100 million being imposed. The standard sanctions procedure is still ongoing.

Installation engineering sub-sector
In the Installation engineering sub-sector, 88% of 180 companies chose to participate in the accelerated procedure, which was concluded in October 2005. Fines of approximately EUR 40 million were imposed. The standard sanctions procedure is still in process.

**Case summary - Case 2021 OSB**

The Netherlands Competition Authority found that OSB, the association of cleaning agencies in the Netherlands, advised its members between 1998 and 2000 once every year to increase price levels by a certain percentage. The percentages were determined by the board of OSB on the basis of information on the development of cost levels. Furthermore in mid 2000, OSB advised its members to carry out an additional rise in prices. The Netherlands Competition Authority concluded that OSB thus infringed Section 6 (1) of the Competition Act and Article 81(1) EC. This finding was upheld in the administrative appeal and a fine of EUR 2 000 000 was imposed on OSB.

The Netherlands Competition Authority – in accordance with the advice of the Advisory committee – has in the administrative appeal procedure decided that on the basis of the evidence available, the file does not contain sufficient proof that CSU, Asito and GOM, three cleaning agencies whose employees were – among others – members of the board of OSB, infringed Section 6(1) of the Competition Act. The imposition of fines on these companies has been revoked as it was not proven that CSU, GOM and Asito initiated plans concerning the additional rise in prices in mid 2000 and then played an active and particular role in preparing the advice of OIB to its members.

**Case summary - 2910 Interpay**

This case concerned the joint venture, Interpay, which was created by eight Dutch banks to manage a debit card system called “PIN”. In addition to the provision of services such as clearing and settlement, Interpay, through a wholly owned subsidiary, Beanet, directly signed up merchants for credit card acceptance and thereby provided a payment guarantee to the merchants for each transaction that had been authorised by Interpay.

Fines were imposed by the Netherlands Competition Authority in respect of excessive pricing by Interpay and the selling of network services as a cooperative joint venture. This decision was taken on the basis of Dutch competition law as it was prior to the entry into force of Regulation (EC) No 1/2003. However, an administrative review procedure was subsequently commenced after 1 May 2004 before the Board of the Dutch Competition Authority which takes account of EC competition law. The excessive pricing case against Interpay was then dropped as part of a gentleman’s agreement following a settlement in a retailer’s lawsuit against Interpay and its shareholder banks in which the banks agreed to lower their prices by a minimum of 20%.

It was found that the concentration of the financial aspects of payment card acquiring within the hands of a single inter-bank entity excludes competition between banks for acquiring merchants contrary to Article 81 (application of EC competition law to a vertically integrated payment cards industry).

The Netherlands Competition Authority decided to lower the fines imposed on the shareholders to EUR 14 000 000 in total. The reason for this reduction of the fines was the
establishment of a fund conducive to socially efficient money transfer, in which they deposited EUR 10 000 000 in total.

Case Summary - 1615 Bicycle producers

In his decision of 21 April 2004, the Director-General of the Netherlands Competition Authority imposed sanctions on the three biggest bicycle producers in the Netherlands (joint market share of approximately 80% (sales of 2000) on the Dutch bicycle market) for a violation of section 6 of the Dutch Competition Act (similar to article 81 EC). Accell (through its subsidiaries Batavus and Koga), Gazelle and Giant had two meetings about their (future) pricing strategy in the bicycle season 2001. The infringement took place from 1 September 2000 to 1 September 2001. The Director-General imposed fines of EUR 12 809 000, 12 898 000 and 3 978 000 respectively. The bicycle producers appealed. According to Dutch administrative law, (now) the Board of the Netherlands Competition Authority has to reconsider the decision of the Director-General in an administrative review procedure, before the parties can challenge the decision in court. In its decision of 24 November 2005 the Board dismissed most of the parties’ objections. It applied Article 81 EC to the infringement, which was not the case in the contested decision as it was taken prior to the entry into force of Regulation (EC) No 1/2003. Because of a violation of the rights of defence, the Board granted the parties a 10% decrease in the fines. The fines after administrative review were as follows: Accell: EUR 11.528.000, Gazelle: EUR 11 608 000, Giant: EUR 3 421 000. The decision is now being challenged in court.

Case Summary - 3353 CR Delta

In his decision of 31 December 2003, the Director-General of the Netherlands Competition Authority imposed sanctions on CR Delta for a violation of Section 24 of the Dutch Competition Act (similar to Article 82 EC) because of three rebate systems that, both separately and together, constitute an abuse of dominant position. CR Delta is a supplier of breeding bull sperm whose customers are cattle breeders. The so-called “quantity rebates” it granted were not “invoice rebates” but were paid at the end of a reference period of one year, the rate increasing gradually (1-5%) according to the quantities purchased. The discount was calculated according to the customer’s entire turnover of breeding bull sperm with CR Delta. The second rebate system (1-2%) was granted in return for an undertaking given by the customer to obtain his stock of breeding bull sperm (almost) exclusively (90-100%) from CR Delta. The third rebate system involved a discount of 10% on the customer’s purchases of classified breeding bull sperm when the customer agrees to test unclassified breeding bull sperm. CR Delta’s market share on the relevant market is approximately 80%. The infringement took place from 1 September 2001 to 1 September 2003. The Director-General imposed a fine of EUR 2 600 000 and two orders. CR Delta appealed. In the subsequent administrative review procedure, the Board of the Netherlands Competition Authority dismissed all of the party’s objections. In view of the entry into force of Regulation (EC) No 1/2003, Article 82 EC was applied to the infringement, which was not the case in the original decision. The case is now under review by the Dutch competition court.

Complete list of decisions taken under Articles 81/82 in 2005:

Construction Sector
OSB

Interpay

Bicycle producers

CR Delta

Austria
Agreements and concerted practices

Fee scale for building engineers
In June 2004 the BWB (and the Federal Attorney-General for Cartel Cases) applied to the Cartel Court for the revocation of the building engineers' fee scale (Honorarordnung der Baumeister (HOB)) following wide-ranging investigations. In this case the fee scale was entered in the cartel register as a non binding recommendation of an association laying down prices for specific activities.

The competition authority considered that the fee scale was incompatible with Article 81 EC. Following an extensive inquiry, the Cartel Court ordered by decision of 14 April the Construction Industry Association to revoke the fee scale because - following the line of argument put forward by the BWB and the Federal Attorney General for Cartel Cases - it had come to the conclusion that it was in breach of European cartel law. The Supreme Cartel Court upheld this decision.

Other enforcement activities
Lufthansa/Austrian travel agencies
On 1 November 2004 Lufthansa announced an overhaul of its sales system and the introduction of a net price model. As a result travel agencies were no longer paid a basic commission. Travel agencies were free, however, to levy their own service charges on customers. When to charge a service charge, and how much, was left to individual travel agencies.

The Association of Travel Agencies petitioned the Cartel Court in November 2004 arguing that abolition of the commission combined with Lufthansa's requirement that the net price appear on the flight ticket should be outlawed as price fixing. The application was rejected. The Court considered that Article 81 was applicable since the sales system was used in several EU Member States, but that there was no unlawful price fixing. The travel contract was concluded directly between Lufthansa and the customer, and only for this transport contract did Lufthansa fix a selling price. The travel agency was only executing a declaration of interest on behalf of the customer. It was left to the discretion of the travel agency whether and how much to charge for its advisory service. Travel agencies were not therefore restricted in their competitive freedom of action.

**Article 81 and 82-related decisions of the Cartel Court:**

- Building engineers' fee scale
- Lufthansa/Austrian travel agencies
- redmail - Logistik & Zustellservice GmbH/Österreichische Post AG
- Synchron Film & Video Bearbeitungs GesmbH/da Vinci Systems, LLC; Datim GmbH*
  (*ended by a settlement between the parties)

*Link to activity report of the BWB (all except Synchron Film et al):*  

**Portugal**

*Agreements and concerted practices*

**Portuguese Veterinarian’s Association**

The Veterinarian Professional Association adopted a Deontological Code in 1996, prescribing that services performed in independent practice by a veterinarian (including from other Member States of the European Union) must be charged in accordance with a minimum fee established by the National Veterinarian’s Union.

The Portuguese Competition Authority found the Portuguese Veterinarian's Association guilty of establishing an obligation to charge minimum fees contrary to Article 81 EC and fined it a total of approximately EUR 76 000 in a decision taken on 19 May 2005. In view of the gravity of the infringement, the offender was obliged to publish the decision in the official gazette and in a Portuguese newspaper with national circulation. Furthermore the Veterinarian's Association had to advertise the measures adopted on its website and in a periodical revue within 15 days.

The Portuguese Competition Authority takes the view that the establishment of an obligation to charge minimum fees by the Veterinarian’s Association cannot be...
considered as necessary in order to ensure the proper practice of the veterinarian independent activity within the meaning of the Wouters judgment (C-309/99).

This was the Portuguese Competition Authority’s first decision involving an infringement of the competition rules set out in the EC Treaty establishing, issued under the new decentralized system for applying Community competition rules.

An appeal against this decision was lodged near the Lisbon Commercial Court (the Court’s decision is expected in early 2006).

Portuguese Dental Association

The Portuguese Dental Association adopted a Deontological Code prescribing that services performed in independent practice by a dentist must be charged in accordance with a minimum and maximum fee established by this Association.

The Portuguese Competition Authority (PCA) found the Portuguese Dental Association guilty of establishing an obligation to charge minimum and maximum fees contrary to Article 81 EC and fined it a total of approximately EUR 160 000 in a decision taken on 30 June 2005. Considering the gravity of the infringement to, the offender was obliged to publish the decision in the official gazette and in a Portuguese newspaper with national circulation. Furthermore the Portuguese Dental Association had to advertise the measures adopted on its website and in a periodical revue within 20 days.

The Portuguese Competition Authority takes the view that the establishment of an obligation to charge minimum fees by the Portuguese Dental Association cannot be considered as an overriding reason justified by the public interest within the meaning of the Wouters ruling.

An appeal against this decision was made to the Lisbon Commercial Court (see under “Overview of application of the EC competition rules by national courts”).

List of decisions taken under Articles 81/82 in 2005

Portuguese Veterinarian’s Association

Portuguese Dental Association

Recommendation nº1/2005 - Gas sector

Recommendation nº2/2005 – Mobile telephony services

Slovakia

Cartels
The construction of the motorway section D1 Mengusovce - Jánovce was tendered by the Slovak Roads Administration in 2004. The motorway section was divided into two parts, which meant that there were two separate tenders.

The lowest proposed prices of applicants in both tenders exceeded the maximum price determined by the state by around 20%. Both tenders were accordingly abolished. In order to assess whether an anticompetitive agreement had been concluded, the Antimonopoly Office of the Slovak Republic started to investigate.

By comparing the price offers of the tender participants at the level of individual items (the tender assignment comprised almost 900 items) the Office found out that the rate of price offers for the individual items from all the tender participants was extraordinarily constant in the offers for the first section of motorway.

The Office concluded that the tender participants concluded an agreement restricting competition resulting in price coordination for the first motorway section. However, the Office did not collect enough evidence to prove collusive behaviour in the tender for the second motorway section. The Office impose the fine on the parties of 1 473 978 000 Slovak crowns (40 000 000 EUR).

List of decisions taken under Articles 81/82 in 2005

**Slovak Chamber of Advocates** – advertising restrictions (decision No. 2005/KH/1/1/136 of December 22, 2005)
(https://webgate.cec.eu.int/competition/ecni/env_decision/index.cfm?fuseaction=dsp_view&key_value=870)

(https://webgate.cec.eu.int/competition/ecni/env_decision/index.cfm?fuseaction=dsp_view&key_value=1009)

**Finland**

The Finnish Competition Authority (FCA) applied the EC competition articles in one case in 2005:

The FCA issued a decision stating that Suomen Numeropalvelu Ltd (Finnish Telephone Number Service, SNOY) had abused its dominant position by requiring that its customer companies which provide telephone directory services cannot offer their services to end customers for free and without prior registration over the Internet.

SNOY is a joint company of the Fonecta Group Ltd and Finnet-Media Ltd, which maintains a national database of telephone subscriber information and resells the information to companies offering telephone directory services. SNOY has no competitors at the moment. SNOY’s owners compete with the complainant, Eniro Finland Ltd, as providers of telephone directory services.
Based on its investigations, the FCA found that SNOY’s conduct is ultimately an attempt to prevent the entry of competitors offering a new type of service. At the same time, SNOY’s conduct slows down the development of directory services which exploit new technology and which are more user-friendly, versatile and cost-effective. SNOY’s conduct hence contradicts the legislator’s aim of increasing the supply of new kinds of telephone directory services and to promote the use thereof.

In its decision, the FCA forbids SNOY’s conduct as a breach of the Competition Act and Article 82 EC. The decision also imposes a supply obligation on SNOY regarding the telephone subscriber information. To enforce the decision, a running conditional fine was imposed. In addition to the prohibition decision, the FCA proposed to the Market Court that it impose a competition infringement fine of 150 000 euros on SNOY. The decision (1097/61/2003) can be found in the FCA’s web pages in Finnish at: http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=ratkaisut/muut-ratkaisut&sivu=ratk/r-2005-61-1097

Sweden

Abuses of dominant position

Dnr 797/2004
SES, a manufacturer and distributor of electrical installation products on the Swedish market, abused its dominant position on the market for manufacturing and distributing ordinary sockets and switches (including remote control switches, time-lag switches and dimmers) by using loyalty rebates in its agreements with wholesale customers. By using loyalty rebates SES made it more difficult for new companies to enter the market.

Outcome: commitment decision with a proposed penalty of a fine of 3 Million SEK subject to confirmation by the Stockholm District Court.

Dnr 873/2005
TS, a Swedish telecom operator, abused its dominant position on the market for access to the public telephone network at a fixed location for residential customers. TS sought to restrict competition from broadband operators offering IP-based access to telephony services by offering selective discounts on installation of a fixed line subscription to those customers who ask for number portation of their subscriber number to the new operator’s network.

Outcome: prohibition decision with a proposed penalty of a fine of 44 Million SEK subject to confirmation by the Stockholm District Court.

Agreements and concerted practices

Dnr 532/2004
EB manufactures and distributes wallpaper on the Swedish market. EB has a very strong position on the market for manufacturing and distributing wallpaper to painters and paper hangers. The Swedish Competition Authority’s investigation shows that EB, by using a selective quantitative criterion in its selective distribution system with its retailers, has made it more difficult for new retailers to enter the market. EB’s selective distribution system cannot be exempted under Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the
application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

Outcome: commitment decision with a proposed penalty of a fine of 1 Million SEK.

List of decisions taken under Articles 81/82 in 2005:

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<td>Dnr 797/2004</td>
<td>Schneider Electric Sverige AB</td>
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</tr>
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</table>

United Kingdom

Agreements and concerted practices

MasterCard UK Members Forum Limited - 6 September 2005

The Office of Fair Trading (OFT) concluded that members of the MasterCard UK Members Forum and other MasterCard licensees in the UK have been party to an agreement which infringes both:

- the prohibition in Article 81(1) of the EC Treaty, and
- the Chapter I prohibition in section 2 of the Competition Act 1998.

This agreement, setting the level of the fallback multilateral interchange fee which applied to all transactions made using UK issued MasterCard cards, was effective from 1 March 2000 to 18 November 2004. From 18 November 2004, new arrangements for setting the fallback interchange fee applying to UK MasterCard transactions were introduced.

The OFT found that the infringing agreement restricted competition in two ways. First, it gave rise to a collective agreement on the level of the multilateral interchange fee (essentially, a collective agreement on price). Secondly, it resulted in the unjustified recovery of certain
costs (extraneous costs) incurred by MasterCard UK Members Forum members and other MasterCard licensees through the multilateral interchange fee.

The infringing agreement was notified to the OFT for decision on 1 March 2000. In light of all circumstances of this case, the OFT did not consider it appropriate to impose a penalty in respect of the infringement arising from the agreement. Because the agreement is now at an end, the question of directions did not arise in this case. However, the principles which inform this Decision are likely to be applicable to the new arrangements for setting the fallback interchange fee.

Other enforcement activities

Complaint from Gamma Telecom Limited against BT Wholesale about reduced rates for Wholesale Calls from 1 December 2004 – 17 June 2005

The Office for Communications (Ofcom) considered that British Telecommunications Group plc (BT) had not infringed section 18 (the Chapter II prohibition) of the Competition Act 1998 or Article 82 of the EC Treaty in relation to revised pricing, effective from 1 December 2004, of BT's Wholesale Calls Product (BT's revised wholesale call tariff structure).

Ofcom's decision was made following an investigation which was opened because of a complaint from Gamma Telecom Limited (Gamma) that BT's revised wholesale call tariff structure represented an anti-competitive margin squeeze.

The decision sets out in detail Ofcom's assessment that under a range of assumptions and scenarios, there was no margin squeeze in respect of BT’s revised wholesale call tariff structure and, therefore, there were no grounds for action.

Re-investigation of a complaint from VIP Communications Limited against T-Mobile (UK) Limited - 30 June 2005

Ofcom concluded that T-Mobile had not infringed the Chapter II prohibition or Article 82 of the EC Treaty by suspending/disconnecting the services it was providing to VIP for use in VIP's GSM gateways, while allegedly continuing to supply the same services to other companies for use in GSM gateways. There were therefore no grounds for action against T-Mobile.

Re-investigation of a complaint from Floe Telecom Limited against Vodafone Limited - 30 June 2005

Ofcom concluded that Vodafone had not infringed the Chapter II prohibition of the Competition Act 1998 or Article 82 of the EC Treaty by disconnecting the services it was providing to Floe for use in Floe's GSM gateways, while allegedly continuing to supply the same services to other companies for use in GSM gateways. There were therefore no grounds for action against Vodafone.

Complaint from NTM Sales and Marketing Ltd against Portec Rail Products (UK) Ltd concerning the supply of grease for use in electric trackside lubricators - 19 August 2005

The Office of Rail Regulation (“ORR”) decided that there were no grounds for action under the Chapter I prohibition of the Competition Act 1998/Article 81 of the EC Treaty against
Portec Rail Products UK Ltd (Portec) and RS Clare and Company Ltd (Clare). ORR also decided that, in respect of Portec, there were no grounds for action under the Chapter II prohibition of the Competition Act 1998/Article 82 of the EC Treaty.

ORR's decision follows its investigation into a complaint by NTM Sales and Marketing (NTM), made on 20 July 2004, that Portec had attempted to use a dominant position in the market for the supply of testing services for grease for use in electric trackside lubricators to foreclose the market for the supply of grease for use in electric trackside lubricators to NTM.

Although ORR did not rule out that Portec might be dominant in the market for testing services, it did not find sufficient evidence to conclude that Portec had abused a dominant position or that it had entered into any anti-competitive agreements or practices with Clare.

2. Application of the EC competition rules by national courts

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

Belgium

National preliminary rulings

The Brussels Court of Appeal has sole jurisdiction to give preliminary rulings on questions submitted to it by domestic courts hearing competition cases. In 2005, it gave preliminary rulings in three cases involving Community competition law and in one case involving national competition law.

In the three cases involving Community law, the Competition Council and the ‘Corps des Rapporteurs’ submitted written observations. With respect to these cases also, the European Commission delivered an opinion in response to the request for assistance addressed to it by the Brussels Court of Appeal pursuant to Article 15(1) of Regulation (EC) No 1/2003.

1. Emond Laurent v Brasserie Haacht: judgment of the Brussels Court of Appeal of 23 June 2005

In 1993 Brasserie Haacht signed with a cafe tenant a ten-year exclusive purchasing agreement for that brewery’s beers. The tenant subsequently sold his goodwill and in 1997 the buyer concluded another exclusive purchasing agreement with Brasserie Haacht for beverages other than beer.

In 1999 the buyer went bankrupt and the first tenant sought early termination of the 1993 agreement. Brasserie Haacht refused, arguing that, on the contrary, it was entitled to insist on observance of the period laid down in the 1993 agreement.

The Liège Court of Appeal made a reference for a preliminary ruling concerning the lawfulness of the 1993 agreement in the light of Article 81 EC.
The Brussels Court of Appeal examined the compatibility of the agreements with Community law, taking it as a given that the condition of an effect on trade between Member States was fulfilled. The two agreements were lawful at the time of their conclusion as they were covered by the block exemptions laid down in Regulations (EC) No 1984/83 and 2790/1999. The Court nevertheless took the view that the relevant time when it came to examining the agreements' compatibility with the competition rules was not the time of the agreements’ conclusion but the time of their termination. The Court considered, moreover, that each agreement had to be examined separately as the goods to which the two agreements related were not substitutable and therefore did not form part of the same market.

Following a very detailed analysis of the application over time of the EC block exemption Regulations, the Court observed that, at the time of the alleged breach, the 1993 agreement was covered by the block exemption provided for by Regulation (EC) No 2790/1999 and satisfied the conditions of the Commission notice of 13 October 2000 containing guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1).

By contrast, at the time of the alleged breach, the second agreement was not covered by any EC block exemption Regulation. Notwithstanding this, the Court held that the agreement was lawful under the competition rules on the basis of the Commission notices on “de minimis” agreements, even allowing for a possible cumulative foreclosure effect. The Court concluded that the lawfulness of the agreements was not in question and that, therefore, the issue of the nullity of an agreement prohibited under Article 81(1) EC did not arise.

2. SABAM v Productions & Marketing (P&M): judgment of the Brussels Court of Appeal of 3 November 2005

P&M, an organiser of musical events, brought an action before the Brussels Commercial Court against SABAM, a collecting society which manages music copyrights and which enjoys a de facto monopoly over the granting of copyright licences for musical performances and concerts. SABAM had refused to confer on P&M the status of “large organiser”, which would have entitled it to a 50% reduction in the royalties payable. P&M argued that SABAM was guilty of abusing a dominant position by making conferment of “large organiser” status conditional, inter alia, on P&M having carried on its activities for at least three years, and that SABAM thus groundlessly favoured established businesses over businesses newly entering the market.

The Brussels Commercial Court applied to the Brussels Court of Appeal for a preliminary ruling on whether SABAM’s conduct constituted an abuse of a dominant position. The Court first of all justified the application of Community competition law in this case. SABAM being the sole operator capable of issuing authorisations on the Belgian market for the organisation of musical performances, the tiered pricing it applied to the organisers of performances according to a criterion based on time in the market was liable to make it more difficult for competitors from other Member States to gain access to the Belgian market for the organisation of performances. The Court held that SABAM’s pricing system constituted an abusive practice in that it had the effect of applying to organisers of performances unequal conditions for services that were equivalent.

The Court found that SABAM could not base the tiered pricing on economic arguments such as the volume of business generated or economies of scale. It viewed, moreover, as manifestly excessive the difference – by a ratio of 2:1 - between the rate offered to large organisers and the basic rate.
3. Wallonie Expo ("WEX‘) v FEBIAC: judgment of the Brussels Court of Appeal of 10 November 2005

FEBIAC is a federation of all Belgian motor car and utility vehicle manufacturers and importers which organises a utility vehicle exhibition every two years. For its 2005 exhibition FEBIAC introduced a rule prohibiting exhibitors from taking part in any similar event held in Belgium during the six months preceding the opening of its exhibition.

The President of the Court of First Instance, hearing an application for interim relief, made a reference to the Brussels Court of Appeal for a preliminary ruling on the question of the lawfulness of such a non-competition clause. In their written observations, the Competition Council and the ‘Corps des Rapporteurs’ concluded – as did the European Commission in the opinion it presented to the Court – that there was an effect on trade between Member States. Most of the vehicles exhibited were imported and the exhibitors accounted for almost all imports and sales of the relevant products in Belgium, with the result that the prohibition on taking part in other exhibitions in Belgium was likely to have an impact on intra-Community trade.

The Brussels Court of Appeal held that FEBIAC’s rule was not contrary to Article 81(1) because the condition as to the appreciable nature of the restriction of competition was not fulfilled. The Court considered that it had not been established that the six-month prohibition had the effect of appreciably restricting an organiser’s ability to compete effectively with FEBIAC by attracting a sufficient number of exhibitors and visitors. FEBIAC’s rule for the 2005 exhibition was therefore not caught by Article 81(1) EC.

The Court then examined the lawfulness of the rule in the light of Article 82 EC. It found that FEBIAC held a de facto monopoly in the market for the provision of services related to the organisation of utility vehicle exhibitions in Belgium and hence in a substantial part of the common market. The prohibition on taking part in other events which FEBIAC imposed on its exhibitors formed an obstacle to any competition during the six-month period and was liable to influence the structure of the market. In the Court’s opinion, this prohibition was neither justified nor proportionate.

In conclusion, FEBIAC’s rule for its 2005 exhibition was lawful and could not therefore be prohibited under Article 81(1) EC. However, as a dominant undertaking, FEBIAC could not apply the prohibition rule to its 2005 exhibition as it constituted an abusive practice.


By judgment of 25 January 2005, the Brussels Court of Appeal answered a question of Belgian competition law put to it by way of a reference for a preliminary ruling from the Antwerp Court of First Instance in a case involving supplementary insurance for orthodontic treatment which the Christian Sickness Insurance Fund of Antwerp offered its members. This insurance afforded entitlement to an additional reimbursement if the care was provided by a dentist who met certain requirements, such as a training in orthodontics or a certain amount of experience in dentistry.
Mrs Kristel Cools was a dentist who did not meet these requirements and who sought from the Court a judgment ordering the Christian Sickness Insurance Fund of Antwerp to pay her damages for loss of earnings from patients who, in order to obtain reimbursement of the cost of orthodontic care, had turned to other dentists who met the requirements laid down by the insurance fund.

The Court confined itself to answering in the negative the question whether, in providing such a service, the Christian Sickness Insurance Fund of Antwerp was acting as an undertaking within the meaning of the Act of 5 August 1991, as coordinated on 1 July 1999, on the Protection of Economic Competition. Given that possession of the status of undertaking was a requirement for the application of Articles 2 and 3 of that Act, the Court no longer had to examine the lawfulness of the competitive practice.

The Court’s reasoning was based on the fact that the service was provided as part of the performance of the task which the legislator had entrusted to sickness insurance funds and social security bodies, namely the payment of compulsory benefits which private insurers were unable either to pay or to pay sufficiently. Hence the orthodontics benefit possessed, in the Court’s view, the features of a benefit paid by a social security scheme.

In its written observations to the Court, the Competition Council had expressed the view that, in providing the orthodontics benefit, the Christian Sickness Insurance Fund of Antwerp was in fact acting as an undertaking, and referred to the decision of the Council’s President on an application for interim measures, No 2001-V/M- of 2 January 2001 (Moniteur belge of 5 May 2001, 14852).

**Denmark**


The judgment concerns inter alia abuse of dominance under Article 82. De Danske Statsbaner (DSB) is a state owned train and ferry operator. DSB owned Gedser harbour and provided ferry transport to Germany. As the owner of the harbour, DSB collected harbour fees for the use of the harbour from another ferry operator, GT Linien, which also used Gedser harbour for ferry transport. The Supreme Court found that DSB had a dominant position on the market for harbour services concerning ferry transport between Denmark and Germany on the Baltic Sea. The Supreme Court ruled that DSB abused its dominant position by imposing harbour fees on GT Linien and without charging such fees to itself and Deutsche Bundesbahn. This constituted an abuse of Article 82(2)(c) EC. The Court concluded that the harbour fees were not passed on to the customers of GT Linien and accordingly, DSB was ordered to pay damages to GT Linien.

**Germany**

The following is a summary of the decisions by German civil courts in which Community law was applied and about which the Federal Government was informed.

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<td>Termination of a dealership contract following adoption of</td>
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<td>Court</td>
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<tr>
<td>LG (Landgericht) Bremen 12 o 442/02</td>
<td>Since defendant did not have a dominant position on the market, no entitlement to payment of damages for refusal of access to the port of Bremerhaven for the performance of stevedoring services by the plaintiff (Articles 33 and 19(4), point 4, Act prohibiting Restraints of Competition (GWB); Article 82 EC)</td>
<td>03.02.2005</td>
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<tr>
<td>OLG Stuttgart 2 u 84/04</td>
<td>No abuse in the defendant's raising network charges and meter rents: assumption of good practice under Article 6(1) of the Energy Act (EnWG) in calculating the network charges on the basis of VV Strom II Plus; approval of the charges in accordance with Article 12 of the Federal Regulation on Electricity Tariffs (BTOElt), Article 6(1) of the EnWG, Articles 19 and 20 of the GWB, Article 315 Civil Code (BGB) and Article 81 EC</td>
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<tr>
<td>BGH (Bundesgerichtshof) KZR 28/03</td>
<td>Plaintiff not obliged to pay damages for repudiation of sales target agreement in the service contract; nullity of the sales target agreement because it was equivalent to a &quot;tied&quot; supply (Article 81 EC, Article 4(1), point (3) of Reg. No 1475/95)</td>
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<td>LG Köln 85 O 75/04</td>
<td>Entitlement to repayment of premiums paid under firms' customer programmes on following grounds: underlying contractual rules valid under antitrust law (Article 81 EC)</td>
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<td>LG München I 27 O 899/04</td>
<td>Entitlement to payment under lease and beer supply contract on the following grounds: contract valid under antitrust law (Articles 17, 19 and 20 GWB; Articles 81 and 82 EC)</td>
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<td>OLG Düsseldorf VI Kart 3/05 (V)</td>
<td>Rejection of the appellant's application for restoration of the suspensive effect of the appeal against the Cartel Office's decision: whether formally, procedurally or substantively, there were no serious doubts about the legitimacy of the disputed decision. Consideration of the conflicting interests justified its having immediate effect. The immediate effect did not cause the complainant undue hardship</td>
<td>13.04.2005</td>
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<td>LG Köln 28 O (Kart) 647/04</td>
<td>Entitlement to repayment of discounts because of resale of vehicles acquired by the defendant (Article 81 EC)</td>
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<td>LG Mannheim 22 O 74/04 Kart.</td>
<td>Plaintiff not entitled to compensation from defendant because of defendant's participation in the price cartel of European paper manufacturers (on the basis of transferred rights) (Article 823(2) BGB, Article 81 EC, Articles 1 and 33 GWB)</td>
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<td>OLG Düsseldorf VI-2 Kart 12/04 (V)</td>
<td>Annulment of the Cartel Office's prohibition order of 17 June 2004 concerning a cartel of SMEs in the distribution of precast</td>
<td>10.06.2005</td>
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<tr>
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<tr>
<td>BGH KZR 26/04</td>
<td>28.06.2005</td>
<td>Annulment of the industrial tribunal's judgment: the block exemption (motor vehicles) Regulation governs only the exemption from the prohibition provided for in Article 81(1): standards of conduct enforceable in civil law cannot be deduced from it (Articles 33 and 20(1) and (2) GWB; Regulation (EC) No 1475/95; Article 81 EC)</td>
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<td>OLG Düsseldorf U (Kart) 39/03</td>
<td>05.07.2005</td>
<td>Payment entitlement arising from several work contracts for the processing of waste glass: even if the defendant's agreed minimum guarantee were not compatible with cartel law, this would not affect the validity of the price agreement (Article 81(1) and (2) EC; Article 139 BGB)</td>
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<td>BGH KZR 14/04</td>
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<td>LG Köln 28 O (Kart) 308/05</td>
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<tr>
<td>OLG Düsseldorf VI-U 11/05 (Kart)</td>
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<td>No entitlement to activation of &quot;SIM cards&quot; by the defendant: blockage was permissible because the plaintiff used the SIM cards with a GSM gateway, in breach of contract, to enable other companies to terminate telephone calls in the plaintiff’s mobile telephony network. No entitlement to use the SIM cards for commercial telecommunications services (Articles 19 and 20 GWB; Article 82 EC; Article 1 Act Prohibiting Unfair Competition (UWG))</td>
</tr>
<tr>
<td>OLG Düsseldorf VI-U 10/05 (Kart)</td>
<td>28.09.2005</td>
<td>No contractual entitlement to activation of &quot;SIM cards&quot; by the defendant: blockage was permissible because the plaintiff used the SIM cards with a GSM gateway, in breach of contract, to enable other companies to terminate telephone calls in the plaintiff’s mobile telephony network. No entitlement to use the SIM cards for commercial telecommunications services (Articles 19 and 20 GWB; Article 82 EC; Article 1 UWG)</td>
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<td>LG Dortmund 13 O 135/05 (Kart)</td>
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<td>LG Berlin 16 O</td>
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</tr>
</tbody>
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Spain

In 2005, ten judgments in which Articles 81 or 82 of the Treaty were applied have been transmitted to the Commission in accordance with Article 15(2) of Regulation (EC) No 1/2003.

Nine judgments related to proceedings brought by petrol stations against oil companies. The matters disputed in these legal proceedings between oil companies and petrol stations have all been similar in nature, focusing principally on the possible invalidity of the supply contracts and their nullity.

Five of these proceedings were appeals against judgments handed down by courts of first instance. The first instance court is either a “Juzgado de lo Mercantil” or a “Juzgado de Primera Instancia”, while the court of second instance is the “Audiencia Provincial”.


In the initial judgment, the complaint brought by the petrol stations Melón SA and Zarza SL was dismissed. The petrol stations appealed, but the Audiencia Provincial confirmed the ruling of the court of first instance that the contracts at issue were “commission agreements”, i.e. genuine agency agreements.

**Judgment No. 14/05 of 22 March 2005 handed down by Juzgado de lo Mercantil No. 2 of Madrid. Parties: confidential.**

A petrol station brought proceedings against an oil company for allegedly setting final prices for customers and demanded damages. The court dismissed all claims. It classified the contract as a “non-genuine agency agreement” according to the Guidelines on vertical restrictions (Commission Notice of 13 October 2000). Secondly, it ruled against the existence of price fixing as the oil company fixed maximum prices leaving it to the petrol station to reduce final prices by cutting its margins in favour of the customers. Fiscal arguments made by the claimant relating to this matter were also dismissed.

**Judgment No. 45/05 of 15 April 2005 handed down by Juzgado de lo Mercantil No. 5 of Madrid. Parties: Aloyas SL against Repsol SA.**

A petrol station brought an action before this specialized court of first instance on the possible invalidity of a supply contract, its nullity and requested damages. After a review of the contract and the distribution of commercial, financial and product risks, the court ruled that the contracts cannot be considered as agency agreements but rather are re-sale agreements. Secondly, it ruled against the allegation of fixing of consumer prices by the oil company. The court found that the exclusive distribution clause at issue did not fall within the scope of the Block Exemption Regulations and that it had anticompetitive effects prohibited by Article 81
EC. The nullity of the exclusivity clause led to a finding of the nullity of the whole contract. Damages were not awarded.

Judgment No. 368/05 of 5 July 2005 handed down by Audiencia Provincial of Madrid Section 21º. Parties: Rutamur SA against Repsol SA.

The appeal formed part of the ordinary proceedings brought by the complainants before the “Juzgado de Primera Instancia” of Madrid No. 26. In the initial judgment, the claim brought by the petrol station Rutamur SA, in which it sought that the contracts be considered as re-sale agreements from 1993 and that it be paid damages for the loss of income during those years, was dismissed. The Audiencia confirmed the decision of the court of first instance, finding that the contract was not a re-sale agreement but rather a genuine agency agreement to which the prohibition of Article 81(1) does not apply (the applicability of the Block Exemption Regulations was therefore not at issue). The costs incurred were divided between the two parties.

Judgment No. 180/05 of 29 July 2005 handed down by Juzgado de Primera Instancia No. 3 of Madrid. Parties: LV Tobar e Hijos SL against Cepsa Estaciones de Servicio SA.

The judge admitted the action of a service station operator and declared that the service station operator is a re-seller of the oil products and that in view of the Block Exemption Regulations 1984/1983 and 2790/1999 the contract with the oil company is null in its entirety. Three aspects were taken into account by the judge. Firstly, the legal nature of the contract is a re-sale agreement, rather than a genuine agency, insofar as the complainant assumes the financial risk. Secondly, the agreement at stake cannot benefit from the Block Exemption Regulations, due to the restriction on resale price maintenance and the profit margins which are fixed by the oil company. Thirdly, the duration of the contract at stake exceeds the limit set by Article 12.1c) of Regulation (EC) No 1984/1983. Finally, the judgment included the fulfilment of the payment obligations in accordance with contracts with similar characteristics.

Judgment No. 191/05 of 3 October 2005 handed down by Audiencia Provincial of Albacete Section 2º. Parties: Conrado Quilez Alejo against Compañía Logística de Hidrocarburos SA & CEPSA Estaciones de Servicio SA.

The substance of the case is once again the legal nature of the contract between the petrol station operator and the automotive fuel distributors. In this case, the court found that the will of the parties was to conclude an agency contract. Moreover, the judgment outlines the criteria (financial and investment risks) for assessing whether a retailer is an agent under EC competition rules by reference to the European Commission’s guidelines. The court dismissed the claim of nullity of the contract and confirmed the decision at first instance.

Judgment of 7 October 2005 handed down by Audiencia Provincial of Madrid Section 8º. Parties: I.D.Infraestructuras y Desarrollo SL against Repsol SA.

The complainant—a petrol station operator—brought a claim against Repsol that the legal nature of the contractual relationship is a re-sale agreement, and therefore Article 12.1.c) of the Regulation 1984/1983 (exception to Article 10) should be applied, so that the contract is void under Article 81 EC. The court ruled in conformity with the doctrine of the Supreme Court about the retail sale of automotive fuel (judgments of 2 June 2000, 20 June 2001) and
the Commission’s guidelines. It found firstly, that I.D. Infraestructuras y Desarrollo is an
agent and that there is no property transfer of the products. Moreover, the retailer has the
option to substitute the re-sale agreement by an agency agreement, and this right had not been
used. Secondly, Article 12.2 of the Regulation 1984/1983 must be applied as an exception to
the time limit indicated by Article 12.1c) because the agreement “relates to a petrol station
which the supplier lets to the reseller or allows the reseller to occupy on some other basis”.
Thirdly, a network of exclusive supply contracts which may lead to foreclosure of the market
in accordance with the ECJ’s case-law (Delimitis) has not been proved As a result, the appeal
was dismissed and the decision at first instance was confirmed.

**Judgment No. 103/05 of 19 October 2005 handed down by Juzgado de lo Mercantil No. 4 of
Madrid. Parties: Inversiones Cobasa SL against BP Oil España SA.**

In a similar case, the judge ruled that the legal nature of the contract is not a re-sale agreement
but an agency contract. Nevertheless, it was further concluded that it was not a genuine
agency agreement because the retailer assumes some level of financial risk. The judge found
that the type and size of the network of suppliers in Spain neither affect interstate trade nor
lead to a restriction of competition. In addition, no resale price maintenance was imposed by
the contract. With regard to the duration of the contract, it was ruled that Article 12.2 of the
Regulation 1984/1983 was applicable in this case. The action of the petrol station operator
was accordingly dismissed.

**Judgment No. 85/05 of 11 November 2005 handed down by Juzgado de lo Mercantil No. 5 of
Madrid. Parties: Conduit Europe SA against Telefonica de España SAU.**

Telefónica was ordered to pay 639,003 € damages to Conduit for a breach of competition law
(Spanish Unfair Competition Law, Article 82 EC and other national regulations) The court
ruled that Telefónica abused its dominant position by providing Conduit with defective and
incomplete subscriber data.

It is the first time that a Spanish court has granted damages for a breach of competition rules
in the telecommunications market, on the back of a prior declaration of that breach by the
telecoms regulator, the “Comisión del Mercado de las Telecomunicaciones” (CMT). The
judgment thereby follows EC case-law (Courage).

The events in question date back when the directory enquiries market in Spain effectively
opened and “118” services were launched. Telefónica was required to deliver accurate
subscriber data to competitive providers in order to enable fair competition. However, the
CMT declared in 2003, as a result of complaints filed by Conduit, that Telefónica had breached
these obligations.

This court ruling confirms that Telefónica provided Conduit with inaccurate and incomplete
subscriber data which caused the new entrant a competitive disadvantage and additional costs
relating to the cost of sourcing alternative data and data cleansing. The court has ordered
Telefónica to pay Conduit for these costs as well as legal costs.

**Judgment of 19 November 2005 handed down by Audiencia Provincial of Madrid Section 11º.
Parties: Multipetróleos SL against Cepsa Estaciones de Servicio SA.**
The action of the petrol station operator against Cepsa is similar to the other cases outlined above. The court ruled that it had jurisdiction to hear the case, which had been denied by the first instance court. The substance of the procedure was about the nature of the contract. Although there are contradictory judgements among the different sections of this “Audiencia Provincial”, the contract was deemed to be an agency and exclusive supply agreement (financial risks are not assumed, no transfer of property in the products, option to change into a re-sale agreement) to which Regulation (EC) No 1984/1983 cannot be applied. The action was consequently dismissed.

**France**

**Injunctions (to stop an infringement, fulfilment of a contractual duty)**

*Court of Cassation, 28 June 2005, Daimler Chrysler France*

The case concerned a refusal to grant authorisation under the new motor vehicle regulation, Regulation (EC) No 1400/2002, to a dealer whose contract had expired following its termination under the previous regulation, Regulation No 1475/95.

The Dijon Court of Appeal had ordered, subject to the payment of a penalty, the manufacturer to recognise the dealer as an authorised repairer. The court had held that the manufacturer’s refusal to authorise an applicant who fulfilled its conditions was a discriminatory decision contrary to the objectives of Regulation (EC) No 1400/2002.

The Court of Cassation confirmed the analysis of the Court of Appeal but ruled that it was not for the latter to assess the appropriateness of the manufacturer’s choice of criteria. It therefore overturned the Appeal Court’s judgment on this point and sent the parties before the Paris Court of Appeal.


**Nullity decisions**

*Paris Court of Appeal, 12 April 2005, Ténor*

By decision 04-D-48 of 14 October 2004, the Competition Council had found that France Télécom and SFR had infringed the provisions of Article 82 of the Treaty by imposing charges which prevented new entrants to the fixed telephony market from proposing, by means of interconnection to the two operators’ mobile networks, competitive “fixed-to-mobile” offerings without incurring losses. The Competition Council considered that those practices had had the effect of delaying new operators’ entry to the market at a time when, in order to operate on the market, they had no other technical solution but interconnection with the networks of France Télécom and SFR.

The Court of Appeal reversed the decision and held that it had not been established that France Télécom and SFR had infringed the provisions of Article 82 of the Treaty.


*Paris Court of Appeal, 2 March 2005, Kitch Moto sarl v Suzuki France*

With a view to obtaining a finding that the termination of an exclusive dealing agreement between it and Suzuki was abusive and harsh, Kitch Moto appealed against a judgment of the

It asked the Court of Appeal to annul Article 2 of the dealing agreement, which it had breached, on the basis of Article 4(b) of the exemption Regulation, which prohibits territorial restrictions under certain conditions. It argued that only active sales outside the network could be banned.

The Court of Appeal rejected the application on the ground that the localisation clause provided for in the dealing agreement did not infringe the provisions of Article 4(c) of the Regulation, which allow the supplier “the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment”.

Paris Court of Appeal, 12 April 2005, Appeal by Export Press against Competition Council Decision 04-D-45 of 16 September 2004

A Law of 2 April 1947 on the status of newspaper and periodical consolidation and distribution enterprises reserves the sale of individual issues in the overseas departments to publishers and press distribution services.

The Competition Council had declared inadmissible an action brought by Export Press against exclusionary practices on the part of NMPP, which was in a dominant position in the market, on the ground that, as it was neither a press distribution service nor a publisher, Export Press did not have an interest in bringing proceedings.

Export Press appealed on the ground that the 1947 Law was contrary to the provisions of Articles 82 and 86 of the Treaty. The Court of Appeal confirmed the Competition Council’s analysis and held that there was nothing to suggest that the status of press enterprises as laid down by the 1947 Law was in itself contrary to the provisions of Articles 82 and 86 of the Treaty and hence incapable of being relied on as against Export Press.

Court of Cassation, 12 July 2005, SPEA

The Syndicat des Professionnels Européens de l’Automobile (SPEA) alleged that Renault and its dealers’ association had engaged in anticompetitive practices aimed at restricting parallel imports of vehicles by means of, firstly, sales support for dealers facing competition from independent agents and resellers located abroad and, secondly, the banning of the granting by the network of discounts on certain models.

The Court of Appeal had confirmed the analysis carried out by the Competition Council in its Decision 03-D-66, holding that the support given to dealers qualified for exemption under Regulation 1475/95 of 28 June 1995 (on the exemption of certain exclusive or selective motor vehicle distribution and servicing agreements) since it had not had the effect of reducing the commercial freedom of dealers, distributors outside the network and end users but had on the contrary had a positive impact on competition by permitting the maintenance of the network’s density and the quality of the services offered and by bringing about a significant reduction in prices.
The Court of Appeal had found, moreover, that no voluntary agreement between the manufacturer and its dealers aimed at prohibiting the network from granting discounts on certain models had been proved to exist.

The Court of Cassation upheld the Court of Appeal’s analysis.


Strasbourg Regional Court, 3 February 2005, Brasseries Kronenbourg SA
Brasseries Kronenbourg SA had terminated a beer supply agreement it had entered into with a café, Le Victor Hugo, on the ground that the latter had not complied with the agreement’s provisions.

The Strasbourg Regional Court held that the agreement was covered by block exemption Regulation (EC) No 2790/1999 if Brasseries Kronenbourg’s market share did not exceed 30% of the relevant market, even if the beer volumes were deemed to be contractually excessive.

The court found that, were Brasseries Kronenbourg’s market share to be such that the agreement did not qualify for automatic exemption under the Regulation, it would be for the café’s owner to show that the agreement did not satisfy the conditions for exemption. In its judgment, the court dismissed for lack of proof the owner’s application for a declaration that the agreement was null and void.


Paris Court of Appeal, 21 September 2005, Jean-Louis David France
In asking the Court of Appeal to declare the consent clause contained in the franchise agreement between it and Jean-Louis David to be abusive, Socovi maintained that it was for the former company to prove the clause’s lawfulness in the light of Article 81 of the Treaty.

The court held that it was not established that the franchise network set up by Jean-Louis David was likely to affect intra-Community trade and found that the clause in question did not constitute a hardcore restriction of competition prohibited by exemption Regulations 4082/88 and 2790/1999.

The court upheld the judgment of the Paris Commercial Court of 23 May 2003.


Paris Court of Appeal, 8 June 2005, LCJ Diffusion SA v La Roche-Posay SA and Cosmétique Active France SNC

La Roche-Posay manufactures skin-care products which it markets through a selective distribution network of which Cosmétique Active France forms part. Having been ordered by the lower court to cease selling La Roche-Posay products, LCJ Diffusion, a company outside the network, asked the Court of Appeal to find that La Roche-Posay’s agreements did not qualify for exemption under Article 81(3).

The court held that the agreements did not contain any clauses prohibited by Article 4 of block exemption Regulation (EC) No 2790/1999 and that the exemption provided for by that Regulation was not rendered inapplicable solely by reason of the exceeding of the threshold of 30% of a market which, moreover, was not the relevant market.

The court upheld the lower court’s judgment.
Procedural issues (e.g. burden of proof, jurisdictional issues etc.)

Paris Court of Appeal, 15 June 2005, Automobiles de Gap SA
Automobiles de Gap SA brought an action alleging that Automobiles Citroën SA had set excessively high sales targets in its dealership agreements and that this had led to the plaintiff becoming insolvent.

The Court of Appeal noted that exemption Regulation 123/85 on motor vehicle distribution agreements, as worded at the material time, provided that “Articles 1, 2 and 3 shall apply notwithstanding any obligation imposed on the dealer to endeavour to sell, within the contract territory and within a specified period, [a] minimum quantity of contract goods … “, save where the criteria laid down for attaining those objectives were not objective and non-discriminatory.

The court held that the method adopted was based both concretely and objectively not only on the make’s performance at national and regional level but also on the relevant dealer’s previous results.

The court upheld the judgment of the Commercial Court.

Paris Court of Appeal, 22 February 2005, appeal by JC Decaux SA against Competition Council Decision 04-D-32 of 8 July 2004
The Competition Council had fined Decaux under Article 82 of the EC Treaty EUR 700 000 for abusing its dominant position in the market for the supply to local authorities of advertising street furniture.

The Paris Court of Appeal rejected Decaux’s plea that the Competition Council had exceeded its remit in this case by prohibiting practices not covered by the referral. The court ruled, in line with established case law, that, once a matter had been referred to it, the Competition Council was empowered to investigate all the facts and practices affecting the market to which the referral related, and hence to examine practices uncovered by the investigation, provided that they had the same object or the same effect as those which had been brought to its attention, even if those practices continued after the referral.

The court upheld the Competition Council’s decision.

Paris Court of Appeal, 24 May 2005, Digitechnic
The Paris Court of Appeal heard an appeal against a decision of the Competition Council (04-D-76) rejecting a complaint by Digitechnic, a computer assembler, against practices by Microsoft, a firm in a dominant position in the market for personal computer operating systems and in that for office application software. The Competition Council had found that the alleged practices of the withholding of licences and price discrimination were not proved, that Digitechnic had not been prevented from carrying on its assembling activities and that the price discrimination was justified by objective reasons.
The Court of Appeal held, on the contrary, that the possibility could not be ruled out that Microsoft might have abused its dominant position in the two relevant markets by deferring the granting of distribution licences to assemblers and by charging them prices which bore no relation to those it charged other equipment manufacturers.

The court annulled the Competition Council’s decision and referred to case back to the Competition Council for further investigation.


**Strasbourg Regional Court, 4 February 2005, Brasseries Kronenbourg SA: The national court has jurisdiction to apply Articles 81 and 82 of the Treaty**

Brasseries Kronenbourg had terminated its beer supply agreement with JBEG sarl. The latter asked the court to suspend judgment and seek the European Commission’s opinion on the agreement's compatibility with Article 81 of the Treaty.

JBEG’s request was refused on the ground that Article 6 of Regulation (EC) No 1/2003 empowered Member States’ courts to apply Article 81 of the Treaty and required them to apply also the Community rules when applying national law on restrictive practices or abuses of dominant positions.


**Paris Court of Appeal, 21 September 2005, Jean-Louis David France**

The Court of Appeal ruled that it had not been proved that the franchise network set up by Jean-Louis David France might affect intra-Community trade. It did not appear in any event that the clause complained of, which constituted a means of giving effect to the *intuitus personae* characterising the franchise agreement and which was designed to prevent the benefit of the know-how and of the assistance provided from going directly to a competitor, infringed, as a hardcore restriction of competition, the rules introduced by Commission exemption Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of franchise agreements.

The Paris Court of Appeal upheld the judgment of the Paris Commercial Court.

**Paris Court of Appeal, 26 January and 16 February 2005, Volkswagen**

Claude Petit and Raphaël Petit, dealers in the Volkswagen France network, had brought an action for the latter’s failure to help them face up to competition from Belgian Volkswagen dealers engaged in parallel imports.

The Court of Appeal ruled that the provision by a supplier of assistance or back-up to the members of its network was not unlawful *per se* under Article 81 of the Treaty. It considered, however, that Volkswagen France was not obliged to compensate for any difference between the prices charged by its own network and those charged by dealers in other Member States. It accordingly nonsuited the appeal.


**List of court judgments applying Articles 81 or 82 of the Treaty in 2005**

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**Netherlands**

The Dutch courts have applied EC competition law in the judgments listed below. It should be noted in this regard that the Dutch courts also interpret Articles 81 and 82 of the EC Treaty when they apply the Dutch Competition Act, since this Act is based on EC competition law. The District Court of Rotterdam has stipulated more precisely in its rulings that a comparison with Community law is only of relevance to the application of substantive law.

1. Court of The Hague, 24 March 2005, 04/694 en 04/695, Marketing Displays International Inc. v. VR (civil proceedings)
This case concerns the enforcement of three American arbitration decisions on the basis of the Netherlands Code of Civil Procedure and the Treaty of New York. The proceedings resulted from the appeal of the judgment of the President of the District Court of the Hague in an interlocutory proceeding (see EC report 2004 Marketing Displays International Inc. v VR Van Raalte Reclame B.V. 27 May 2004, KG/RK 2002-979 and 2002-1617). The Court first referred to the Eco Swiss judgment (C-126/97), in which the Court of Justice of the EC held that Article 81 EC is a matter of public policy. Therefore the Court of The Hague can annul an arbitration award if it conflicts with public policy. The Court concurred with the judgment of the President of the District Court of The Hague that the licensing agreement is contrary to Article 81(1) EC and refused to enforce the arbitration decisions. The Court did not examine if the licensing agreement fulfilled the criteria laid down in Article 81(3) EC, because the Court presumed that Regulation (EC) No 1/2003 did not have retroactive effect. In other words, the national court could not give an exemption from Article 81(1) EC for an agreement prior to 1 May 2004.


This case concerns the termination of a distribution agreement by the supplier Polar, because distributor A did not agree to a change to the distribution system. Distributor A wanted Polar to supply its products in conformity with the previously applicable system. Distributor A claimed that Polar abused its dominant position contrary to Article 82 EC and Section 24 of the Dutch Competition Act. Distributor A also alleged that if Polar is deemed to operate a selective distribution system, it does not fulfil the criteria laid down in Article 81(3) EC and the Block Exemption Regulation on Vertical Restraints. Polar took the position that it does not operate a selective distribution system but rather an exclusive distribution system.

The Court first referred to the fact that Article 81(1) EC does not concern agreements which have no appreciable effect on trade (De Minimis Notice of the European Commission). The Court secondly ruled that Section 7(1) of the Dutch Competition Act, the national equivalent of the De Minimis Notice, is not applicable in this case. The Court then referred to the Commission Notice on Vertical Restraints. The Court stated that Polar did not provide any information about its market share and therefore the Court could not rely on the 30% threshold as set out in the Block Exemption Regulation on Vertical Restraints. Furthermore it found that Polar had not proved that its distributors can only sell in a particular territory, which is typical for an exclusive distribution agreement. The Court thus ruled that Polar did not prove that it operates an exclusive distribution system, but rather the system tends towards that of selective distribution. Since it is not likely that the distribution system of Polar fulfils the criteria of Article 81(3) EC and Section 6(3) of the Dutch Competition Act, the Court concluded that Polar’s distribution system is contrary to EC and Dutch competition law. Because the alteration of the distribution system was the reason for terminating the distribution agreement, and the new distribution system is contrary to EC and Dutch competition law, termination of the distribution agreement was found to be contrary to Dutch Civil Law with regard to the principle of fairness. The Court ordered Polar to supply its products to A until the old distribution agreement has been legally terminated. The Court did not rule on whether Polar abused its dominant position.

In 2002, Daewoo lawfully terminated a dealer agreement with the plaintiff. Thereafter, the plaintiff made a request to Daewoo that it be appointed as an Authorized Daewoo Repairer. Daewoo refused this request on the grounds that the business relationship between Daewoo and the plaintiff was damaged to such an extent that the plaintiff did not qualify to be appointed as an Authorized Repairer. The central question in this case is whether Regulation (EC) No 1400/2002 obliged Daewoo to enter into an Authorized Repairer Contract with the plaintiff. The Court agreed with the judgment of the President of the District Court of Haarlem that an obligation to enter into a contract cannot be derived from Regulation (EC) No 1400/2002 (see EC report 2004, plaintiff v Daewoo Motor Benelux B.V. 28 September 2004, 103753/KG ZA 04-347). The Court also ruled that Regulation (EC) No 1400/2002 does not prevent Daewoo from terminating an Authorized Repairer Contract. According to the Court, it should therefore be possible for Daewoo to refuse to enter into a contract with the plaintiff, on the same grounds as it is possible to terminate an Authorized Repairer Contract. Because the business relationship between Daewoo and the plaintiff was damaged to such an extent by the plaintiff (the plaintiff, for example, refused to pay two times, and refused to purchase ex-rental cars as was agreed) it found that Daewoo lawfully refused to conclude a contract with the plaintiff.

4. President of the District Court of Utrecht of 3 November 2005, 201038 KG ZA 05-911, PCA v Peugeot Nederland N.V. (interlocutory proceedings) (civil proceedings)

Peugeot Nederland is the Dutch importer of Peugeot motor cars. With regard to the distribution, repair and maintenance of Peugeot motorcars, Peugeot has selected a limited number of distributors and repairers. For the repair and maintenance of Peugeot motor cars, repairers need specific technical information/ diagnosis equipment with regard to the software systems implemented in Peugeot motor cars. Peugeot has two versions of this equipment, namely a complete system (PPS) for authorized distributors and repairers and a restricted version of the system (PPRI) for independent repairers. The PCA-dealers are independent repairers which sought access to the complete system.

The central question in this case is whether Peugeot is obliged to give independent repairers the same information as authorized repairers. Peugeot first claimed that a violation of Article 4(2) of Regulation (EC) No 1400/2002 only means that the agreements between Peugeot and its authorized distributors and repairers are no longer exempt under the Regulation. However, the Court ruled that Regulation (EC) No 1400/2002 has direct effect, which means that Peugeot has to comply with the obligations as set out in Article 4(2) of the Regulation.

Peugeot secondly claimed that it did not violate Article 4(2) of Regulation (EC) No 1400/2002 and referred to recital 26 of the Regulation. The Court ruled that the PPS and PPRI systems are defined as know how according to Regulation (EC) No 1400/2002. Peugeot wrongfully rejected access to the complete system with regard to these independent repairers. The Court considers this wrongful rejection as a type of abuse as is mentioned in recital 26 of the Regulation. According to the Court Peugeot acted unlawfully against the PCA-dealers and must grant them access to the necessary technical information in line with Article 4 (2) of the Regulation.

5. Trade and Industry Appeals Tribunal, 7 December 2005, AWB 04/237 and 04/249 9500, Secon Group B.V./ G-Star International B.V. v. the NMa (administrative proceedings)
The Netherlands Competition Authority imposed a fine on Secon because Secon violated Section 6 of the Dutch Competition Act (general prohibition on cartels equivalent to Article 81 EC). In its General Conditions of Sale, Secon included provisions which have rise to a resale prohibition, recommended minimum resale prices and recommended resale prices. On appeal, the Court of Rotterdam ruled that Secon’s General conditions were contrary to Section 6 of the Dutch Competition Act. The Trade and Industry Appeals Tribunal (hereinafter: the Tribunal) ruled on appeal that Section 6 of the Dutch Competition Act had not been breached.

The Tribunal first considered if there was an agreement and consensus between Secon and its buyers. Citing the Sandoz and Adalat judgments of the Court of Justice, the Tribunal ruled that there was consensus between Secon and its buyers. Secondly the Tribunal considered whether there was an imperfect selective distribution system which would mean that the resale prohibition was not anticompetitive. According to Sections 12 and 13 of the Dutch Competition Act, Section 6 of the Dutch Competition Act is not applicable to an agreement that fulfils the criteria laid down in the Block Exemption on Vertical Restraints. The Tribunal ruled that Secon does not operate a (imperfect) selective distribution system, because Secon has not proved that it selects its buyers pursuant to objective selective criteria, which is the main characteristic of a selective distribution system. This meant that the resale prohibition was found to be anticompetitive. Thirdly the Tribunal ruled that the minimum recommended prices are anticompetitive. Secon’s General Conditions provide that a buyer cannot deviate from the minimum recommended prices unless Secon has given its permission. According to the Block Exemption Regulation on Vertical Restraints, buyers must be free to set their own resale prices. The Tribunal finally considered whether the agreement has an appreciable effect on competition (within meaning of the Volk Vervaeke case law concerning the quantitative criteria for assessing the appreciability of restrictions). It ruled that the specific situation in which the agreement takes effect must be considered, in particular, the economic and judicial context in which the undertakings operate, the nature of the services at issue, the structure of the relevant market and the actual circumstances in which the agreement operates. The Tribunal ruled that the Netherlands Competition Authority has not sufficiently considered the specific situation in which the agreement operated and had not sufficiently reasoned why the argument of Secon that the agreement has no appreciable effect on competition (very low market share) is unfounded. The Tribunal ruled that the Netherlands Competition Authority has to take a new decision.

Austria

The Cartel Court in its capacity as one of the national competition authorities has applied Articles 81 and 82 EC in three decisions which have been transmitted to the European Commission pursuant to Article 15 of Regulation (EC) 1/2003 (see also under pt. I.1.2). All these decisions had been appealed and definitive judgments have already been rendered by the higher courts in respect of each of them.

Portugal

Portuguese Dental Association

The Lisbon Commercial Court took a decision on 9 December 2005 concerning an appeal brought against the Portuguese Competition Authority’s decision in the case of the Portuguese Dental Association.
The Court confirmed the Portuguese Competition Authority’s finding that the Portuguese Dental Association had established an obligation to charge minimum fees for all dental practitioners in Portugal contrary to Article 81 EC. The Court considered, however, that the Portuguese Dental Association had acted negligently [as opposed to intentionally?], and reduced the fine to EUR 50 000. Moreover, the Court declared void some provisions of the Deontological Code. Furthermore, the Court confirmed the obligation for the defendant to publish an extract of the decision in the official gazette and in a Portuguese newspaper with national circulation, as well as on the website and in a periodical review of the Association.

An appeal against this decision has been brought by the Portuguese Competition Authority before the Lisbon Appeal Court.

**Sweden**

*The Market Court*

**Case No 2005:5: VVS-Installätörerna v. the Swedish Competition Authority – Date 29 February 2005**

The case concerned an appeal against a decision by the Swedish Competition Authority ordering the Swedish trade association for plumbing, heating, refrigeration, electrical and platework contractors, VVS-Installätörerna, under penalty of a fine of SEK 5 million, to cease to provide a price list for frequently used sector-specific goods and services. In the same decision, the Swedish Competition Authority had decided not to grant an individual exemption for these arrangements. The Market Court removed the latter part of the decision from the case list due to transitional provisions in the Swedish Competition Act. As concerns the cease and desist order, the Market Court upheld the decision but postponed by three months the date by which the remedy should take effect.

**Case No 2005:7 : Swedish Competition Authority v. 5 petrol companies - Date 2005-02-22**

Following a major investigation by the Swedish Competition Authority, suspicions as to the existence of a petrol cartel in Sweden were confirmed. The Swedish Competition Authority filed actions with the Stockholm City Court against Statoil Detaljhandel AB, OK-Q8 AB, AB Svenska Shell, Preem Petroleum AB and Norsk Hydro Olje AB in 2000, requesting fines for infringements of Article 6 of the Swedish Competition Act and Article 81 of the EC Treaty. The investigation showed that representatives from the companies had held secret meetings during the autumn of 1999 in order to plan and to implement an agreement on prices and discounts. A large number of meetings had taken place under the pretext of ongoing discussions on a certain environmental issue. During the course of these meetings, the companies developed a common strategy for lowering their costs in connection with discounts. The Market Court found that the five petrol companies had infringed the Swedish Competition act and set the fines for the five companies at SEK 112 million.

The Market Court did not find that Community law was directly applicable to the case since there was no effect on trade. It noted that the concerted practices on the one hand covered a whole Member State and that the concerned undertakings had very large market shares, which, according to the Court, supported the effects on trade criterion. Elements that worked against such findings were on the other hand the fact that the practice only concerned one rebate arrangement and that the exchange of information only occurred during a limited time period. The Court found that under these circumstances there are natural trade restrictions on
the relevant market which are such so as to exclude the practice having an effect on trade within the meaning of Article 81 EC. The Market Court did, however, conclude that even if the Court applied Article 81 EC, the outcome of the case would have been the same.

The Swedish Competition Authority’s method of calculation of the fines, based on the Commission’s guidelines on fines, was rejected by the Market Court. The Court stated that the fines should be calculated on the basis of national legislation and not primarily by applying the method used by the Commission.

Case No 2005:27: FAC Flygbussarna Airport Coaches AB a.O. v. Swedish Competition Authority and the Civil Aviation Authority (Luftfartsverket) - Date 30 August 2005
The case concerned an appeal against a decision by the Swedish Competition Authority finding that the access system and fees obtained for buses and coaches calling at Arlanda airport did not constitute an abuse of the Civil Aviation authority’s (Luftfartsverket) dominant position. The Market Court found that it could not be excluded that the system of such calling fees could constitute an abuse of Luftfartsverket’s dominant position and therefore ruled in favour of the plaintiff.

The Market Court found that the circumstances of the case were such that Article 82 EC was applicable. It concluded that the assessment carried out under national law was compatible with Article 82 EC and that the application of Article 82 EC would therefore lead to the same result as the application of the equivalent article in the Swedish Competition Act (Article 19).

B2 Bredband Holding AB claimed that TeliaSonera abused its dominant position on the market for fixed-line telecom subscription by offering new broadband customers lower prices for fixed line telecom (mixed bundling). The Market Court found that B2 Bredband Holding AB failed to prove that TeliaSonera had a dominant position.

United Kingdom

Procedural issues (e.g. burden of proof, jurisdictional issues, etc.)
BHB Enterprises plc v Victor Chandler (International) Ltd - High Court
Mr Justice Laddie - 27 May 2005

Appropriate level of detail in a pleading alleging infringement of Article 82

The claimant is vested with the function of administering British horseracing and to do so, it among other things, compiles data related to horseracing. The defendant is a British bookmaker. The defendant stopped paying a licence fee for the use of the defendant’s horseracing data, contending that the claimant’s database rights no longer existed as a result of an ECJ judgment and that the licensing agreement was therefore void. The claimant asserted that over £200,000 was due to it from the defendant and further threatened to instruct a third-party onward transmitter of the data in question to cease supplying the defendant with the data. The claimant sued for breach of contract.
The defendant sought permission of the court, inter alia, to amend its Defence and Counterclaim, so as to plead, inter alia, that the claimant was abusing a dominant position contrary to Article 82 of the EC Treaty and the Chapter II prohibition of the Competition Act 1998. More specifically it sought permission to plead that the Claimant had a dominant position in the market for the supply of pre-race data for horse racing in the United Kingdom, that that data were an essential facility required for any bookmaking in relation to professional horse racing in the UK and that by charging particularly high prices for that data and by threatening to make arrangements to prevent the supply of that data, the claimants had abused their dominant position.

The court considered that the case set out in the proposed amendment was not properly pleaded. Under the English civil procedure rules, a pleading must contain a precise statement of the facts on which the party relies. In some situations, such as where fraud is alleged, a greater degree of particularity is required in the pleadings. The court considered that the latter principle also applied to allegations of infringement of Articles 81 and 82 and the corresponding domestic competition law prohibitions. More specifically, the court considered that particular care was to be expected of a party who pleads an infringement of Article 82 and its domestic counterpart, the Chapter II prohibition. The court noted that cases involving such allegations can lead to lengthy and expensive trials. Accordingly a mere assertion of infringement in a pleading will not be sufficient. Instead, it will be necessary for a party making such an allegation to set out clearly and succinctly the major facts upon which it will rely. In the instant case, the proposed amendment failed to set out a basis for asserting why the claimant’s prices were abusively high, as opposed merely to high.

The court furthermore considered that the proposed pleading was not capable of amendment in order to set out a viable case. In the court’s view, in a case where abusive pricing is alleged, an assessment of the value of the asset to both the vendor and the purchaser must be a crucial part of the assessment. The defendant’s approach did not take this into account at all. It simply related prices to the cost of acquisition or creation. According to the court, the defendant ignored the necessity of proving that the prices were unfair and considered only whether they were high.

Permission to amend the pleadings to include an allegation of infringement of Article 82 and the Chapter II prohibition was therefore denied.

AtTheRaces Ltd and another v British Horseracing Board Ltd and another - High Court
The Vice Chancellor - 15 July 2005

The claimants supply broadcasting, website and other audio-visual services in relation to British horse racing. They obtained rights in respect of certain British racecourses which entitled them to produce audio and visual coverage of horseracing. They also allowed viewers to place bets on those races through the internet or through interactive services offered on satellite television.

The defendants own and maintain a computerised database of information containing a large quantity of data relating to British horseracing. A key part of the defendants’ database consists of pre-race data, which is distinct from on-course data (the latter of which include information relating to the non-runners in, and the results of, races). The claimants’ audio-visual services provide pre-race data to customers and views and prospective bettors which is
ultimately derived from the defendants’ database.

In the proceedings, the claimants claimed that the defendants effectively have a monopoly in the supply of pre-race data to those in British racing that require such information, including, in particular, bookmakers and producers of TV channels or internet sites showing British racing. They further claimed that the defendants sought to impose terms for the supply of pre-race data and made threats to procure the termination of the supply of such data to them that amounted to an abuse of a dominant position contrary to Article 82 and the Chapter II prohibition contained in section 18 of the Competition Act 1998. The key allegations were excessive, unfair and discriminatory pricing.

The claimant also requested an interim injunction to restrain the defendants from terminating the supply of pre-racing data.

The court stated that it had to consider whether claimant had reasonable grounds for bringing the claim and also whether the claim had a real prospect of success. When considering these questions, the court had to guard against conducting any form of a “mini-trial.” Having regard to this consideration, the court noted that many of the issues in contention, in particular, those relating to objective justification, involved complex questions of fact and law and were unsuitable for determination on an application such as the one in question. Accordingly, the court could not conclude that the claimants had no reasonable grounds for bringing their claim nor that it had no real prospect of success. The application for strike out or summary judgment against the abuse of dominant position claims was therefore refused.

The court also considered that the balance of convenience and the maintenance of the status quo both favoured the grant of an interim injunction. The court considered that if the supply of pre-race data to the claimants was stopped, then the loss of business caused to the claimants could not be properly compensated by money. Up to date and accurate information was crucial to the bookmakers and bettors alike. Furthermore, the reasons for the decision not to strike out or give summary judgment on the claim also supported the view that there was a seriously arguable case for the grant of an injunction at trial.

_Hewlett Packard Development Company LP and others v Expansys UK Limited - High Court Mr Justice Laddie - 15 July 2005_

_No sufficient nexus between alleged abuse and exercise of IP right resulting in grant of summary judgment_

The claimants applied for summary judgment in their claim for infringement of registered trade marks. The claimants make and market electronic personal organisers under the trade marks HP and iPAQ. The defendants are an on-line reseller of electronic equipment and sourced supplies of the claimant’s personal organisers in Asia and offered to sell and sold them in the UK. The claimants argued that this infringed the claimants’ registered trade marks and that there was no real or credible defence to the claim.

The defendants inter alia claimed that as a result of the claimants’ allegedly anti-competitive behaviour, the claimants were not entitled to deploy their registered trade marks against otherwise unlawful importation of the trade-mark bearing goods. More specifically, the
defendants argued that HP, the first claimant, was abusing a dominant position by fixing the price of its personal organisers.

Under the English civil procedure rules, summary judgment may be appropriate when the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case or issue should be disposed of at a trial. For the purposes of applying this test to the competition law arguments raised by the defendant, the court made an assumption that there was at least an arguable breach of the competition rules (though all issues relevant to this assumption were vigorously disputed by the claimant). The court nevertheless noted that that would not provide a defence to the claim unless there was a relevant nexus between that breach and the claimants’ cause of action.

The court considered that no such nexus existed. The court noted that even if there was an abuse of a dominant position (which was again was denied by the claimants), what is prohibited was the abuse, not the dominant position or the abuser’s ability to continue in the relevant market and to exploit his various property rights. Thus, if the defendant’s allegations concerning price-fixing were made out at trial, then the claimants would have been ordered to stop fixing prices. However, this would not have disentitled them to use their trade mark rights, as such rights did not determine whether or how they fixed their prices in the UK. Accordingly, there was no real prospect that, even if it were to make out its allegation of abuse, the defendant could use that as a defence to the claimants’ claim. Furthermore, there was no other compelling reason why the action should go before trial. Accordingly, having rejected other non-competition law arguments by the defendant, the court granted summary judgment for the claimants.

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Sportswear Company Spa and Four Marketing Ltd v Sarbeet Ghattaura (trading as “GS3”) and Stonestyle Ltd - High Court
Mr Justice Warren - 3 October 2005

Lack of sufficient nexus between alleged infringement and exercise of intellectual property rights sufficient grounds for striking out competition law defences.

The court had to consider an application by the claimant in a trade mark infringement case for strike out of paragraphs of defences alleging an infringement of Article 81(1). The claimants in the relevant action were the owner and distributors of a leading sportswear clothing trade mark and clothing bearing that mark. The claimants had brought an action against the defendants for selling clothing bearing the claimant’s trade mark which had the labels defaced and/or swing tags cut out and defaced. The labels give out “Garment Codes” which contain information relating to the order and quantity of the order and from which Sportswear would be able to ascertain to which of its distributors/customers the clothing was originally sold. Although the claimants did not deny that the clothing sold were authentic products, they nevertheless claimed that notwithstanding the exhaustion of rights principle, under UK trade mark legislation they could oppose further dealings in the trade-mark bearing goods, owing to the allegedly damaged state of the clothing.

The defendants relied upon a number of defences, including an assertion that certain distribution agreements made between the claimants infringed Article 81(1). They further argued that the relevant provisions of UK trade mark legislation allowing a trade-mark proprietor to object to oppose further dealings in goods in certain cases had to be construed against Article 81(1). According to the defendants, the real reason for the trade mark
The claimant objected to the competition law defence on two grounds: (1) that the effect on inter-state trade requirement had not been pleaded and (2) that even if an Article 81(1) infringement could be proven, it would not provide a defence to trade mark infringement on the grounds of lack of sufficient nexus.

The court did not consider it necessary to consider at length the effect on inter-state trade point, though the defendant submitted amendments and particulars to deal with this defect, which it asserted was merely a pleading point. Instead, the court focused on the nexus point.

While the court recognised that Community case-law on free movement of goods might be relevant to the issues in suit, it rejected any relevance of Article 81(1) to the proceedings. The court considered though enforcement of a trade mark with a purpose of preventing dealers from supplying persons carrying on parallel trades may or may not be a breach of Community competition law, it was not to the point in relation those arguments whether, when carrying out that purpose, the claimants were parties to an agreement which happened to infringe Article 81(1). In the view of the court, if the defendants were right in saying that there is artificial partitioning of markets, then they may have good defences to the infringement actions under Community law, but those defences would not have anything to do with Article 81(1). Furthermore, if the defendants did not have good defences under Community law other than under Article 81(1), then, in the court’s view, Article 81(1) would be unlikely to assist them either.
excessive, unfair and discriminatory pricing. Prior to the trial, certain elements of the dispute were settled. The judgment therefore only related to the pari-mutuel pool and fixed-odds betting services offered by the claimants.

The court concluded that the relevant market was that for the supply of UK pre-race data to those in the horse-racing industry that required such information for the services they provide to their customers (in particular bookmakers and producers of TV channels or internet sites relating to horse racing). In the view of the court, that conclusion was confirmed by the application of the SSNIP test. According to the court, the geographical extent of the product market was, for the purpose of the proceedings, all countries outside the UK and Ireland, but it made no difference to the outcome of the case if that was incorrect and the geographical extent of the market was the world.

The court further held that BHB was dominant in that market. In the view of the court, the claimants abused their market dominance by threatening to terminate the supply of pre-race data to the defendants, even though the defendants were existing customers of the claimants and the pre-race data was an essential facility controlled by the defendants, without which the claimants would be eliminated from the market. In the view of the court, there was no objective justification for such conduct by the defendants. It was irrelevant, according to the court, that the claimants and the defendants were not competitors. The defendants sought to justify its proposals as to price, which the claimants refused to accept, as being reasonable charges on the claimants’ overseas customers— who would otherwise be "free riders"—collected through the agency of the claimants. According to the court, that was not a correct description of them as a matter of substance or form: they would be charges on the claimant in substance and form. Further, in the opinion of the court, the prices proposed prior to the commencement of the proceedings were unfairly excessive, and they also discriminated unfairly against the claimants. In addition, the defendants continued to insist, until after the commencement of the proceedings, that the claimants enter into an intellectual property licence from the defendants, even though the use by the claimants of the defendant’s pre-race data would not infringe any intellectual property right of the defendants.

More specifically, the prices charged from time to time by the defendants to the claimants prior to the commencement of the proceedings were excessive and unfair, and so an abuse of defendant's dominant position in the market, because they were significantly in excess of the economic value of the pre-race data and not otherwise justified. The economic value of the data was to be measured, on the facts of the case, by the cost to the defendants of producing its Database (about £5m) together with a reasonable return on that cost. The defendant's proposed charges to the claimants were so far in excess of any justifiable allocation to the claimants of that amount as to be plainly excessive.

The court added that in the absence of any public interest defence under Article 86 of the EC Treaty or para. 4 of Schedule 3 of the Competition Act 1998 (which in domestic law corresponds to Article 86(2)), the fact that a decision against the defendants in the present case would have serious consequences for the proposals and plans of the Government and the defendants to modernise British racing by "commercialising" the defendants’ assets and replacing the statutory levy on bookmakers cannot affect the outcome of the proceedings. Nor, in the view of the court, could it make any difference to a proper application of Article 82 and the Chapter II prohibition of the 1998 Act that the defendants had been motivated, in its proposals to the claimants, by the wider interests of British racing rather than private profit.
The court therefore found for the claimants and invited arguments as to the form of any appropriate relief.