COMPETITION LAW AND THE CONSUMER:

A LEGISLATIVE SURVEY OF FOURTEEN EUROPEAN COMPETITION LAW REGIMES

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About Consumers International (CI)

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1. INTRODUCTION

Purpose of the Surveys

According to its terms of reference the DG Sanco-Consumers International Competition Project's primary goal is to increase the capacity and expertise of EU consumer organisations to represent the consumer cause in the most effective way in the development of competitive markets and competition policy; this aim is to be achieved by undertaking market surveillance into competition within the retail distribution sector. More specifically, the DG Sanco-Consumers International Competition Project creates and/or develops expertise within 14 EU Member consumer organisations to analyse competition policies, law and investigations at the national and Community level from a consumer perspective; this report and the legislative surveys which underpin it are important elements of this aspect of the project.[1]

The legislative surveys of the competition regimes of the various partner countries thus intended to:

(i) Focus the partner organisations on the most important competition law rules in their respective jurisdictions;
(ii) Focus the partner organisations on the most important competition law issues for consumers in their respective jurisdictions;
(iii) Allow the partner organisations an opportunity to demonstrate their understanding of basic competition law rules/issues; and
(iv) To highlight those areas of competition law where the partner organisations need more training and experience.

Methodology

Two legislative surveys were sent out to each of the partner organisations: 'Legislative Survey: Part I' and 'Legislative Survey: Part II'. The first legislative survey was sent out in November 2005; the second in June 2006. Both of the surveys are attached as annexes to this report. In brief, the legislative survey concentrated on the main substantive competition law rules in each jurisdiction as well as the principal competition concerns for consumers in each of the partner countries. Competition concerns in each of the markets chosen by the partners (*viz.* petrol, printer-ink, paracetamol, and downloadable music) were also requested. More subjective questions were also asked however; these questions aimed to assess the general level of awareness of the importance/substance of competition law rules among both consumers and the business community in each partner jurisdiction. It must be noted that the information gathered during the research phase of the project is likely to change over time and the surveys reflect a snapshot of information from November 2005-June 2006.

Layout of the report

The country reports are generally divided into the following sections:

[1] This report on the legislative surveys is not intended to be a detailed statement of the applicable competition law rules (or competition concerns) in each of the partner countries; rather its purpose is to present the findings of various consumer organisations in their attempts to understand and interpret the competition law rules and issues that are at play in their respective jurisdictions. Consequently, the comments revealed in this report are not necessarily to be taken as the opinions of either the British Institute of International and Comparative Law (BIICL) or of Consumers International (or of their respective staff)—or indeed of anyone at DG Sanco.

- Overview of the Partner's Competition Law;
- The Institutional Framework;
- Substantive Provisions of the Competition Law;
- Sanctions and Enforcement;
- Legal Protection;
- Consumer Organisations and their Influence in Competition Cases;
- Important Competition Concerns in the Partner's Jurisdiction; and
- Perceptions Revealed in the Legislative Survey.

2. COUNTRY-BY-COUNTY RESULTS

Cyprus

Overview of the Cypriot Competition Law

The rules governing the protection of competition are contained in the Protection of Competition Law of 1989 (Law 207 of 1989) (hereafter 'PCL' or 'Law').[2] The provisions of this act regulating agreements that restrict competition and abuse of a dominant position are inspired by, respectively, Articles 81 and 82 EC. After the adoption of Regulation 1/2003[3] the Cypriot Government has made substantial efforts to incorporate the enforcement of Articles 81 and 82 into the Law, but these amendments have not yet come into force.[4] Another notable feature of the Cypriot competition law is the Control of Concentrations between Enterprises Law of 1999 (Law 22(I) of 1999), which regulates the notification of concentrations (hereafter 'CCEL' or 'Concentrations Law').[5]

The Institutional Framework

The institution that was set up to ensure the enforcement of the Law is the Commission for the Protection of Competition (hereafter 'CPC' or 'Commission').[6] The Commission is an independent entity and is competent to investigate infringements of Sections 4 and 6 (see below) and shall give opinions according to the provisions of the Law (Section 8). The Commission can consider infringements of Sections 4 and 6 either on its own motion or upon a complaint lodged to it by the Service (see below) or by third parties: Section 22(2).

The Commission consists of seven members, which are appointed by the Council of Ministers on a proposal of the Minister of Commerce and Industry (Sections 9(1) and 2). They are appointed for a renewable term of four years (Section 9(4)). The Chairman of the CPC is responsible for the execution of its decisions and represents the Commission before the judiciary or other authorities (Section 11(2)). The CPC can only take decisions if at least the Chairman and three other members are present (Section 13(1)). Decisions are taken by majority and in case of a tied vote the Chairman has the casting vote (Section 13(2)).

The Service for the Control of Prices and Protection of Consumers, which is of the Ministry of Industry and Commerce (hereafter 'the Service'), acts as a secretariat for the Commission. The

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[2] An English text is available on the website of the Commission for the Protection of Competition: http://www.competition.gov.cy/competition/competition.nsf/legislation_en/legislation_en?OpenDocument (last accessed: 26 September 2006).

[3] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).

[4] *Cyprus – Global Competition Review*, available at: http://www.globalcompetitionreview.com/ear/22_cyprus.cfm (last accessed: 4 August 2006).

[5] An English text is available on the website of the Commission for the Protection of Competition: http://www.competition.gov.cy/competition/competition.nsf/legislation_en/legislation_en?OpenDocument/ (last accessed: 26 September 2006).

[6] The Commission has a very detailed English website containing legislation, press releases, selected cases; it allows provides for the possibility of filing an online complaint: http://www.competition.gov.cy/competition/competition.nsf/legislation_en/legislation_en?OpenDocument/ (last accessed: 26 September 2006).

Service collects information for the Commission, introduces complaints to the Commission, and provides recommendations on Cypriot competition law (Section 29).

Substantive Provisions of the Competition Law

There are some preliminary provisions in Part I of the Law. Section 2, for example, provides definitions of phrases that are used in the PCL, such as 'consumer' 'dominant position', 'agreement' and so on. Section 3 details the agreements and enterprise practises that are subject to the provisions of the Law. These are agreements and unilateral practices that are capable of:

- Restricting free access to the market;
- Restricting competition to a substantial degree; and
- Prejudicing the interests of consumers.

Anti-competitive Agreements

Section 4(1) prohibits agreements that have as their object or effect the elimination, restriction or distortion of competition. An agreement is defined as any arrangement between two parties, by virtue of which one of the parties has willingly undertaken the obligation to constrain its freedom to act in respect of the other party (Section 2). This PCL lists examples of the types of agreements that are prohibited; they are agreements that:

(a) fix, directly or indirectly, the purchase or reselling prices or other terms of transaction;
(b) restrict or controls production, supply, technological development or investments;
(c) distribute geographically or otherwise the markets or other resources of supply;
(d) apply different terms for identical transactions so that certain enterprises are placed at a disadvantageous position regarding competition; or those that
(e) make the entering into contracts conditional upon the acceptance by the other parties of additional obligations which by their nature or according to commercial usage have no connection with the subject-matter of these contracts.

It must be remembered that this is not an exhaustive list and that other agreements having the same object effect are also caught.

Agreements that are in violation of this provision are void *ab initio*; in other words they are void from the moment they are formed (Section (4(2)). Agreements that fulfil the requirements of Section 5(1) can be exempted by a decision of the Commission or an Order of the Council of Ministers (which must first obtain a reasoned opinion from the CPC): Sections 4(3) and 5(2). The requirements of Section 5(1) are as follows:

- The agreement must contribute, with the reasonable participation of the consumers in the resulting benefit, in the development of production or distribution or the promotion of technical or financial progress;
- The agreement must not impose restrictions which are not absolutely necessary to achieve the abovementioned purposes;
- The agreements must not afford the parties the possibility to eliminate competition in a substantial part of the market concerned.

It is also possible for the Commission to exempt categories of agreements which are deemed to satisfy the requirements of this Section (i.e. block exemptions are provided for): Section 17.

Abuse of a Dominant Position

Section 6(1) prohibits the abuse of a dominant position in the market. The Law lists some examples in Section 6(2):

(a) the direct or indirect fixing of unfair purchase or selling prices or other unfair, under the circumstances, terms of transaction;
(b) the restriction of production or supply, or of the technological development to the loss of the consumers;
(c) the application of different terms for identical transactions, the result of which is that certain enterprises are placed in a disadvantageous position in respect of competition;
(d) the making of contracts conditional upon the acceptance by the other parties of additional obligations which by their nature or according to commercial usage, have no have no connection with the subject-matter of these contracts.

Again it must be remembered that this is not an exhaustive list and that other conduct having the same object or effect are also caught.

A dominant position is described as a position of market power that an enterprise holds and that enables it to obstruct the maintenance of effective competition and allows it to act, to a substantial degree, independently from competitors, customers and consumers (Section 2). The Commission has the discretionary power to call on any enterprise which possesses a dominant position, to inform it of evidence that it has in respect of its activities and arrangements with other enterprises (Section 6(3)).

Mergers

By virtue of Section 7(1)(b) the mergers of enterprises are excluded from the Law. Their notification however is required by Section 7(2) of the PCL. The Control of Concentrations between Enterprises Law regulates the notification of mergers. A concentration is defined as a merger, acquisition or the establishment of a joint venture that carries out the functions of an autonomous economic entity (Section 4(1) of the Concentrations Law). Section 3(2) of the Concentrations Law provides thresholds that must be met before notification is required. The concentration shall not be put into effect until it has obtained a notice of approval from the Service (Section 9(a) of the Concentrations Law). A concentration that creates or strengthens a dominant position in the affected markets shall be declared incompatible with the requirements of the competitive market and shall be prohibited (Section 10).

After notification the Service will investigate the concentration and reach a preliminary decision within one month. This decision can give approval for the implementation of the concentration or it may conclude that the concentration raises serious doubts as to its compatibility with the competitive market and start a full investigation (Section 19). If the CPC starts a full investigation it shall reach a decision within four months from the date of receipt of the notification (Section 29).

Sanctions and Enforcement

The Commission is exclusively competent to investigate infringements of Sections 4 and 6 (Section 22(1)). It can investigate violations on its own motion or upon a complaint from the Service or third parties (Section 22(2)).[7] Any natural or legal person who has a legitimate interest may lodge a complaint regarding the infringement of Sections 4 and 6 (Section 28(1)). A

[7] On complaints in general see: *Cyprus – Global Competition Review*, *op. cit*.

legitimate interest exists when he has suffered, or there is a serious risk that he will suffer, a substantial financial injury or that he will be placed at a competitive disadvantage (Section 28(2)).

If there has been an infringement of Sections 4 or 6 the Commission can impose a fine up to a maximum of 10 per cent of the combined annual revenue in the preceding year. When determining the fine the CPC shall take into account the gravity and duration of the infringement (Section 23(3)(c)). If more than five years have past since the infringement ended the Commission shall be deprived of its powers to impose a fine for that particular infringement (Section 36).

A person who continues to apply an agreement that is prohibited by the PCL or to abuse its dominant position is committing a criminal offence and can be punished with imprisonment of up to one year possibly together with a pecuniary penalty (or both): Section 32. A person who knowingly provides false information to the authorities will also commit a criminal offence and faces a similar penalty (Section 33).

Legal Protection

Any person who has suffered damage from an action (or omission) contravening Sections 4 or 6 has a right to bring an action for damages (Section 35(1)). Actions for damages must be lodged before the District Court. There is a possibility of a further appeal before the Supreme Court of Cyprus without the need for leave.[8] The decisions by the Commission may be challenged before the Supreme Court of Cyprus under Article 146 of the Constitution. This challenge must be brought within 75 days from the date of notification of the decision.[9]

Consumer Organisations and their Influence in Competition Cases

A consumer organisation with a legitimate interest may lodge a complaint regarding the infringement of Sections 4 and 6 (Section 28(1)). A legitimate interest exists when it has suffered, or there is a serious risk that it will suffer, a substantial financial injury or a competitive disadvantage (Section 28(2)).[10] A complaint can be filed in one of two ways: (i) by filling in a formal complaint form; or (ii) by writing directly to the CPC.[11] In any case, a complaint must be signed and in writing and contain information relating to: (a) nature of the legitimate interest claimed in making a complaint; and (b) the facts that constitute the breach.[12]

The Commission publishes a summary of applications for a negative clearance or an exemption from Section 4(1) and third parties, including consumer organisations, can submit their observations within the fixed time limit provided (Sections 16(5) and 18(4)).

Cypriot law allows for the possibility of representative actions in Cyprus; these actions should also be available for breaches of the PCL. However, this procedure is rather limited as the court has to authorise the person or persons that can sue on behalf of other people having the same interest. This authorisation can only be given if the people have signed a power of attorney empowering the representative to defend them on their behalf.[13]

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[8] *Ashurst Report – Cyprus*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/cyprus_en.pdf (last accessed: 4 August 2006), at p.1.
[9] *Cyprus – Global Competition Review*, *op. cit*.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ashurst Report – Cyprus*, *op. cit.*, at p.2.

As of yet there have been no representative actions in the competition law arena. It is not surprising then that our Cypriot partner has not yet represented consumers in a judicial setting. Two possible reasons for this were provided in the Cypriot response to the second legislative survey: (a) the lack of interest in bringing a case on behalf of individuals as well as consumers; and (b) the prohibitive nature of the legal costs involved with such an action. That said, our Cypriot partner has regularly filed complaints with the CPC (e.g. in relation to the market for football tickets).

Important Competition Concerns in Cyprus

According to the Cyprus Commission for the Protection of Competition, thirty complaints and five applications for individual negative certifications or individual exemptions were submitted to it during 2004. During the same year, there were also eight investigations initiated by the CPC. Out of these thirty-eight investigations, twenty-six of them were concerned with the possible abuses by an undertaking holding a dominant position in various sectors of the economy and twelve of them were in relation to agreements, decisions and concerted practices between undertakings that possibly resulted to the distortion of competition in the market.

Investigations in relation to concerted practices—cartels: Twelve cases were investigated during 2004 concerning the possible abuse of Section 4 of the PCL and the existence of concerted practices; these focused on the telecommunications, trade, media and insurance sectors.

Investigations in relation to abuses of dominant position: The most frequent type of infringement raised in relation to abuse of a dominant position was unfair pricing; the second most frequent allegation was the application of different terms for identical transactions; and the third most frequent was refusal to supply.

The sectors of the economy most frequently investigated during 2004 were trade and telecommunications, which together accounted for more than 50% of all cases dealt with by the Service of the CPC. The majority of the concentration cases were concerned with animal food, cleaning products and the rest were concerned with companies engaging in activities in the insurance and tourist sector.

Concerns of the Cyprus Consumers Association

Over the last year the most serious 'competition problems' encountered by our Cypriot partner covered such issues as telecommunications, the distribution and pricing of the foreign press (newspapers, magazines), the pricing of football match tickets, medicines, and petrol.

In the case of excessive pricing of football match tickets, our Cypriot partner received numerous complaints from consumers/fans that all the big teams of the island increased the prices of their tickets[14] when they played against each other, leaving fans with no alternative but to buy the over-priced ticket. It had been receiving these complaints from 1999 onwards. (It should be mentioned that although the price of tickets is fixed beforehand by the Cyprus Football Federation, the Federation does nothing to combat the illegal overpricing of the tickets.) Our Cypriot partner, after using up all other means available to it (e.g. letters to the Federation, contacts with the football teams themselves, and announcements in the mass media), decided to file an official complaint to the Commission for the Protection of Competition. This case is still pending.

[14] In return fans would get team merchandise/souvenirs.

Competition Concerns In the Product Markets Chosen by the Partners

According to our Cypriot partner, the competition authorities have investigated at least one of the markets chosen by the partners, namely the market for petrol.

Petrol:

The CPC recently gave instructions to the Service to carry out an investigation with a view to examining if petroleum companies had infringed both Section 4 and Section 6 of the PCL. Upon examining the preliminary investigation of the Service, the CPC decided that there had been no infringement of the Cypriot competition law. The CPC did decide however that the Service would have to observe the behavior of these companies in the future in order to ensure the rules of competition were being observed.

Printer-ink: No competition problems were brought to the attention of our Cypriot partner in this area.

Paracetamol: No competition problems were brought to the attention of our Cypriot partner in this area.

Downloadable music: No competition problems were brought to the attention of our Cypriot partner in this area.

Perceptions Revealed in the Legislative Survey

The Media

The level of media involvement in the reporting of competition related problems appears to be relatively high in Cyprus. Major competition problems are usually covered with articles in the local newspapers; interviews on local TV talk shows are also. The media considered our Cypriot partner's complaint concerning the over-pricing of football matches, for example, to be very important and journalists were generally in agreement concerning its arguments relating to the practices in this market. This media attention helped to increase public awareness of the significance of our Cypriot partner's complaint.

The above-mentioned case concerning competition in the petrol market was covered by the media quite extensively. The problem was presented not only in newspapers but also in TV programs as it was considered a 'hot' issue affecting consumers in many direct and indirect ways.

Awareness of the Substance/Importance of Competition Law

Over the last couple of years Cypriot consumers have become much more sensitised to competition law issues. Overall their general level of awareness of the importance of competition law could be considered to be 'good'; however, there is much space of improvement. Likewise, the general level of awareness of the substance of competition law rules can be considered to be 'good'. Such levels of awareness can be explained by the relative novelty of competition law in Cyprus.

The authorities have tried to improve understanding and awareness of competition law issues among the business community by issuing relevant leaflets, making announcements in the mass media, through the Internet, and by giving seminars and organizing workshops. The CPC has also organised competition seminars in order to improve the understanding of competition law issues among its own officials. Further, officials of the CPC frequently attend training sessions held by DG Competition.

The authorities have also tried to improve understanding and awareness of competition law issues among the consumers in general. They have attempted to do this by giving publicity to cases under investigation and by announcing in public its decisions as well as the level of the fines they have imposed. More specifically, the official website of the CPC (www.competition.gov.cy) was recently improved and its information was made more up-to-date. This was done in order to entrench and expand the competition culture into all aspects of Cypriot society. Further, in accomplishing its task of improving understanding and awareness of competition law issues, the CPC cooperates with other national bodies on a regular basis, namely:

- The Service for the Protection of Consumers of the Ministry of Commerce, Industry and Tourism;
- The Office of the Regulator of Telecommunication and Postal Services;
- The Regulator of Energy and Gas; and
- The Consumers Protection Association, an independent private body representing consumers' interests.

Finally, the media has proved to be an effective means towards increasing public awareness and to keep the public informed about the activities of the CPC. The Commission itself has tried to increase media attention in this field by increasing the number of press releases and by initiating formal media briefings on a regular basis.

The Czech Republic

Overview of the Czech Competition Law

The rules protecting competition in the Czech Republic are contained in the Act on the Protection of Competition of 4 April 2001 (No. 143/2001) (*Zákon o Ochraně Hospodářské Soutěže*) (hereafter 'the APC' or 'the Act').
[15] The Act came into force on 1 July 2001 and has been amended four times;[16] it covers the three traditional branches of competition law: agreements between undertakings; abuse of a dominant position; and concentration of undertakings. EC competition law rules have had a major influence on the substantive competition provisions in the Czech Republic; indeed, the APC explicitly mentions that it incorporates the European Community Regulation 1/2003 (Article 1(2)).[17]

The Institutional Framework

The enforcement and supervision of the APC is entrusted to the Office for the Protection of Competition (*Úřad pro ochranu hospodářské soutěže*) (hereafter 'OPC' or 'Office') (Article 20(1)).[18] The Office has three sections: competition, public procurement and state aid. The OPC is headed by a Chairman who is appointed by the President of the Republic after being proposed by the government. The appointment is for a term of six years, which may be renewed once. The Chairman must not be a member of a political party or movement. There are two Directors-General, one heads the antitrust section and one heads the merger department. The Chairman has a separate section, which includes the economics department, and a group that advises the chairman concerning decisions on administrative appeal.[19]

The OPC is fully independent in its decision-making; no bodies of the state, including the government, can interfere with its decisions and there is no political control of its decisions.[20] The Office is bound by government resolutions assigning both legislative and non-legislative tasks to it.[21]

The following statistical information represents the workload of the OPC:

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[15] An English version is available at: http://www2.compet.cz/English/HS/Zakony/CCAC.doc (last accessed: 7 August 2006).
[16] *Global Competition Review – Czech Republic*, available at: http://www.globalcompetitionreview .com/ear/23_czech.cfm (last accessed: 7 August 2006).
[17] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/ en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).
[18] The Office has a relatively detailed English website, but it is quite unclear where to locate information. The Czech version looks much better. The website is available at: http://www2.compet.cz/ English/Info.htm (last accessed: 7 August 2006).
[19] *OECD Report – The Role of Competition Policy in Regulatory Reform in the Czech Republic*, available at: http://www.oecd.org/dataoecd/3/23/2497276.pdf (last accessed: 7 August 2006).
[20] Jiri Nemec and Petr Halbrstat, 'Competition Law: the Czech Republic', available at: http://competition.practicallaw.com.
[21] *Ibid.*

2000: 607 cases (in total); 170 administrative procedures, incl. 57 mergers

2001: 464 cases (in total); 244 administrative procedures, incl. 140 mergers

2002: 492 cases (in total); 321 administrative procedures, incl. 204 mergers

2003: 821 cases (in total); 309 administrative procedures, incl. 239 mergers

2004: 672 cases (in total); 194 administrative procedures, incl. 134 mergers

Substantive Provisions of the Competition Law

Article 1(1) of the Act lists the three substantive provisions that are contained in the Act. These are:

- Agreements between undertakings;
- Abuse of a dominant position; and
- Concentration of undertakings.

Article 1 further specifies to which undertakings the Act applies. It applies only to undertakings entrusted with a service of general economic interest in so far as it does not obstruct the provision of this service (Article 1(3)). Other examples are that the APC does not apply to the agricultural sector and it only applies to a limited extend to undertakings that fall under the Act on Electronic Communication (No. 127/2005) (Articles 1(8) and 1(9)). The Act furthermore gives definitions of the terms 'undertaking' and 'relevant market' in Article 2.

Anti-competitive Agreements

Section II deals with agreements distorting competition. Article 3(1) states that agreements that result, or may result, in the distortion of competition are prohibited and null and void, unless the Act provides otherwise or the Office grants an exemption. The Act also provides examples of those types of agreements which would be caught by the prohibition; this list is not exhaustive and other agreements that distort competition will also be caught (Article 3(2)). If the prohibition relates to only a part of the agreement only this part will be null and void. If the part cannot be severed from the agreement it will be null and void in its entirety (Article 3(3)).

An exemption is contained in Article 3(4). This exemption is similar to Article 81(3) EC and also contains four elements:

- The agreement must improve the production or distribution of goods or promote technical or economic progress;
- It must allow consumers a fair share of the resulting benefits;
- It must not impose restrictions which are not indispensable to attain the objective; and
- It must not afford the parties the possibility of eliminating competition in a substantial part of the market.

If these conditions are fulfilled the agreement is automatically exempted from the prohibition of Article 3.[22]

Another exemption is listed in Article 4. This Article gives the authorities the power to adopt block exemptions, which is an exemption for certain types of agreements. The Act provides that agreements that satisfy all conditions of European block exemptions, but do not affect trade between Member States shall nonetheless be exempted from Article 3(1) (Article 4(1)). The Office may also grant block exemptions if it is proved that the agreement satisfies the conditions of Article 3(4) (Article 4(2)).

The last possible exemption is contained in Article 6. This exempts horizontal agreements where the combined market share of the parties does not exceed 10 per cent. It also exempts vertical agreements if the market share of the parties does not exceed 15 per cent (Article 6(1)). A definition of horizontal and vertical agreements is given in Article 5. A list of agreements that are not exempted by these rules is provided for in Article 6(2). If one of the provisions listed is present in the agreement in question it will fall under Article 3(1).

Abuse of Dominance

Section III deals with dominant positions and their abuse. Article 10(1) defines a dominant position as a position held by one or more undertakings where their market power enables them to behave to a significant degree independent from other undertakings and consumers. There is a presumption that an undertaking does not hold a dominant position if its market share during the examined period does not exceed 40 per cent (Article 10(3)). Article 11(1) lists some examples of abuse; these examples are generally the same as those detailed in Article 82 EC.

Mergers

Section IV deals with the concentration of undertakings. Article 12 gives some definitions used in the section. It states that a concentration arises when two formerly independent undertakings merge (Article 12(1)); when an undertaking acquires control of another undertaking either by contract or by equity shares (Articles 11(2) and (3)); or when undertakings establish joint control over an undertaking that performs on a lasting basis all the functions of an autonomous economic entity (a so-called full-function joint venture) (Article 11(5)). Some situations do not give rise to a concentration. These are listed in Articles 12(7) and (8).

Article 13 contains some thresholds, which must be met before the concentration requires the approval of the Office. Article 14 deals with the calculation of turnover. The parties have to notify the concentration to the OPC (Article 15). They cannot proceed with the concentration before they have obtained the approval of the Office (Article 18(1)). There is an exemption to this suspension obligation in Articles 18(2) and (3). If the concentration raises serious concerns about a possible significant impediment of competition, in particular because of the creation or strengthening of a dominant position, the Office shall inform the parties within 30 days that it is continuing its investigation (Article 16(2)). After the OPC notifies the parties of the fact that it is continuing the proceedings the latter have fifteen days to offer commitments. The Office may make the approval conditional upon fulfilment of the commitments (Article 17(4)). In this phase the Office must take a decision within five months after the initiation of the proceedings (Article 16(5)).

[22] *Global Competition Review – Czech Republic*, available at: http://www.globalcompetitionreview.com/ear/23_czech.cfm (last accessed: 7 August 2006).

Sanctions and Enforcement

The OPC can, by way of a decision, conclude that the provisions concerning agreements distorting competition have not been observed (Article 7(1)). The Office must deliver its objections to the agreement to the parties, which then have fifteen days to propose commitments that eliminate the harmful situation (Article 7(3)). The Office may make the commitments binding upon the parties (Article 7(2)).

The OPC also has to conclude that the provisions on abuse of a dominant position have been infringed by way of a decision (Article 11(3)). After receiving the objections to the behaviour, the undertaking has fifteen days to propose commitments that will eliminate the violation (Article 11(5)). The Office may make these commitments binding upon the undertaking (Article 11(4)).

The Office may initiate proceedings on its own initiative (Article 20(2)). Third parties may also apply to the Office to start an investigation and the applicant will be informed in writing. If the Office decides to initiate a proceeding on its own initiative, which deals with a subject matter that was the basis of a complaint, it shall inform the applicant of the results of the investigation (Article 21(3)).

For a violation of Article 3(1), 11(1) and 18(1) the OPC can impose a fine of up to 10 per cent of the net turnover achieved in the last accounting period. This fine may also be imposed if the parties do not fulfil the commitments that are part of the decision (see Articles 7(2) and 11(4)) or they implement a concentration without prior approval (see Article 18(5)) (Article 22(2)). When deciding on the amount of the fine the Office shall take into account the gravity, duration and possible recurrence of the infringement (Article 22(2)). Lesser fines can be imposed for other infringements (Article 22).

Legal Protection

Decisions of the Office are subject to an administrative appeal to the President of the Office. This appeal must be lodged within fifteen days after notification of the decision. Judicial review is possible after this administrative appeal and this must be lodged with the District Court in Brno.[23]

Third parties can claim damages from parties to an agreement that distorts competition. During these proceedings the Office may be asked to deliver a statement on the lawfulness of the agreement. A person is liable for any damage caused by failure to comply with a legal duty, which includes a breach of the competition legislation.[24] Generally these claims will have to be lodged with the District Courts; but Article 9 of the Civil Code gives a special provision for competition matters. These will have to be lodged before the regional courts (Article 9(3)(k) of the Civil Procedure Code).

Consumer Organisations and their Influence in Competition Cases

The notification of concentrations will be announced in the Commercial Bulletin. This will also mention a deadline for the submission of objections to the concentration (Article 16(1)). Consumer organisation could report their objections within these time limits. Furthermore, any

[23] *Ibid.*
[24] *Ibid.*

person, including consumer organisations with a legal or economic interest can file a complaint against the merger.[25]

Consumer organisations may also apply to the Office to start an investigation concerning an alleged breach of the competition law rules and it will be informed in writing about its application. If the Office decides to initiate a proceeding on its own initiative which deals with a subject matter that was the basis of a complaint, it shall inform the consumer organisation of the results of the investigation (Article 21(3)).

Joint actions are possible in the Czech Republic, but this only joins several independent actions. Therefore, it is possible to start an action with many consumers, but those consumers must bring the action themselves (Articles 91(1) and 92(1) of the Civil Procedure Code). It is possible for consumer organisations to bring an action against practices of unfair competition, but this does not include infringements of competition law (Article 54(1) of the Commercial Code). It is also possible for these organisations to bring an action based on consumer protection laws (Article 25(2) of the Protection of Consumers Act). However, both these actions do not relate to damages so it will not be possible for consumer organisations to obtain damages.[26]

Our Czech partner has a memorandum of cooperation with the Czech Competition Office. Our Czech partner, along with other concerned parties, has complained to the OPC n a number of occasions. One recent example relates to bank charges (account cancellation, account administration fees); this complaint was a joint complaint on behalf of customers of 2 major banks, CSOB and Ceska sporitelna.

Important Competition Concerns in the Czech Republic

The following are examples of the major cases that have been investigated by the OPC recently:

Case	**Problem**	**Outcome**
Commercial Banks (2005)	Possible collusion in bank charges	Investigation was not completed
Bus Transportation (2005)	Abuse of dominant position in relation to disabled access to bus station for one competitor	Fine of approx. € 70,000 was imposed
Building Societies (2004)	Prohibited agreement on information exchange; abuse of dominant position (excessive charges)	Fine of approx. € 7million

[25] *Global Competition Review – Czech Republic*, *op. cit.*
[26] See: *Ashurst Report – Czech Republic*, available online at the following website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/czech_republic_en.pdf (last accessed: 7 August 2006).

Czech Forests (2005)	Non-transparent contractual conditions	Investigation was stopped
TV Nova (2005)	Abuse of dominant position; pressure on advertising agencies	Awaiting decision
RWE Transgas	Alleged gas monopoly; different prices for RWE group members and others	Awaiting decision
Bakeries (2006)	Price-fixing cartel	Awaiting decision

Other cases were also investigated by courts, these were connected mainly with unfair competition, forbidden advertising and so on.

Competition Concerns In the Product Markets Chosen by the Partners

With the exception of the petrol market, the OPC has not yet undertaken a formal investigation of the market chosen by the partners. Further, these product markets (and their potential competition related problems) have not yet been examined to any great degree by the mainstream media.

Petrol: In 2004 the OPC found 6 retailers of petrol in the Czech to have entered into a cartel agreement whereby the participants collectively agreed to raise their prices. The retailers involved were: Agip, Aral, Benzina, ConocoPhillips, OMV and Shell. In brief, the OPC found that the above mentioned companies had raised their prices without any objective reason; they were fined approximately 10 million Euro.

Printer-ink: No competition concerns were brought to the attention of our Czech partner concerning this market.

Paracetamol: No competition concerns were brought to the attention of our Czech partner concerning this market.

Downloadable music: No competition concerns were brought to the attention of our Czech partner concerning this market.

Perceptions Revealed in the Legislative Survey

The Media

Many of these cases mentioned above were covered in the media (i.e. on TV and in the newspapers), especially at the beginning of the case. Sometimes the final decision also received media attention, especially when a fine was set. As far as our Czech partner can tell, the coverage wasn't very deep; that said, our Czech partner believes that it was comprehensive enough for the non-professional public. Competition on the market in and of itself is not

perceived as one of the major problems currently facing the Czech Republic; consequently there is not a wide public debate on competition law issues. (In fact, corruption is much more debated nowadays.) In general (and logically) issues which are directly connected with final consumption and higher prices for consumers are considered by the media to be the most important competition law issues to cover.

Awareness of the Substance/Importance of Competition Law

Our Czech partner believes that the media coverage of competition law issues has ensured that the general level of awareness of the importance of competition law is particularly good; the level of awareness of the substance of competition law is relatively non-existent however.

Our Czech partner is not aware of any governmental projects in the Czech Republic aimed at improving the understanding and awareness of competition law issues among the business community.

Our Czech partner is not aware of any governmental projects in the Czech Republic aimed at improving the understanding and awareness of competition law issues among consumers in general.

Denmark

Overview of the Danish Competition Law

Denmark adopted its Competition Act (*LBK, nr. 785 om konkurrenceloven*) (hereafter CA) in 1997 and it came into force on 1 January 1998. With this Act the Danish competition rules were brought in line with the European competition rules. Like the EC competition rules, the Danish Act is based on two prohibitions:

- a prohibition on anti-competitive agreements; and
- a prohibition on the abuse of a dominant position.

These provisions show a strong resemblance to Articles 81 and 82 EC. Consequently, it is very likely that enforcement of these rules would also be in line with the case law of the European Courts.[28] The purpose of the Competition Act is to promote efficient resource allocation, which means that goods and services must be produced and distributed at the lowest possible costs and in quantities and compositions, which reflect the users'—including consumers'—preferences.[29]

The Institutional Framework

The Competition Council (*Konkurrencerådet*) (hereafter CC) has the jurisdiction to enforce the Competition Act (Section 14(1)). The Competition Council is supported by the Competition Authority (*Konkurrencestyrelsens*), which is the secretariat of the CC handling the day-to-day enforcement of the Act on behalf of the Council (Section 14(2)).[30] The Council is composed of a Chairman and seventeen members. The Danish King appoints the Chairman; the Minister for Economic and Business Affairs appoints the other members. All of the members are appointed for a period of up to four years (Section 15(1)).

Of all the members eight are independent, but one of them must have a special insight into governmental business activity. Seven members are appointed on the recommendation of trade organisations and one is appointed on the recommendation of the consumer organisations. Two members shall be appointed on the recommendation of the National Association of Local Authorities in Denmark (*Kommunernes Landsforening*) (Section 15(1)). The Council is allowed to administer cases in English and take decisions in that language if so requested by the addressee. If a decision is published in English a Danish summary must be made available (Section 15c).

According to the OECD, the Competition Council decided 31 major cases in 2005, while the Competition Authority made 52 decisions in important cases with subsequent publication.[31] In

[27] A consolidated version of the text is available at: http://www.ks.dk/english/competition/legislation/ comp-act785-05/ (last accessed: 11 August 2006).
[28] Introduction to the Danish Competition Act, available at: http://www.ks.dk/english/competition/legislation/guide/ (last accessed: 11 August 2006).
[29] *Ibid.*
[30] The Competition Authority has a detailed and useful English website with general information, legislation, press releases, but also decisions in English and allows for the possibility of filing a complaint. The website is available at: http://www.ks.dk/english/ (last accessed: 14 August 2006). In the remainder of this Chapter the enforcement agency shall be referred to as the Competition Council. This must be understood as also referring to its secretariat, the Competition Authority.
[31] See: OECD, *Annual Report on Competition Policy Developments in Denmark (2005)*, DAF/COMP(2006)7/05, 12 May 2005, at para. 5.

2004, the authority also concluded about 567 minor cases, mainly concerning access to documents, questions from citizens, etc.[32]

Substantive Provisions

The CA aims to promote efficient public resource allocation by means of workable competition for the benefit of companies and consumers (Section 1). The Act therefore contains a reference relating to consumer benefits. It applies to any business activity and any aid granted to business activities by public funds (Section 2(1)). Section 2(2) states that the Act shall not apply if the anti-competitive conduct is a direct or necessary consequence of public regulation. If there are questions relating to whether this section covers particular behaviour the Competition Council may send a request to the Minister responsible for the regulation (Section 2(4)). The Act furthermore does not apply to pay conditions and labour relations (Section 3).

Anti-competitive Agreements

The first substantive part of the Competition Act is contained in Section 6, which deals with anti-competitive agreements. Paragraph one states that the conclusion of agreements between undertakings which have as their direct or indirect object or effect the restriction of competition is prohibited. This also applies to decisions by associations of undertakings and concerted practices (Section 6(3)). Agreements caught by this prohibition include those which:

- fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investments;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- co-ordinate the competitive practices by two or more undertakings through the establishment of a joint venture; or
- determine binding resale prices or in other ways try to make one or more trading partners not to deviate from recommended resale prices.

The agreement shall be void unless one of the exceptions from Sections 7 to 10 applies. Section 7 contains a *de minimis* rule. It contains some thresholds in paragraph 1. Section 7(2) contains some hard-core restrictions that are never exempted by virtue of this rule. Section 8(1) contains an exemption clause which is similar to Article 81(3) of the EC Treaty. If the agreement satisfies the four criteria listed in this Section the parties have to notify it to the CC to obtain clearance (Section 8(2)).[33] Section 9(1) allows parties to ask for a declaration that the agreement is outside the scope of Section 6(1) or that there is no reason to act for the CC. The Council may refrain from assessing the agreements notified to it if they appreciably affect trade between Member States since the agreement will then be subject to Article 81 EC (Sections 8(5) and 9(2)). Section 10 gives the Minister for Economic and Business Affairs the possibility, after consulting the CC, to adopt block exemptions for certain types of agreements.

[32] *Ibid.*
[33] This can also be done electronically. See: *Denmark—Global Competition Review*, available at: http://www.globalcompetitionreview.com/ear/24_denmark.cfm (last accessed: 11 August 2006).

Dominant Undertakings

Part 2 of the Act deals with the trading terms of a dominant undertaking. The Council may order, under certain conditions, a dominant undertaking to submit its general trading terms to it (Section 10a(1)). This part is closely related to Part 3 of the CA, which deals with the abuse of a dominant position. Abuse of a dominant position is prohibited by Section 11(1); it includes the following conduct:

- directly or indirectly imposing unfair purchase or sales prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Upon request the Council must declare if a company holds a dominant position. Such a decision is binding until the Council revokes it (Section 11(2)). An undertaking may also apply for a decision from the Council that a certain course of conduct does not constitute an infringement under Section 11(1) (Section 11(5)). Section 11(7) gives the Council the possibility of refraining from taking a decision if the abuse covers a significant part of the common market and effects trade between Member States, as it will then fall within Article 82 EC which does not allow for such an application.

Mergers

Part 4 of the Act provides the Danish rules on merger control. The provisions of Part 4 only apply to those mergers above the thresholds detailed in Section 12 which do not need to be notified according to the European Community Merger Regulation.[34] Danish merger control rules will however apply to these mergers if the European Commission decides to refer them to the Competition Council (Section 12(5)). A merger can also be the acquisition of direct or indirect control over a company or the establishment of a joint venture, which performs on a lasting basis all the functions of an autonomous economic entity (Section 12a(1) and (2)).

The merger must be notified to the Council after the conclusion of the merger agreement, publication of takeover offer or acquisition of a controlling share and before it is implemented (Section 12b(1)).[35] The Competition Council will assess if the merger needs to be prohibited or can be approved (Section 12c(1)). A merger that significantly impedes effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be prohibited (Section 12c(2)). The merger may not be put into effect before it has been approved. The CC can approve a merger subject to terms and conditions (Section 12e(1)).

Sanctions and Enforcement

The Council may start an investigation on its own initiative, upon notification, upon the receipt of a complaint or on referral by the European Commission. The CC will decide if the complaint gives sufficient reasons to initiate an investigation (Section 14(1)). When the Competition Council discovers a violation it may issue orders to bring the detrimental effects of them to an

[34] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/=l_02420040129en00010022.pdf (last accessed: 14 August 2006).
[35] This can also be done electronically, see *Denmark—Global Competition Review*, *op. cit.*

end (Section 16). These obligations can be made binding on the undertaking and can be limited in time (Section 16a(1)).

The Council may request any information it deems necessary (Section 17). It may also conduct investigations in any of the premises and means of transportation of the undertaking (Section 18). The Competition Authority's investigations require a court order and sufficient proof of identity (Section 18(3)). If the Council concludes that the undertaking has intentionally or by gross negligence infringed the Act it can impose a fine (Section 23(1)).

The fines will be imposed on legal persons under Part 5 of the Penal Code. The limit of the fine shall be fixed in consideration of the turnover obtained by the legal person during the year before the fine is imposed as well as the general rules of Part 10 of the Penal Code (Section 23(3)). The limitation period for imposing a penalty is five years (Section 23(4)).

Legal Protection

Decisions by the Competition Council can be appealed before the Competition Appeals Tribunal (*Konkurrenceankenævnet*) (Section 19(1)), except for decisions concerning a complaint (Section 19(3)). Appeals must be lodged within four weeks after notification of the decision to the party concerned (Section 20(2)).

The Competition Appeals Tribunal consists of five members. The Chairman must be qualified for the post of Supreme Court Judge. Then there are four other members, two of which shall be legal experts. The other two members shall be economic experts (Section 21(1)). The Minister for Economic and Business Affairs appoints the Chairman and the members (Section 21(2)).

The decisions of the Tribunal can be further appealed before the courts of law. This can only be done after the Tribunal has made its decision (Section 20(1)) and must be done within eight weeks after the decision of the Tribunal has been communicated to the parties (Section 20(3)).

Seven cases were decided by the Competition Appeals Tribunal in 2005.[36] As of 1 April 2006, seven cases were pending before this court.[37]

Third parties may sue for damages under a normal civil procedure.[38]

Consumer Organisations and their Influence in Competition Cases

There is no possibility of class action or collective claims in Denmark.

According to Danish procedural law more plaintiffs can under certain conditions appear together in a joint case, but the claims of each party are treated individually and the outcome of the case may differ from party to party.[39] If a right belongs jointly to several different persons (e.g. through the common purchase by several persons of an object) the owners are obliged by Danish law to file a lawsuit together; they will act as one party during the proceedings.[40]

[36] OECD, *Annual Report on Competition Policy Developments in Denmark (2005)*, DAF/COMP(2006)7/05, 12 May 2005, at para. 6.
[37] *Ibid*. at para. 7.
[38] *Denmark—Global Competition Review*, *op. cit*.
[39] *The Ashurst Report: Denmark*, 2004, available online at the following website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html, at p.4.
[40] *Ibid.*

Indirect actions by representative bodies are possible; however the representative body must demonstrate sufficient legal interest in the case.[41] Cases instituted by representative bodies may in principle involve claims for damages if the association or organisation has itself suffered a loss; no consumer organisations have statutory rights to file proceedings based on claims for damages based on a breach of competition law.[42]

The *Ashurst Report* notes that there no examples of consumer organisations having filed proceedings on behalf of consumers who have suffered harm due to a breach of Danish or EC competition law.[43]

Important Competition Concerns in Denmark

There are three main areas of concern in Denmark as regards competition law:

(i) the concentration in the retail and food production sectors;
(ii) The lack of transparency of the prices charged by dentists; and
(iii) the consequences of liberalisation of energy resources (water, waste, electricity and telecommunication).

There are two main problems in the retail and food sector: high prices and less variety on the shelves. An investigation by the Nordic competition authorities from 2005 concluded that the net price (without taxes, VAT and price campaigns) is 6-12 per cent higher in Denmark than in the EU 15. (The situation is the same in Finland and Sweden). Secondly, the Nordic retail sector is more heavily concentrated than other European countries. A consequence of this concentration is that 4-6 organisations negotiate with suppliers and make decisions on what to put on the shelves. An investigation showed that consumers in Denmark and the other Nordic countries have a much narrower choice of foodstuffs than consumers in France for example. Part of the explanation for this is the structure of the retail sector: Nordic countries have smaller stores. But even in similar stores the Nordic stores have a higher level of prices and a narrower assortment of food. Retailers in Denmark are dominated by three large groups. In fact, the largest chain has a 35% share of the market; the three biggest chains together have 90%. The food industry in Denmark has a similar problem with concentration. It is true that concentration levels in the food markets are significantly higher than in Germany and UK for example. The biggest market players in Denmark have the following market shares:

- Pig meat: 70%
- Liquid milk: 85%
- Bread: 55%
- Beverages: 65%

Dentists: Unlike with visits to the hospital or to a local doctor, a visit to a dentist is only partially free in Denmark, still 75% of the prices of dentistry services are negotiated with the Health Authorities. The last 25% should be subject to competition in the market; however real competition is lacking. The competition authorities believe that this may be due to the fact that consumers are very loyal to their dentist – 63% will not change dentist because of changes in prices and in general price is seldom an object for discussion or negotiation. The Danish Consumer Agency has also investigated the dentistry market; like the competition authorities it found that this market lacks effective competition. It pointed out that one of the biggest barriers to competition is lack of transparency in prices and that more information about prices is necessary. For example, 60% of consumers do not know that they can save up to 2000 Dkr

[41] *Ibid.*
[42] *Ibid.* at p.5.
[43] *Ibid.*

(267 Euros) by changing to a cheaper dentist and only 24% know that there is a possibility to save up to 40% of the cost by going to Sweden.

Competition Law Cases

The major cases of the Competition Council are usually merger cases, although there have been cases on anti-competitive agreements. Cases on abuse of dominance are also taken very seriously; Carlsberg and Arla for example have been investigated several times.

Danish Inns and Hotels (Anti-competitive Agreement)

According to the Competition Council Danish Inns and Hotels breached the provisions of the Danish Competition Act relating to anti-competitive agreements when it demanded its members to observe a fixed price floor for accommodation. This obligation not to rent out rooms below the fixed price floor was contained in the guidelines of Danish Inns and Hotels. The members were also forbidden from advertising or displaying room tariffs below the fixed price floor. Members would face expulsion from Danish Inns and Hotels for failure to adhere to these rules. The Competition Council ordered Danish Inns and Hotels to revoke these obligations relating to minimum prices. (The case was also referred to the Public Prosecutor for Serious Economic Crime for criminal investigation.)

Toyota (Abuse of a Dominant Position)

The Competition Council recently held that Toyota had abused its dominant position by making it difficult, in a variety of ways, to be a Toyota service mechanic. The Competition Council found that Toyota's conduct of business in principle could be used to squeeze unwanted service mechanics out of the market, even though they meet all the demands of being authorised Toyota service mechanics. Thus, the number of operators might be limited and controlled to the disadvantage of competition. Among other things, Toyota had set out one-sided demands to their service mechanics in relation to disputes on trade mark law and law of torts, and threatened to terminate or cancel the repair contracts, if the demands were not fulfilled. In this way, Toyota had tried to force service mechanics to accept compensation claims, without allowing for these demands to be settled by arbitration or by an impartial third party. Moreover, Toyota had discriminated in favour of Toyota garages selling both new cars and offering repair jobs, and the garages exclusively offering repair jobs. Garages exclusively offering repair jobs were not allowed to lease cars at Toyota Financial Services on equal, favourable terms as the garages selling new cars. Also, the guidelines set for the garages displaying signs were enforced differently between the two parties. The Competition Council ordered Toyota Denmark A/S to cease this practise. Toyota appealed this decision to the Appeals Tribunal, where the case is pending.[44]

Important merger cases over the years include:

2000: The dairy company MD Foods merged with Swedish dairy company Arla e.k. to form Arla Foods. The Competition Council approved the merger in January 2000 subject to the commitment that Arla Foods would sell off 40 million kilos of its milk capacity per year.

2002: The European Commission allowed the Danish Competition Council to rule on the merger of Danish Crown and Steff-Houlberg as this merger would have primarily affected the domestic market. The most important commitments of the cleared merger were:

[44] The above summary of the Toyota case was taken directly from the following source: OECD, *Annual Report on Competition Policy Developments in Denmark (2005)*, DAF/COMP(2006)7/05, 12 May 2005, paras 16-21.

(i) Improvement of the individual suppliers' choice of buyer together with further protection of small suppliers;
(ii) Danish Crown had to sell off a slaughterhouse with a capacity of producing 2.5 % of the Danish meat production;
(iii) The conditions of the minor producers must not be weakened; and
(iv) In a period of up to ten years Danish Crown must not set prices higher than the average export prices when distributing to the wholesale market.

2003: The merger between the mortgage credit institutes Nykredit and Totalkredit was approved subject to the following commitments:

(i) Originally Nykredit was to have exclusive rights for nine years for distributing their mortgage products to the 106 banks owned by Totalkredit. Now the most anti-competitive provisions only run for four years and the less anti-competitive for six and a half years;
(ii) Nykredit agreed to lower the interest-differential by more than 5 %; and
(iii) Nykredit would introduce registration of bonds free of charge.

2004: The Danish Competition Council approved the merger between power plants/power distributors Elsam and NESA subject to the following commitments:

(i) Elsam had to sell off capacity;
(ii) NESA's share in Elkraft System and Transmission had to be handed over to an independent company; and
(iii) There was to be improvement of the conditions on the market by giving access to customer profiles on the Internet with certain access codes.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: There are 7 main players in the Danish market for petrol:

Company	**Market Share (%)**	**No. of Stations**
Shell (incl. discount chain METAX)	19	297
Statoil (incl. discount chain 123)	16.5	304
Kuwait (incl. discount chain F24)	16	244
Hydro Texaco (incl. discount chain Uno-X)	15.5	370
OK	18	556
DK-Benzin	7.5	170
Discount chain JET	5	69

The market as such is not problematic in the sense that several players are on the market with a fair spread in market shares. The real problem seems to be the accusations of cartel-behavior which has attracted media attention several times. In November 2003 for example the petrol stations were accused of raising prices on petrol every Tuesday and Friday at 10 a.m. This was regarded as a sort of 'ceasefire' before competition (i.e. on lower prices) sat in again at 2 p.m. As such the ceasefire provided an opportunity to 'reset' the price level and neutralise competition on prices twice a week. The problem for the competition authorities is in proving that this

manoeuvre was part of an agreement which would have been illegal according to the competition law.

Printer-ink: Our Danish partner does not currently perceive any competition problems in the printer ink market. It is, however, aware of discussions relating to the difficulty of comparing prices for printers. (Comparison of prices requires information on the price of ink and the amount of that ink that will be consumed by the consumer in question.)

Paracetamol: The market for pharmaceutical products in Denmark is strictly controlled and therefore very different from the other markets in Europe. The total number of pharmacies is restricted and only registered pharmacists can own these. Furthermore, pharmacists are only permitted to own one each. The pharmacies are located in certain addresses around the country to secure easy access for all consumers also in rural areas. Profits are restricted to a certain amount and prices are under strict control and to a high degree determined by the percentage of the state subsidies. This means that there is no real competition between pharmacies when it comes to prices of paracetamol. A few years ago it became possible for supermarkets, mini-markets etc. to sell a small range of medicines over the counter; paracetamol is one of these medicines. Here also selling is strictly controlled; paracetamol is only allowed to be sold in packets of ten with a maximum one packet to each customer per day. The Danish pharmacy monopoly is now being criticised for violating EU law. Medicines are state-subsidised when bought from Danish pharmacies and therefore there is no mobility of goods and services and lack of competition when medicines from foreign and cheaper pharmacies are not subsidised. In 2005 the Competition Council conducted an analysis of the Danish pharmacy sector and proposed the following reorganisation:

- Improved capabilities for establishing and owning pharmacies;
- The pharmacies must be allowed to broaden their range of products;
- More permissive opening hours in accordance with the ordinary retail trade;
- The option of establishing 'pure' internet pharmacies;
- The option of pharmacies being able to compete on price by introducing price ceiling; and
- The option of inviting tenders for the running of pharmacies receiving economical support.[45]

According to the OECD, with this reorganisation the Danish pharmacy sector would be 'even more development oriented and efficient without giving in on the safety of the consumers'.[46]

Downloadable music: Earlier this year the Danish Competition Council backed the Norwegian Competition Council in its allegation that the practice by Apple Computer of only allowing music downloaded from its iTunes online music store to be played on its own digital music players is contrary to the European competition law rules.[47] The Danish authority sees this practice as a tool to lock consumers into Apple's products thereby distorting the competitive process. It wants changes to allow downloaded music to be played on any MP3 player, such as mobile phones. The Danish Competition Authority has recently highlighted another problem with this market: Danish consumers cannot buy music directly from Greek or Spanish homepages put only from Danish pages and therefore at a Danish price, a price that is higher than that in Southern Europe.

[45] See: OECD, *Annual Report on Competition Policy Developments in Denmark (2005)*, DAF/COMP(2006)7/05, 12 May 2005, at para. 38.
[46] *Ibid*. at para. 39.
[47] See: Ibison, 'Apple Denies iTunes Contravenes Consumer', *Financial Times*, 3 August 2006.

Perceptions Revealed in the Legislative Survey

The Media

In general the level of media attention depends on how concrete and 'easy' a topic is. Cartels get most attention; mergers get some too. Changes in the law and policy developments receive little attention as they are perceived as difficult, theoretical issues.

There has been some media attention in Denmark given to the debates surrounding the proposal of amendments to the Danish competition regime, including the introduction of a leniency programme. However, our Danish partner feels that the level of media attention was low in comparison to the importance of the changes proposed. This lack of media interest could be explained by the fact that the issues involved are complicated. Further, there have been three changes to the competition legislation over the last six years, a fact that further complicates the debate.

By contrast there has been a lot of media attention in relation to the competition concern highlighted above involving dentists. This subject is less abstract that the debates surrounding the amendments to the law. 'How to save money' stories are often easy stories to sell to the public. The mergers in the energy sector also received quite a bit of attention from the media, at least up until the time of their approval by the Danish authorities. This was especially true for the business papers. That said, there has been little or no follow up from the media or analysis of whether approval was the correct decision in terms of its impact on consumers. The taxi issue is regularly taken up by the Danish media, especially in Copenhagen. This competition issue is perceived as something that affects everyone in the city. Taxi drivers complaining on television have also been known to provide an entertaining presentation of the issues involved, thus attracting more attention from average consumers.

Awareness of the Substance/Importance of Competition Law

The awareness of the importance of competition law issues is generally very good in Denmark, although the complicated issues involved often confuse consumers. There is greater awareness of both the importance and the substance of the competition laws the more concrete the issues. The Danish Competition Agency attempts to educate consumers and the general public on competition law issues through the publication of its yearly *Competition Report*. This report is generally in the region of 400-500 pages in length and describes changes in the law, news from the EU, general trends in Denmark and has 4-5 chapters on specific sectors that are perceived as being problematic. This report is written in 'normal language' and is accessible to everyone. It receives great attention from the press when it is published, especially from business magazines. Our Danish partner believes that this report plays a great role when it comes to improving understanding of competition law issues. There have been no specific programmes launched by the authorities in relation to improving the understanding and awareness of competition law issues among consumers in general in Denmark. The media attention surrounding the publication of the yearly *Competition Report* has an impact of course, but there has been nothing as of yet which is specifically aimed at consumers.

Other Observations

(1) A class action procedure is required in Denmark in order to provide consumers affected by anticompetitive behaviour an effective method of seeking compensation through the courts.

(2) Along with the absence of a class action procedure, the major obstacle to private enforcement of competition law is the cost involved in litigation. In many cases only major customers have the resources to go to court to claim compensation. Initiatives to reduce the costs involved in litigation must be discussed and adopted.

(3) Our Danish partner has not yet brought a complaint to the Competition Council concerning breaches of the Danish competition law. Various reasons have been put forward for this including: lack of experience in drafting complaints; lack of resources; scarcity of information; lack of a suitable case; and the fact that competition problems have been solved by other means, e.g. through use of information homepages, or through use of the consumer protection laws.

(4) There is a debate currently taking place in Denmark on the desirability of introducing a leniency programme. It is generally believed that such a programme would increase the tools available to the authorities in their fight against cartels. Leniency programmes have not however been used in any other part of Danish law and thus the debate concerns the principle of leniency in general. (The desirability of creating a leniency programme in relation to the general criminal law is also under discussion.)

France

Overview of the French Competition Law

From 1945 onwards the French state has known some form of competition rules. These where amended and expanded several times. The French competition legislation in currently force is the *Ordonnance sur la liberté des prix et de la concurrence*, dated 1 December 1986. From September 2000, it has been integrated in the French Code of commercial law (*Code de Commerce*).[48] Some of the articles were modified in 1996 and 2001. Book four of the Code deals with the freedom to set prices and to compete. The main substantive provisions on competition can be found in this part of the Code. They include a prohibition of restrictive agreements, a prohibition of abuse of a dominant position and merger control provisions. These provisions are substantially very similar to the EC competition law rules. Indeed, the Code has been amended several times in recent years to incorporate changes at EC level, such as Regulation 1/2003, and also to include turnover thresholds in its merger control, rather than market share thresholds.[49]

The Institutional Framework

Two different bodies are responsible for application of the competition law rules:

(i) The DGCCRF (*Direction Générale de la Consommation, de la Concurrence et de la Répression des Fraudes*); and

(ii) the Competition Council (*Conseil de la Concurrence*) (hereafter CC).

The *Direction Générale de la Consommation, de la Concurrence et de la Répression des Fraudes* (DGCCRF) is within the Ministry of Economy, Finance and Industry and is directly linked to the Minister of Economy. It is the main preliminary investigation body relating to competition law in France and is the chief advisor to the Minister on merger issues.

The Competition Council is a collegial decision-maker, judging on cases, which has the status of an independent administrative authority.[50] The current CC consists of seventeen members, which are appointed for a period of six years (Section L. 461-1). Eight of the members must be chosen from the present or formers members of the Council of State (*Conseil d'Etat*), the Supreme Court (*Cour de Cassation*), the General Accounting Office (*Cour des Comptes*), or of other administrative judicial bodies. Four members must be chosen on account of their competences in the fields of economics or competition and consumption. Five members must be chosen from people exercising or having exercised their activities in the sectors of production, distribution, crafts, services or the independent professions (Section L. 461-1). There is one Chairperson and three vice Chairpersons—three of these individuals must be from among the members or former members of the Council of State, the Supreme Court, or the General Accounting Office. The remaining individual must be from one of the other groups (Section L. 461-1). As well as the members—who decide by majority—the Council also has

[48] The text is available at: http://www.conseil-concurrence.fr/doc/code_commerce_gb.pdf.

[49] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).

[50] PS Mehta (ed.), *Competition Regimes in the World—A Civil Society Report*, CUTS International, 2006, at p. 371.

case-handlers (*rapporteurs*), which may conduct investigations and produce reports. The CC can also ask the investigators of the Minster of Economy for assistance.[51]

Since 2000, the French CC has completed more than 580 litigious cases, and has answered roughly 140 requests for opinions. Regarding the litigious cases, those figures include cases where claims were held to be inadmissible. Over the last six years, there have been numerous decisions concerning the telecommunications sector, but also banks, insurance, construction sector. 434 companies or groups have been penalized, and 115 decisions imposed fines to companies. The aggregate amount of fines over those years is in the region of 443 million Euros.

Substantive Provisions of the Competition Law

Anti-competitive Agreements

The Code of Commercial Law includes a prohibition of restrictive agreements (Section L. 420-1). This article is based on the EC competition rules, specifically Article 81 EC. Section L. 420-1 prohibits '…either directly or indirectly through a company or a group located outside of France, when they have a their object or effect the prevention, restriction or distortion of competition on a market, concerted practices, agreements, express or tacit cartels, or combinations, notably when they aim to:

- limit the market access of, or free competition between, other undertakings;
- serve as barriers to price-setting by the market by affecting their increase or fall;
- limit or control production, market investment or technical development; or
- share markets or sources of supply'.

Section L. 420-1 covers both horizontal and vertical agreements. These agreements are not prohibited *per se* so the Council will have to provide a reasoned decision when deciding a case. The CC has recognized that vertical agreements are mostly not concluded to hinder competition and therefore it has taken a more tolerant approach to these particular arrangements.[52] To prohibit an agreement the Competition Council must prove that the agreement has the purpose or may have the effect of barring, restricting or distorting the process of competition in a market.

Abuse of Dominance

Section L. 420-2 covers the abusive exploitation of a dominant position in the domestic market. This section provides as follows: 'Is prohibited … the abusive exploitation of a dominant position by one or more undertakings on the internal market or a substantial part thereof. Abuses include refusal to sell, tied sales, or discriminatory selling conditions as well as the disruption of established commercial relations, on the sole basis that the partner refuses to subject itself to unjustified commercial conditions'. This provision thus covers the abusive exploitation by a company of a customer which is economically dependant on it. In practice the provision covers the same abuses as Article 82 EC. As with Article 82, the provision does not cover those non-dominant firms who becomes or attempts to become dominant on the market—such an undertaking may only be caught for such behaviour under the French merger control rules.

[51] Salans, 'French Competition Law Overview', available at: http://www.salans.com/FileServer.aspx?oID=450&lID=0 (last accessed: 27 July 2006).
[52] PS Mehta (ed.), *Competition Regimes in the World—A Civil Society Report*, CUTS International, 2006, at p. 372.

Exemptions

Any undertaking, agreement or contractual clause referring to a practice prohibited by Articles L.420-1 and L.420-2 are null and void (Section L. 420-3). In Section L. 420-4, however, there are two exemptions listed which are not subject to the provisions about restrictive agreement or abuse of a dominant position:

- Those practices which result from the implementation of an act or regulation adopted in application thereof; and
- Those practices which have the effect of ensuring economic progress (provided certain conditions are fulfilled).

The last exemption can only be used if the undertakings give a fair share of the resulting profits to the consumers, without providing the companies concerned the possibility of eliminating competition. These actions are furthermore only allowed to the extent that they are indispensable to the achievement of the underlying benefits. Agreements may be acknowledged as meeting these conditions by a decree issued by the Competition Council. Section L. 420-4 also incorporates the same elements as Article 81(3) EC. However, there is a notable difference with EC competition law: this provision also applies to abuses of a dominant position. Predatory pricing—a separate offence under the competition rules than an abuse of dominant position (L. 420-5)—may not benefit from the exemption however.

Mergers

Title Three of Book Four of the Code of Commercial Law provides for the rules on the control of concentrations. This Title applies to mergers, acquisitions, and full function joint ventures (i.e. joint ventures which exercise all the functions of an autonomous economic entity for a lasting period) (Section L. 430-1). Section L. 430-2 sets out the turnover thresholds that have to be met in order for a concentration to fall within the jurisdiction of the merger control rules. If the merger is subject to the Code of Commercial Law (i.e. when the thresholds are met) the parties must notify the transaction to the Minister of Economy. The merger cannot be completed until is it approved by the Minister of Economy (Section L. 430-4). The Minister will decide the matter within five weeks. During this time the parties can propose commitments. If the Minister concludes that the merger is likely to lead to anti-competitive effects, which are not remedied by any commitments offered, he must refer the case to the Competition Council for non-binding advice (Section L. 430-5). The Competition Council will ascertain if the proposed merger undermines competition, especially through the creation or reinforcement of a dominant position or the creation or reinforcement of purchasing power creating economic dependence at the supplier's expense. It shall also take into account any economic progress that may compensate for these anti-competitive effects. The Council will deliver its opinion within three months from the date of the referral (Section L. 430-6). The Minister can then, within a limited timeframe, prohibit or approve the merger and it can attach conditions to the approval (Section L. 430-7).

Sanctions and Enforcement

Title V of Book IV of the Code of Commercial Law regulates the enforcement of the competition provisions. This Title gives several powers to investigators. The CC can act on its own initiative or have a case referred to it by complainants (including consumer organisations) or the Minister of Economy (Section L. 462-5). The Competition Council may reject a complaint for lack of interest or lack of evidence, but it must do so with a reasoned opinion (Section L. 462-8). The Code includes a limitation period of three years within which complaints must be brought (Section L. 462-7).

The Competition Council can adopt interim measures if the practice seriously and immediately undermines the economy as a whole, or that of the concerned industry, the consumers' interest or the plaintiff company (Section L. 464-1). When adopting a definite decision the CC can impose a fine or impose special conditions. If it chooses to impose a fine it will take into account the gravity of the alleged facts and the damage caused to the economy (Section L. 464-2).

If the party is not a company (for instance an individual) it can receive a maximum fine of three million euros. The maximum amount of the penalty for an undertaking shall be 10% of the highest global pre-tax turnover made during one of the financial years closed since the financial year prior to that in which the practices were carried out. Partial relief is available for companies, which do not dispute the allegations and agree to change their behaviour. In such a case their fine can be reduced by half. The Code also provides for the possibility of obtaining leniency. A party can be totally or partially exonerated from the financial penalties if it has contributed to establishing the existence of the prohibited practice and to identifying its perpetrators, by providing information which the Council or administration did not have previously. (Section L. 464-2).

The Code of Commercial Law has recently incorporated a *de minimis* rule. The Council can decide that it will not initiate (or continue) proceedings when the combined market share of the parties to the agreement is below 10% for competitors and 15% for non-competitors (Section L. 464-6-1). There are certain hard-core restrictions contained in Section L. 464-6-2, which do not benefit from this exemption.

In the normal procedure before the Council a case handler issues a Statement of Objections and after receiving the observations by the parties it will render a final report. The parties have a chance to respond to this report and the CC will hold a hearing, after which it will adopt a decision. There is also a simplified procedure in which the case handler does not adopt a final report. The president of the Council can decide to follow this procedure.[53]

Legal Protection

A decision on interim measures can be appealed before the Paris Court of Appeal (*Cour d'Appel de Paris*). The parties have to submit an appeal within ten days of the notification of the decision containing the interim measures. The appeal does not have a suspensive effect, but the First President of the Court of Appeals may order that the enforcement is deferred if it believes that they have manifestly excessive consequences or new facts have occurred since the decision was adopted (Section L. 464-7).

The parties or the Minister of Economy may appeal decisions by the Competition Council before the Paris Court of Appeal within one month after the notification of the decision. The appeal does not stay the execution of the decision, but the First President of the can order, under the same circumstances as those for interim measures, that the enforcement be suspended. A further appeal before the Supreme Court (*Cour de Cassation*) is possible within one month of the notification of the ruling on appeal (Section L. 464-8).

Any private disputes relating to the application of Sections L. 420-1 to L. 420-5 or Articles 81 and 82 EC shall be dealt with by the County Courts (*Tribunaux de Grande Instance*) or to the Commercial Courts (*Tribunaux de Commerce*) (Section L. 420-7). Decisions by the Minister in relation to concentrations can be appealed to the Council of State (*Conseil d'Etat*).[54]

[53] *Global Competition Review – France*, available at: http://www.globalcompetitionreview.com/ear/26_france.cfm (last accessed: 27 July 2006).
[54] Salans, 'French Competition Law Overview', *op.cit.*

Consumer Organisations and their Influence in Competition Cases

The Competition Council does not have a direct consumer protection function, but there has always been a representative of a consumer organisation among its members.[55] A consumer organisation may consult the CC on competition matters (Section L. 462-1). They may also refer a case on restrictive agreements or abuse of a dominant position to the Council (Section L. 462-5). A consumer organisation can also complain to the Minister, which may then refer the case to the Competition Council.[56] It can also ask the Council to adopt interim measures if the practice seriously and immediately undermines the economy as a whole, or that of the concerned industry, the consumers' interest or the plaintiff company (Section L. 464-1). If it wishes to hear expert testimony the Competition Council can decide to hear a non-party to the case; this party can be a consumer organisation.

Our French partner has consulted the CC on competition law issues on two separate occasions; both consultations related to banking services. It has not yet filed a competition complaint with this body. (According to our French partner, only one association has done this to date, concerning practices in the mobile phone market.) Our French partner has not filed a complaint due to resource constraints and the difficulties associated with acquiring sufficient information on which to base a complaint. To date such activity has not been a priority. That said, our French partner has a good working relationship with some members of the CC and is aware that this authority is currently seeking greater participation from consumer organisation in competition law procedures.

There is no equivalent to the US class action procedure in France. Representative actions by contrast may be possible in certain circumstances, i.e. once certain conditions are fulfilled, certain associations may institute proceedings to represent either the individual interests of its members (*action en représentation conjointe*)[57] or a collective interest.[58] With an *action en représentation conjointe* the representative association in question must however have an explicit mandate to act for the interests of their members and this mandate cannot be requested in the press.[59] The conditions that need to be fulfilled in order to bring a representative action in France are very strict and according to the *Ashurst Report* these actions have not been used to seek damages for breach of the competition law rules.[60] See however the comments below on the case relating to the three French telecoms companies Orange France, SFR and Bouygues.

Important Competition Concerns in France

The principal competition concerns in France at the moment relate to:

- the area of information and communication technologies (broadband access to the internet, mobile telecommunications for example) with different types of questions and problems like the access to the market for new entrants, the access to clear and complete information for consumers and the possibility to easily change operator;
- the area of credit cards: a case has been brought to the European Commission (DG Competition) by a new entrant on the credit card market regarding the organisation of the French system and potential barriers to new entrants. This is a difficult problem for

[55] OECD Report, France: The Role of Competition Policy in Regulatory Reform, available at: http://www.oecd.org/dataoecd/52/60/31415943.pdf (last accessed: 28 July 2006).
[56] Condomines, 'Private Enforcement of Competition Law in France', available at: http://www.jurismag.net/articles/artiGB-private.htm (last accessed: 27 July 2006).
[57] Article L. 422-1 Consumer Code.
[58] Articles L. 421-1 and L. 421-7 Consumer Code. See: *The Ashurst Report: Frances*, 2004, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html, at p.7.
[59] *Op. cit.*
[60] *Op. cit.*

consumers because more operators can permit lower prices, but at the same time, the French system, which could still be considered anti-competitive by the Commission, has permitted a wide interoperability which is highly appreciated by consumers.

At least two recent significant developments involving direct harm to the final consumer can be recorded in France; these concern: (i) below cost selling; and (ii) market and price fixing in the mobile phone market.

At the end of 2004, an important issue began to be discussed in France regarding the level of prices in the food retail sector and the legal framework organising the relations between retailers and producers. One of the main questions in this debate concerned the calculation of the price under which a retailer is not allowed to sell (‘*seuil de revente à perte*’). In France, under the Galland Law, a retailer could not sell a product at a price lower than the one he has paid to the producer and which appears on the invoice. Retailers, however, have managed to secure additional services from their suppliers (e.g. promotional deals for consumers, rebates…) which do not appear on the initial invoice. Consequently, these services provided by the supplier were not taken into account in determining below cost pricing by the retailer. The benefits from these commercial services thus went directly to the retailers; consumers did not benefit from them in the form of lower prices for example. This had led to an important increase in the prices of branded products sold to consumers. Following the protestations of consumer organisations (and also of some retailers anxious about the development of hard discounters), the Ministry of Economy first tried to obtain promises from retailers and producers to lower the prices from 2 to 5% in the next year. The Minister then proposed a change in the law to Parliament which would allow more competition in prices. Serious debate had taken place long before the discussions in Parliament: working groups were constituted which gathered retailers, producers, consumers, and administrations together. The main questions concerned prices and competition in prices but also about the ways one can promote competition in prices without killing off the smaller shops. (The protection of small shops against the development of big retailers was one of the ‘raison d’être’ of the previous legal framework.) One of the reasons small shops were anxious about reform was that, as they can not offer the same commercial services as those given by big retailers, if the benefits from those services could be reassigned to consumers in the calculation of prices, big retailers would gain a very big price advantage with the possibility that they would be priced out of the market. After long debate the law was eventually changed. It is now possible for retailers to reduce their prices by part of the amount given to them by producers for commercial services. This is supposed to lead to a reduction of back margins as well as a reduction in prices for consumers. According to our French partner however consumer organisations did not obtain exactly what they were asking for, i.e. the possibility of reassigning the totality of those back margins in the calculation of the final price to consumers.

Another major competition development concerned mobile phones. In November 2005 the three French operators (at that time the only ones on the market) Orange, SFR and Bouygues, were all condemned for anti-competitive practices in violation of Article 81 EC and Section L. 420-1 of the Commercial Code. They were accused and found guilty of exchanging strategic information in order to stabilise their respective market shares between 2000 and 2002. They were also found guilty of simultaneously increasing their retail prices. These practices had a direct effect on consumers in this market. The Competition Council ordered them to pay a global fine of 534 million Euros (Orange: 256million; SFR: 220 million, Bouygues: 58 millions). As well as these large fines the above three operators also run the risk of being subjected to private damages actions in French courts. The CC does not have jurisdiction to grant compensation to consumers. For this reason the consumer organisation UFC-Que Choisir announced that it would be willing to bring a private action in France. In fact, this organisation has encouraged the clients of the three operators to claim compensation. The outcome of these actions remains to

be seen. It must be remembered that the ruling of the CC is not binding on the courts; however, it will undoubtedly constitute quite persuasive evidence.[61]

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: According to our French partner no cases have been considered by the Competition Council in this market. Even if the major petrol chains still own the biggest market share, there is real competition on the market since hypermarkets have decided to sell petrol under their own brand. They represent today more than 37% of total sales, and they have introduced real competition in prices. Nevertheless, competition problems can appear in terms of access, in very rural areas, where there is a very limited choice of providers, or on the motorways, where the consumer has less choice and less possibility to compare prices. To develop competition on motorways, it is mandatory that before each gas station, a panel indicates the prices in the other stations further down the motorway, with an indication of the number of kilometres. The main problem in France regarding petrol is the level of taxes, around 60% of the final price; according to our French partner that's why it's now nearly impossible to find a gas station near a border.

Paracetamol: According to our French partner no cases have been considered by the Competition Council in this market. Nevertheless, this market appears to be a very complicated one for consumers, due to the functioning of the health and medicines system in France. Medicines in France can only be sold in pharmacies even when a prescription is not needed; this is the case for paracetamol. Then another aspect interferes with paracetamol, which is that some can be reimbursed by the social security system if prescribed by a doctor, while others can never be reimbursed. This difference has an impact on prices as the price of the product that can be reimbursed is fixed and the price of the others is not, although the active principle is the same. Each laboratory has a basic product that can be reimbursed, then sold at a fixed price, and at least one other product, which is also only paracetamol but with an added value (for example the tablets melt into the mouth and then can be taken without water); the latter product has no fixed price. The problem is that most consumers do not know about this and are then very dependent on what the pharmacist will sell to them. In brief, the competition problem is this area is a problem of access to information for consumers.

Printer-ink: According to our French partner no cases have been considered by the Competition Council in this market. The market for printer ink cartridges is starting to become more competitive with the development of generic cartridges, and more specifically the development of shops dedicated to refill cartridges. Nevertheless, brand cartridges still own the biggest part of the market (86%). When looking at prices in the past years, it appears that they are decreasing in all types of shops and even more in super and hypermarkets. The main competition regarding ink cartridges in our view is the attempt from main brands to prevent the development of generic solutions by using technical barriers like the introduction of chips in the devices, i.e. attempting to create a very protected market. The segmentation of the market with a lot of different models of printers, all using specific types of cartridges, is also probably an attempt to create a captive market.

Downloadable music: There is about a dozen commercial websites offering downloadable music for French consumers. At the beginning, prices for a title or an album were nearly the same on all websites, based on the prices of i-Tunes Music store, the dominant operator on the market. But things are slowly changing with the development of different commercial offers, monthly subscription, prepaid cards etc. One of the main problems for consumers on this market is the problem caused by the non –interoperability of devices and files due to different schemes of DRM systems. A consumer with a Sony MP3 player will not be able to buy its music on any commercial website except the one owned by Sony music, and the same happens with Apple and i-Tunes.

[61] See: 'Current Developments: France', (2006) 2 *European Competition Journal* 209 at p.213.

The only formal competition case that came to the attention of our French partner regarding the product markets chosen by the partners is a case concerning downloadable music. In that case VirginMega, a French website for downloadable music, argued that Apple, while refusing to give access to their DRM Fair Play, was guilty of anti-competitive practices. The Competition Council held that there was not sufficient evidence to find a violation of the competition rules for the following reasons:

- considering the state of the market, access to FairPlay was not essential to develop a website of downloadable music;
- considering the dynamism of the market, there was a very low risk of a restriction of competition on that market; and
- the link between a possible dominant position of Apple on the market of MP3 players and the state of competition on the market of downloadable music was not clearly established.

Perceptions Revealed in the Legislative Survey

The Media

The media does not in general cover competition law issues in any great detail. The activity of the Conseil de la Concurrence, however, is being placed under more and more scrutiny by the media.

The two cases relating to the Galland Law and to mobile phones detailed above were widely covered by the media, no doubt because they concerned areas of great interest for nearly all consumers and industries and which are of great importance for the national economy. In both cases there clearly appears to be a problem concerning competition, with firms trying to limit price competition in order to ensure benefits for themselves. Cases concerning national and international companies, especially when those companies liaise directly with the final consumer, are often publicised—but more often than not only in specialist economic newspapers. Decisions like the ones condemning large French retailers and manufacturers of audio and video equipment for an agreement on prices, or condemning some of the largest French banks for an anti-competitive agreement limiting the opportunity for consumers to renegotiate their credit, were well publicised in economic and specialist newspapers. Some decisions can have a great impact. For example, in November 2005 the Competition Council condemned the three French mobile operators as explained above. This decision has had a very significant impact in the media, press, radio and TV.

According to our French partner, the case concerning downloadable music was not widely covered by the media. (It seems there were only one or two short articles written specifically for the public about the decision of the Council.) But the question of downloadable music—and specifically regarding the situation of Apple and also Microsoft—is often covered in the media as a competition issue which has a direct and concrete impact on consumers.

Awareness of the Substance/Importance of Competition Law

Our French partner believes that, with the exception of the two cases discussed above[62] (both of which involved very obvious and significant consequences for consumers), there is not a very good level of understanding of the importance of competition law issues. Generally consumers perceive competition law more as a solution to problems between companies than as a law which has direct (beneficial) effects for consumers. Things are slightly changing in this area

[62] Relating to the Galland Law and to mobile phones.

however. Our French partner also believes that the level of awareness of the substance of the competition law rules is very low—most consumers may know that there are competition rules, but most do not know what they are.

In relation to the business community, the DGCCRF and the Competition Council organise competition law seminars in order to improve awareness/understanding of the competition laws. They also regularly publish articles on competition law issues. At the regional and local level the DGCCRF has also helped to improve understanding and awareness of competition law issues among the business community. Our French partner is not aware of any government campaigns to improve the understanding of the substance/importance of the competition law rules among consumers in general. It must be remembered however that the Competition Council has a useful website which can be viewed in French, English and Spanish. It contains a good description of the Council's work as well as press releases and other general information. Likewise, the DGCCRF maintains a comprehensive, helpful website.

Other Observations

(1) According to our French partner, whether or not the impact of certain behaviour on consumers is considered by the Competition Council in any given case depends on the actual nature of the market being investigated in the case before it. If the market under consideration is directly oriented to consumers (e.g. mobile phones, perfumery…) the CC clearly takes into account the harm to consumers; in other cases, less consideration is given to consumer harm. That said, there is no specific mention of the protection of the consumer interest in the French competition legislation.

(2) Our French partner is strongly in favour of the development of a class action procedure in France so that individual consumers will be able to better defend their economic interests.

Germany

Overview of the German Competition Law

The Seventh Amendment to the German Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, hereafter 'GWB' or 'Act')[63] entered into force on 1 July 2005. The main purpose of this amendment was to bring German competition law more in line with European competition law.[64] This became necessary after the entry into force of Regulation 1/2003.[65] The new act abolishes the difference between the treatment of horizontal and vertical restraints. The old act presumed that vertical restraints were legal as long as they did not effect restrictions on prices and terms of business. There is now one general prohibition based on Article 81 which covers all types of agreements, whether horizontal or vertical.[66] The GWB also covers abuse of a dominant position and merger control. Due to the similarity between the provisions of the GWB and the EC competition law rules European caselaw has a dynamic influence on the new GWB.

The Institutional Framework

The authority that applies the GWB is called the German Federal Cartel Office (*Bundeskartellamt*, hereafter BKartA.[67] The BKartA has been entrusted with the enforcement of the act since 1958. It is an independent higher Federal authority, which is responsible to the Federal Ministry of Economics and Technology. In practice this relationship ensures that the Cartel Office can decide independently how to treat individual cases; the minister responsible only provides general instructions.[68]

Germany is a federal state and therefore there are also enforcement bodies at the regional level, which are not responsible to the BKartA. For conduct (other than mergers) whose effect is limited to a single *Land*, the competent enforcement body is the authority designated by the local law (Section 48). The governments of the *Länder* cannot decide on mergers, but they must be consulted in a merger matter if the BKartA proposes to prohibit it or if the parties apply for intervention to the Minister.[69] The Federal office is the only German authority that can rule on mergers and apply Articles 81 and 82 EC. (In accordance with Regulation 1/2003 it is obliged to do so from 1 May 2004.) Article 3(2) of that regulation states that Community law takes precedence over national law. Because the provisions are now aligned it is not believed that this requirement should give rise to any serious problems.[70]

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[63] The original GWB had been enacted in 1958.
[64] Faegre & Benson, 'Germany Reforms its Competition and Antitrust Law', available at http://www.faegre.co.uk/articles/article_1730.aspx (last accessed: 20 July 2006).
[65] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).
[66] Ashurst, 'Modernisation of German Competition Law – The 7th Amendment of the GWB', available at http://www.ashurst.com/doc.aspx?id_Content=1926 (last accessed: 20 July 2006).
[67] The Federal Cartel Office has a website in German, French and English. It contains a lot of general information like an English version of the act and press releases and can also be used to contact the office informally. See http://www.bundeskartellamt.de/wEnglisch/index.shtml.
[68] E.M. Graham & J.D. Richardson, *Global Competition Policy*, Washington: Institute for International Economics, 1997, at 119.
[69] OECD, *Regulatory Reform in Germany—The Role of Competition Policy in Regulatory Reform (2004)*, 23, available at http://www.oecd.org/dataoecd/40/49/33841373.pdf (last accessed: 20 July 2006).
[70] Faegre & Benson, *op. cit.*

The Federal Cartel Office is headed by a President. The current President has been in place since 2000. Eleven Decision Divisions, which are generally organised by sector, support the BKartA. There is one division that only deals with the prosecution of cartel agreements. A collegiate body composed of the chairman and two associate members of the relevant Decision Division take decisions by majority vote. There is a special litigation department, which represents the BKartA in legal proceedings.

The following grid represents the workload of the BKartA between 2000 and 2004:

Year	2000 Pending Cases	2000 New Cases	2001 Pending Cases	2001 New Cases	2002 Pending Cases	2002 New Cases	2003 Pending Cases	2003 New Cases	2004 Pending Cases	2004 New Cases
§ 1 GWB Cartel ban	20	55	56	66	56	84	94	108	108	19
§§ 14 – 18 GWB Vertical agreements	7	19	19	13	14	3	17	17	18	3
§§ 19 – 23 GWB Market Control, anticompetitive behaviours	45	96	89	128	132	100	160	118	199	63

Substantive Provisions of the Competition Law

Anti-competitive Agreements

The GWB includes a prohibition on cartels. This provision has been altered by the Seventh Amendment to reflect more closely Article 81(1). It does not include the element of 'effect on trade' and therefore the same rules apply regardless of whether there is an effect on trade or not. Previously the Act incorporated a difference in treatment between vertical and horizontal restraints. As stated above this difference has now also been abolished in Germany.

Before the amendment it was possible to obtain clearance or an exemption from the prohibition by notifying the agreement to the BKartA. This feature is unavailable under the new law. In Section 2 there is an exemption which resembles Article 81(3) of the EC Treaty. As in Europe the companies are now expected to assess agreements themselves. The Act also contains a reference to European block exemptions, which makes them directly applicable in Germany (Section 2(2)). Because of the increased legal uncertainty the BKartA can adopt so called no-action letters. This informal guidance by the authority states that they see no reason to take action against the agreement. However, there is no right to obtain such a letter so it is within the discretion of the BKartA to provide one if they so wish. The no-action letter does not preclude

any private actions. It is also possible to have an informal discussion with the cartel office to obtain informal guidance.[71]

Agreements between small and medium sized enterprises (hereafter SMEs) remain privileged under the new law. They are exempted if they do not substantially impair competition and the agreement improves the competitiveness of the market. However, the agreement may still infringe Article 81(1). If this provision is not infringed the parties can ask for a decision if they can demonstrate a significant legal or economic interest. The provision is valid until 30 June 2009 (Section 3).

Abuse of Dominance

The second substantive part deals with the abuse of a dominant position. According to Article 3(2) of Regulation 1/2003 the national laws on abuse of a dominant position can be stricter than the European rules. Therefore, the Seventh Amendment has only introduced marginal changes. According to Section 19 an undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services on the relevant product and geographic market, it:

(i) has no competitors or is not exposed to any substantial competition; or
(ii) has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Section 19(4) lists some examples of abuses, including impairing the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification; demanding payment or other business terms which differ from those which would very likely arise if effective competition existed; or refusing to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market.

Mergers

The last substantive part of the GWB is that of control of concentrations. This remains largely unaffected by the amendment of 1 July 2005. It only introduces some changes to possibility of third parties seeking injunctive relief.[72] The test that the BKartA applies remains the same: they still look if the concentration is expected to create or strengthen a dominant position. It is possible for the parties to show that the merger will improve the conditions of competition and that these outweigh the disadvantages (Section 36). The control of concentrations does not only cover mergers, it also covers acquisitions and joint ventures (Section 37).

The GWB contains some thresholds in Section 35(1). It also contains a *de minimis* exception in 35(2). When the merger exceeds the threshold they are under a duty to notify the proposed merger to the BKartA before putting the merger into effect (Sections 39 and 41). The authority may grant an exemption from the prohibition of putting a merger into effect at any time. The parties must show that there are important reasons for granting the exemption. This exemption may contain conditions and obligations (Section 41(2)).

[71] Faegre & Benson, *op. cit.*.
[72] This will be described in more detail in the part on legal protection.

The cartel office reviews the merger on the basis of the notification and if it concludes, within one month, that a further examination of the concentration is necessary it investigates the main examination proceedings (Section 40(1)). In the main examination proceedings the BKartA has a period of four months from the receipt of the complete notification to clear or prohibit the merger (Section 40(2)). This time can be extended if one of the exemptions of Section 40(2) applies. Conditions and obligations can be imposed on the undertakings in case of a clearance (Section 40(3)).

If the concentration is prohibited the parties may apply to the Federal Minister of Economics and Technology to authorise the concentration. They should show that the advantages outweigh the anti-competitive effects. The parties must apply within one month from service of the prohibition or the date when the prohibition becomes final (after appeal). The Minister shall decide on the application within four months and it may attach conditions and obligations to the authorisation (Section 42).

Sanctions and Enforcement

The new Act has changed the level of fines that the BKartA can impose. Under the old law they had to prove that the conduct had generated additional revenue for the companies involved. Now the level of fines is in line with European law and thus the authority can impose a fine of 10% of the annual worldwide turnover for most offences. In fixing the amount of the fine regard shall be had of the gravity and duration of the infringement (Section 81(4)).

The fine may skim off the economic benefit that the undertakings obtained from the infringement (Section 81(5)). In all other cases a fine of € 100.000 may be imposed. This level mostly counts for procedural deficits. A clearance decision may be revoked if it has been obtained by means of deceit or if the parties do not comply with an obligation (Section 40(3a)).

The BKartA is also allowed to impose fines for the infringement of Articles 81(1) and 82 (Section 81(1)). The enforcement occurs pursuant to the provisions applying to the enforcement of administrative measures (Section 86a). The authority (also the federal authorities) can impose structural or behavioural measures and these measures can also be imposed in interlocutory procedures if it is an urgent matter. The BKartA also has an enquête right, providing it with the ability to investigate sectors without any suspicion (Section 32e).[73]

The cartel authority can act on its own initiative or after a request (Section 54). If the parties dispute that the BKartA has jurisdiction it will take a preliminary decision on this point. Against this decision the parties can lodge an appeal separately (Section 55 (1)). If the authority concludes that it has jurisdiction an appeal cannot be based on lack of jurisdiction later on, once the party has not claimed this before (Section 55(2)). The BKartA has several powers to investigate such as: seizures, information requests, testimonies, etc. The authority is obliged to give reasons for its decisions.

Legal Protection

Decisions by the BKartA may be appealed by the parties; they may also appeal if the authority fails to act (Section 63). The appeal usually has a suspension effect on the decision (Section 64); this is not so in the case of decisions concerning abuse of market power in case of energy or gas distribution systems (Section 64 (1 a)). The BKartA may also order the immediate enforcement of the decision, which means that an appeal will not suspend the application of the decision. Such a decision can only be taken if it is in the public interest or the prevailing interest of a party (Section 65).

[73] Ashurst, *op. cit.*

An appeal has to be filed within one month after service of the decision and has to be directed to the cartel authority. The parties have to appeal to the Court of Appeals, in whose district the authority has its seat, with a statement of reasons within two months of service of the decision (Section 66). The Court of Appeals decides by decree and may grant leave to the parties to appeal on points of law to the Federal Supreme Court (*Bundesgerichtshof*) (Section 74). If leave is refused the parties can appeal that refusal with the Federal Supreme Court (Section 75). The appeal on points of law and against the refusal must be made within one month after service of the decision (Sections 75(3) and 76(3)).

Consumer Organisations and their Influence in Competition Cases

A consumer organisation can file a request with the BKartA to investigate a certain agreement or practice. Consumer advice centres and consumer associations supported by public funds have a chance to participate in proceedings before the cartel authority if their interests are substantially affected. The organisation must apply to the BKartA to be admitted to the proceedings. The rights of these consumer organisations are substantially affected if the decision has an effect on numerous consumers (Section 54(3)). If the interests of the consumer organisations are substantially affected they may also participate in appeals (Section 67(1)). If they are party to the proceedings they are entitled to a hearing (Section 69).

Violators are obliged to remediate affected persons, which may claim injunctive relief (Section 33). In damage claims courts are bound by final decisions of the European Commission, national competition authorities or competition authorities from third countries (Section 33(4)).[74] Civil claims must be filed with the District Courts (*Landgerichte*) (Section 87(1)). Actions may be joined if there is a legal or direct economic connection between the two (Section 88). The *Land* governments are allowed to refer cases to a particular District Court to centralise proceedings. They may delegate this authority to their judicial administrations (Section 89).

Trade associations may also be able to ask for injunction if they have the legal capacity to promote commercial or independent professional interests, provided they have a significant number of members selling on the same or related markets and the infringement affects the interests of their members (Section 33). A trade association may also skim off the benefits from the infringement if the undertaking intentionally infringes the act. This can only be done if the cartel authority has not ordered the skimming off (Section 34a).[75]

In contrary to trade associations, consumer law associations do not have the right to skim off the benefits from the infringement in competition cases. Even if an individual consumer has the right to claim for damages, the incentive to go before court will be limited for an individual consumer due to the high legal fees involved in the proceedings.

Our German partner has brought one case to the cartel authority recently and has been involved in (or better, tried to be involved in) two further competition cases in the past:

(a) Investigation of exclusive agreements between Intel and the Media-Saturn-Holding

In September 2006 our German partner send a written pleading to the Federal Cartel Office as well as to the European Commission concerning an assumed exclusive agreement between Intel and the Media-Saturn-Holding (MSH). Therein our German partner proposed to expand their investigations of Intel and Hardware manufacturers concerning competition law infringements also towards the relationship of Intel and the MSH distributor because such anti-competitive behaviour would constitute a danger for competition in a market critical to consumers and it is therefore of paramount importance that any abuses are stopped as soon as

[74] Ashurst, *op. cit.*
[75] Faegre & Benson, *op. cit.*

possible to allow consumers the benefits of full competition. The Federal Cartel Office announced that it would send the investigations to Brussels in the interest of effective proceedings. The EC requested the German partner to expand their investigations towards the distribution level.

(b) Merger control by the German competition authority concerning the merger of E.ON and Ruhrgas

In this case the cartel authority prohibited the merger of E.ON and Ruhrgas (which are major gas providers) in 2002. According to German law the parties of the merger have the possibility to apply for a ministerial authorisation from the Federal Minister of Economics and Technology after a rejection of a merger. E.ON and Ruhrgas applied for and received this authorisation from the minister. Our German partner applied to be heard during the ministerial proceedings. It failed to do so even after lodging a complaint against the German Minister of Economics and Technology. The Court of Appeal in Düsseldorf (Oberlandesgericht) declined the request of our German partner to be heard during the ministerial authorisation proceedings. It argued that since the merger might lead to a rise of gas prices for the consumer of up to 10 EUR per month or 10 %, that this was not enough to affect consumer interests considerably as was required. This decision shows how difficult it is for consumer organisations to be involved in competition proceedings and how high the threshold is to be involved. This legal situation has been improved by the 7th amendment of the German Competition Code in 2005 but still, also after the amendment it is necessary that consumer organisations prove that the decision of the cartel authority affects a multiplicity of consumers and thereby the collective interests of the consumers are touched considerably.

(c) Refused Ministry authorisation concerning the prohibited merger of Holtzbrink and Berliner Verlag by the German federal competition authority

After this legal and political debacle in the E.ON/Ruhrgas case the German Ministry of Economics and Technology as well as the courts have been more careful in a case later on in the planned merger between two publishers. In this case our German partner participated in the proceedings concerning the application for authorisation of the Ministry. The BKartA prohibited the merger of Holtzbrink and Berliner Verlag. Our German partner was against the merger and applied for participation in this case. The court referred to the German constitution and the freedom of press as affected consumer interests and allowed the participation of our German partner in the merger proceedings. In the end the Ministry authorisation was refused.

Important Competition Concerns in Germany

The following represent the major competition cases in Germany over the last couple of years:

Cartel Issues:[76]

- Investigation against major energy providers (E.ON and RWE) (May 2006): The Bundeskartellamt investigates whether these providers formed a cartel.

- Imposition of penalty against six German moving companies (April 2006): When the US military re-deployed, six German moving companies fixed prices. The Bundeskartellamt imposed a penalty of 2.4 million Euro.

[76] Please note that the information in this section can be sourced to the following website: http://www.bundeskartellamt.de.

- Imposition of penalty against insurance companies that insure industry (September 2005): The Bundeskartellamt complained that seven insurance companies fixed prices in the market for industry insurances. The penalty was 20 million Euro.

- Misuse proceedings against seven gas providers (February 2006): The Bundeskartellamt complained that consumer choice in the German gas market was insufficient due to the lack of competition. The proceedings were ceased when the seven agreed to improve terms and conditions under which other gas providers could buy gas from them. (From the point of view of our German partner these terms are still insufficient.)

Abuse of Dominance:[77]

- Written warning against national lottery (May 2006): In May 2006 the Bundeskartellamt sent a written warning to the national lottery. It complained that the national lottery discriminated against commercial agents; that it shared markets; and that the system of informing the federal states about revenues would hinder competition.

- Imposition of penalty against spice producer Fuchs (May 2006): Fuchs ignored an interdiction order of July 2002 and was fined 250,000 Euro. In 2002 the Bundeskartellamt imposed an interdiction order against Fuchs, since Fuchs has a dominant position in Germany and promised retailers subsidies if they decided to sell products from Fuchs only. In the period after 2002 the Bundeskartellamt was able to find at least five cases in which employees of Fuchs continued this practice. Consequently, the Bundeskartellamt imposed a penalty again.

- Interdiction order against Soda-Club, a company selling CO2-barrels to produce sparkling water (April 2006): Soda-Club inhibited other companies to refill their CO2-barrels. The Bundeskartellamt argued that by doing so Soda-Club misused its dominant position and infringed competition.

- Interdiction order against E.ON Ruhrgas (January 2006): The Bundeskartellamt decided that long-term contracts between E.ON Ruhrgas (the major German gas provider) and re-distributors (such as the local gas providers, Stadtwerke) which receive more than 80% of their gas from E.ON Ruhrgas violate German and EU competition law.

- Imposition of penalty against retailer Schlecker (September 2005): Schlecker offered a digital print service below cost-price (Einstandspreis) which violates German competition law.

- Bundeskartellamt ceased investigation against tour operator TUI (August 2005): Tour operator Holiday Jack complained that TUI pressed hoteliers in a number of countries not to make agreements with Holiday Jack. After TUI agreed to advice its employees about the fact that such activities would be unlawful, the Bundeskartellamt ceased its investigation.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: Our German Partner reported that the German market is dominated by very powerful petrol chains and some smaller chains and independent retailers who do not have very much market power. Sometimes they have market power on regional/local markets due to their low

[77] Please note that the information in this section can also be sourced to the following website: http://www.bundeskartellamt.de.

price policy, e.g. petrol stations at super and hypermarkets. But, they have only small effects against the market power of the big chains.

The top three major chains in Germany in 2005 were:

Retailer	Type of outlet	Market share %
1.Aral	major petrol chain	22,0 %
2.Shell	major petrol chain	21,0 %
3.Jet	major petrol chain	10,5 %
4.BFT	independent	9,5 %
5.Esso	major petrol chain	9,0 %
6.Total	major petrol chain	8,5 %
7.Agip	major petrol chain	4,5 %

The petrol market in Germany is decreasing; so too is the number of petrol stations.
Usually the companies have lease contracts with the managers of the stations (tenants). The benefit for the station manager is not very high, so that they try to improve their income by other additional activities (like car wash, car repair and shops).

The price for petrol changes quite a lot. Petrol is quite expensive in Germany at present. The price has continuously increased since last year. It should be noted that prices are increasing especially before holidays. This was already the topic of an investigation of the German Cartel Office, in the past but this is without result so far. In this context it should be remembered that the world market price for oil has increased as well; and the question is whether prices increased in proportion or not.

Printer-ink: The market for printer ink cartridges is a very broad market with a huge range of products and different prices. The market is evolving very much due to technical progress, e.g. the industry is planning to provide printer ink cartridges with RFID chips. That could limit the competition very much as well as influence the market. RFID chips could, for example, be used as regional codes like for DVDs or could determine which cartridge the consumer has to buy for his special printer, so he would have less choice. The three top selling brands in Germany are HP, Canon and Epson. 79 % of the market is branded or original cartridges and 21 % generic products (Pelikan, KMP and GEHA). According to our German partner, original cartridge brands experience tough competition from generic cartridges in the printer-ink market in Germany. Accordingly, printer manufacturers have made it difficult to refill original cartridges. The market researchers in Germany reported that the investigations have been very difficult, especially for printer ink cartridges. The leading companies as well as the suppliers or resellers did not give any relevant market information to the public, especially concerning the questions about:

- top selling models of HP, Canon or Epson; or
- the points of sale or stores where the cartridges are sold the most.

Paracetamol: Our German partner reported that the investigations on the market have been very difficult for paracetamol. The leading companies as well as the suppliers or resellers did not give any relevant market information to the public. Concerning paracetamol the most important fact for Germany is that paracetamol is sold only in pharmacies and Germany has no pharmacy chains. The packages of paracetamol are arranged behind the counter, often in closed shelves in a separate room without any presentation or price marking which would be visible for clients. The client can not see a range of different brands of paracetamol from which he could choose; he needs to ask for paracetamol. The pharmacist will then present him a brand of his choice if the client does not mention a special brand or asks for the cheapest product. So the costumer needs to trust that the pharmacist made the best choice of price and quality. The best-selling paracetamol pack in Germany is the package size of 30 tablets with a market share of 58 %.

The package size of 20 is not very popular with 5,5 % market share. The top two soluble and non-soluble paracetamol products are from Ratiopharm and Stada. In Germany the market for paracetamol is not growing. The market share of generic products is growing; the market share of branded products is decreasing. Generic products become more and more important. Our German partner could not get any information on this or on the reasons for it; it presumes that this is due to the fact that people need to pay for paracetamol themselves and also more and more for other medicaments and that medical insurance does not bear the expense of paracetamol. It was remarkable that the product chosen by the other partners for the market research by Glaxo Smith 'Panadol' is not available in Germany; only a different import package with caffeine is available.

Downloadable music: The copyright law is in the process of changing in Germany. Even if the law in some parts is already consumer friendly, the practice is not. The licensing terms and conditions for online music are not very consumer friendly and are very restrictive at present. Our German partner believes that DRM systems, the new Windows Vista Operating system and other technology innovation will affect consumer rights even more in the future. The prices for online music are still too high. The consumer has no right to have a back-up copy for his music bought online, and data privacy is not guaranteed.[78]

iTunes Case: An example of a specific case study relates to the iTunes music download service and the iPod, the biggest selling MP3 player at the moment. The file format that it uses is not compatible with other formats. If you have another MP3 player you are not able to use the same music or you have to buy the music twice because it is not transferable. For that reason our German partner reported that many consumer organisations in the world cooperate and have sent written warnings to Apple, e.g. from Germany, Norwegian, Sweden, Denmark, France and the USA. Apple is trying to get together with the consumer organisations in order to to settle the case.

Perceptions Revealed in the Legislative Survey

The Media

Not surprisingly, different competition problems receive different degrees of attention in the media. The imposition of penalties against six German moving companies and against insurance companies, for example, were covered only to a limited degree and if so, mainly in specialized newspapers/journals/portals. Issues which are of greater relevance for consumers (such as the proceedings against gas suppliers, the warning against national lottery or the proceedings against German tour operator TUI) are of greater interest for the media and thus receive a higher degree of attention than other competition law issues.

Awareness of the Substance/Importance of Competition Law

Our German partner believes that the German government underestimates the importance of competition. Much too often Berlin tries to foster 'national champions' (e.g. in the field of energy) to the disadvantage of competition and consumers. As a result, the German government liberalised, for example, the energy market without creating adequate institutions, which would ensure fair competition.

Our German Partner reported that the BKartA has published a list of gas prices for consumers from 739 regional companies from all over Germany in January 2007. This publication is intended to bring more transparency for consumers and stimulate competition. It is to note that prices differ in Germany up to 58 % from region to region. But nevertheless, the main problem

[78] See: http://www.vzbv.de/go/dokumente/545/5/24/index.html. The summary in English is available at: http://www.vzbv.de/mediapics/consumer_protection_in_digital_media_2006.pdf.

for the consumer will still be the fact that gas companies are very often monopolists in their region—apart from Hamburg and Berlin where consumers have the choice between gas providers.[79]

While there are some journalists and academics who have a high level of awareness about the importance of competition law issues, this area is much too complex for the general public to grasp.

In general our German partner believes that the level of understanding of competition and of preconditions for functioning competition is insufficient. During the last decade many sectors were liberalised and privatised in Germany. The impression received is that much too often there was the implicit naïve assumption that once one liberalised, the liberalised markets would function automatically more efficiently. There is still much too little awareness that in order for a market to function properly, you need proper laws and capable institutions that enforce the rules of the game. In other words, what Germany needs is a much more enlightened approach to competition.

Since the general awareness of the importance of competition law issues is low, the general awareness of the substance is also unsatisfactory. Yet, it is important to distinguish between informed circles and the general public. Informed groups (such as specialists, academics, journalists and some politicians) know the laws very well.

Our German partner believes that the government underestimates the importance of competition and competition law and it therefore also does not do enough to improve understanding and awareness of competition law issues among both the business community and consumers. Our German partner is not aware of any government programmes aimed at improving the understanding of competition law issues among the general public.

Other Observations Contained in the Legislative Survey

(1) In Germany, class actions similar to those in the US are not regulated by law. Consumer organisations may only file monetary claims in a law suit if every single consumer concerned signs a contract assigning his/her claim to the organisation. To do this for a larger group of people poses a great administrative burden. But lately in the context of the discussions in Europe, Professor Micklitz suggested a draft law, which is promising. It proposes group actions in Germany. This proposal was criticized widely by the industry fearing an American legal system in Europe. A comparative report from the British Department of Trade and Industry on consumer policy regimes in countries of the OECD concludes for Germany that the existing legal instruments concerning small claims are insufficient[80]. Due to the absence of a class actions system similar to the one in US law or group litigations as in English law, the German legislator has introduced and passed a bill relating to claims for damages as a result of wrong or misleading capital information by the company, e.g. damages due to wrong or omitted ad-hoc-disclosure. With the Capital Markets Model Case Act, the German legislator provides an effective way to handle capital market mass proceedings. The Act introduces a model case procedure into German Law - not a class action. Our German partner will monitor how useful this instrument proves in the future. If positive, it will investigate how to use it for other domains as well.

(2) Our German partner would like to see the following major changes to the German competition law:

[79] See: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2007_01_03.shtml.
[80] DTI, Department of Trade and Industry; Comparative Report on Consumer Policy Regimes, October 2003, p. 20 ff.

(i) The law should clearly stipulate that the purpose of the law is to defend the interests of consumers;

(ii) Consumer organisations should have the right to take collective actions for damages in competition and have the right to skim off profit from companies infringing competition law;

(iii) Due to the fact that consumer organisations are no competition authorities, they have difficulties investigating cartels and other infringements in order to quantify the damage of the consumers concerned. That means that for any infringement of competition rules the amount and the causality will be probably the highest burden of proof for consumer organisations. That means that the procedural rules for legal actions in competition cases should include the possibility of estimation of the damage/amount by court; and

(iv) A procedure should be introduced that allows consumer organisations to initiate proceedings and insist on an answer of the competition authority similar to the super-complaints in the UK.

Greece

Overview of the Greek Competition Law

The competition rules in Greece are contained in the Act on the Control of Monopolies and Oligopolies and the Protection of Free Competition.
[81]; this is also known as Act no. 703 of 26 September 1977. This Act has been amended seven times since the nineties. The last amendment dates from 2 August 2006.[82] The Greek competition law includes provisions relating to anti-competitive agreements, abuse of dominance, and the control of concentrations. As is to be expected, EC competition law has had (and continues to have) a profound effect on the development of the Greek competition law rules.

The Institutional Framework

The Act establishes a Competition Committee (hereafter 'Committee'), which functions as an independent authority (Article 8(1)). The Committee consists of eleven members. There are rules on the composition of the Committee; they are contained in Article 8(3). A representative of consumer organisations was not included in the composition of the Committee when it consisted of nine members. It was not possible to obtain information whether, after enlargement to eleven members, a consumer representative has been admitted as a member on the Committee.

All members are appointed for a term of three years, which can be renewed only once (Article 8(5)). The Competition Committee can only take decisions if the President and at least four members are present. In case of a tie in the votes, the vote of the President shall be the casting vote (Article 8(12)). The Committee is in charge of the observance of the provisions of the present Act (Article 8a).

The Act also provides for the establishment of a Secretariat that shall operate within the Committee. The Secretariat is headed by a Director who is appointed for a period of five years (Article 8c(1)). The Secretariat assists the Committee in its investigations.

	2000	2001	2002	2003	2004	2005	2006
Decisions	65	32	15	6	19	22	4

Source: the Greek Competition Committee website: http://www.epant.gr.

Substantive Provisions of the Competition Law

The provisions of the Act apply to certain specified sectors and undertakings. The Act applies to for example public undertakings and to undertakings in the public utility (Article 5(1)), the agriculture sector (Article 5(2)), and transport undertakings (Article 5(3)). However, certain Ministers can jointly exempt categories of undertakings or sectors from these rules.

[81] The English version used for this chapter was taken from a translation that was provided with the 2000 Annual Report of the Greek Competition Committee to the OECD. This report is available at: http://www.oecd.org/dataoecd/52/16/2087969.doc (last accessed: 14 October 2006).
[82] See for a short description of the changes: http://www.globalcompetitionforum.org/ europe.htm#Greece (last accessed: 15 October 2006).

Anti-competitive Agreements

Article 1(1) of the Act prohibits all agreements between undertakings, all decision by associations of undertakings and concerted practices of whatsoever kind, which have as their object or effect the prevention or restriction of competition. The Act then lists some examples of agreements that are in particular considered to have the object or effect of restricting or preventing competition. Article 1(2) says that these agreements are null and void.

An exemption to this prohibition is contained in Article 1(3). This Article states that the prohibition of Article 1(1) may be declared void if they fulfil all of the following four conditions:

- The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- The agreement must allow consumers a fair share of the resultant benefit;
- The agreement must not impose any restrictions which are not indispensable to the attainment of the aforementioned objectives; and
- The agreement must not afford the parties concerned the possibility of eliminating competition in a substantial part of the relevant market.

No guidance is given on the interpretation of certain definitions given in this Article. However, since the Article closely resembles Article 81 EC it is likely that guidance can be found in the interpretation by the European Community Courts and the guidelines and notices issued by the European Commission.

Other exemptions to these rules are contained in Articles 6 and 7. Anti-competitive agreements whose aim it is to insure, promote or strengthen exports are allowed, unless the Ministers of National Economy and Development decide otherwise with respect to categories of undertakings (Article 6). Furthermore, the Minister of Development may, after obtaining the approval of the Competition Committee, issue a ministerial decision that exempts certain agreements or categories of agreements from the prohibition of Article 1(1) or a decision that exempts certain categories of agreements in accordance with Article 1(3) (Article 7).

Abuse of Dominance

Article 2 of the Act prohibits any abuse by one or more undertakings in a dominant position within the national market as a whole or in a substantial part of it. The Article then lists some examples of what is in particular considered an abuse. The Act does not give a definition of a dominant position, but it is probable that it will be interpreted similarly to Article 82 EC.

Article 2a was abolished in 2000, but was reintroduced by Law 3351/2005, which was enacted in August 2005.[83] This Article prohibits the abuse of a relationship of economic dependence. This is the case when one undertaking is for a large part dependent upon one supplier/buyer and has no equivalent alternative source of supply or demand. The supplier could in this case exploit the buyer even though it might not be in a dominant position.

Control of Concentrations

Article 4(1) provides that a concentration between undertakings does not fall within the scope of the prohibitions of Articles 1(1) and 2. A concentration shall be deemed to arise where two previously independent undertakings merge or where direct or indirect control is acquired over another undertaking (Article 4(2)). The creation of a joint venture that performs on a lasting

[83] *OECD – Annual Report on Competition Policy in Greece 2005*, available at: http://www.oecd.org/dataoecd/54/40/37008414.pdf (last accessed: 15 October 2006).

basis all the functions of an autonomous legal entity is also regarded as a concentration (Article 4(5)).

Article 4a, abolished in 2000 but reintroduced by Law 3351/2005, provides for rules on the post merger notification of smaller scale concentrations. Notifications that fulfil the condition of Article 4b(1) must be notified within ten days from conclusion of the contract or announcement of the public bid if:

- The combined aggregate market share of the parties involved on the relevant market exceeds 35%;
- The combined aggregate turnover in Greece of all undertakings concerned is at least 150 million Euro; and
- The aggregate turnover of at least two of the undertakings concerned is more than 15 million Euros.

Special rules on the calculation of the market share and the turnover are contained in Article 4f. If a concentration fulfils these conditions it must be notified to the Committee and may not be implemented before it has been approved by the Committee (Article 4e).

The Committee will assess if the concentration would significantly impede competition in the national market or in a substantial part of it, in particular through the creation or strengthening a dominant position (Article 4c(1)). The Committee will do a preliminary examination of the notification within one month. If the concentration raises serious doubts as to its compatibility with the Act the Committee will start a full investigation, which it will be concluded within 90 days of the notification. (Article 4d).

Sanctions and Enforcement

The Act provides for a possibility of getting negative clearance. This is a decision from the Committee that Articles 1(1) or 2 are not applicable to the agreement or conduct notified to the Committee (Article 11). The undertaking can apply to the Committee to get such a negative clearance and the Committee will certify, within two months, that there is no infringement (Article 11(1)). This clearance can also be obtained for future conduct.

Where the Competition Committee, upon its own initiative or after a complaint, concludes that there has been an infringement of Articles 1(1) or 2 the Committee can issue a decision requiring the undertaking to put an end to the infringement and it can impose a fine (Article 9(1)). The fine imposed may not be in excess of 15 per cent of the gross receipts of the offending undertaking or group of undertakings. When fixing the amount of the fine the Committee shall take into account the gravity and the duration of the infringement (Article 9(2)).

Article 3 determines that agreements contrary to Article 1(1) and abuses of a dominant position contrary to Article 2 are prohibited without any prior decision to that effect from the Committee being required. This means that private parties are able to claim damages for an infringement of Articles 1(1) and 2 without the need for a decision of the Committee. Furthermore, judges can apply these provisions directly in national courts.

Legal Protection

The decisions taken pursuant to the Act can be challenged before the Athens Administrative Court of Appeal within 60 days from their notification to the parties (Article 14(1)). The appeal does not suspend the execution of the contested decision. However, the president of the Court may suspend the execution if there are sufficient grounds justifying such a suspension (Article 14(2)). It is also possible for a complainant to bring an action against a decision of the

Committee. Furthermore, all parties with a legitimate interest are able to appeal the decision (Article 14(3)).

A further appeal is possible by a writ of error to the Council of State (Article 15(1)). It is also possible to bring an action for damages before the Civil Courts as Article 3 provides that there is no decision of the Competition Committee required to find a infringement of the Act (see also Article 18(2)).[84]

Consumer Organisations and their Influence in Competition Cases

Consumer organisations can file a complaint with the Competition Committee regarding the infringement of Articles 1(1) or 2 (Article 24(1)). If the Committee decides not to act on a complaint, the consumer organisation can appeal the decision to the Athens Administrative Court of Appeal within 60 days. If the Committee acts, but the consumer organisation does not agree with the decision, it can also appeal the decision (Article 14(3)). It is also possible for a consumer organisation to appeal a decision if it can show a legitimate interest, even if it did not act as a complainant (Article 14(3)).

According to Law 2251/1994 a consumer organisation which has at least 500 members and which is registered in the Registry of Consumers' Unions may bring an action for the protection of the general interests of consumers. The object of such litigation is to obtain pecuniary indemnity for moral damage and all proceeds must be used for public benefit purposes relevant to the protection of consumers. However, this action has not been made available under Act no. 703/1977.[85]

Our Greek partner has brought complaints to the attention of the Greek competition authorities. The case below concerning bakeries (Case 225/III/2002) is an example of one of these complaints.

Important Competition Concerns in Greece

The following were among the most significant competition cases for consumers in Greece over the last number of years:

(a) Case 284/IV/2005: This was a case brought against eight supermarkets who were accused of manipulating and forming rigid selling prices. The Committee held that all eight supermarkets violated the Law 703/77. This case is currently pending in court.

(b) Case 225/III/2002/2005: This was a case taken against the bakers of an administrative area in Greece, called Fokida, concerning the simultaneous rise in bread prices as well as the formation of a solid selling price on November the 16th 2001. The outcome in this case was the fining of these bakeries, with the amounts varying according to income.

(c) Case 292/IV/2005: This was a case taken against the Greek Dentist Federation; the Federation was accused of manipulating price increases on a regular basis concerning the minimum prices for their services, with the aim of constraining competition in the dental market. The Committee held that the Greek Dentist Federation violated the Law 703/77, and that this practice should be abandoned in the future.

[84] *Ashurst Report – Greece*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/greece_en.pdf (last accessed: 15 October 2006).
[85] *Ashurst Report – Greece, op .cit.*

(d) Ex-officio investigation of the General Directorate of Competition into the wholesale oil market for possible infringements of the Competition Law. Following the ex-officio investigation launched by the General Directorate of Competition into the wholesale oil market, the plenary session of the Hellenic Competition Committee convened on 6 April 2006 in order to examine the relevant proposal of the General Directorate for possible infringements of the Hellenic Competition Act (Law 703/1977) by the oil companies. The Hellenic Competition Committee decided that the discussion of the abovementioned case should be repeated according to Article 19 paragraph 1 of its regulation procedure so that a complementary proposal could be prepared by the General Directorate of Competition. The General Directorate of Competition has taken into account all the arguments of the two parties (BP Hellas S.A and Shell Hellas S.A) as they were stated in the oral hearing. The General Directorate of Competition, after having examined the arguments of the undertakings, retains its initial position on the existence of a common discount policy by the two oil companies in order to fix the prices in unleaded petrol. The common discount policy was considered by the Directorate to constitute a serious violation of the European and National competition law (Article 81 of the EC Treaty and 1 of the Hellenic Competition Act). For this reason, the General Directorate of Competition proposed the imposition of fines on the oil companies BP Hellas S.A and Shell Hellas S.A. It should be noted that the proposal of the General Directorate of Competition is not binding on the Committee, which shall decide on the case after it has taken into consideration the arguments of the concerned undertakings.

Competition Concerns In the Product Markets Chosen by the Partners

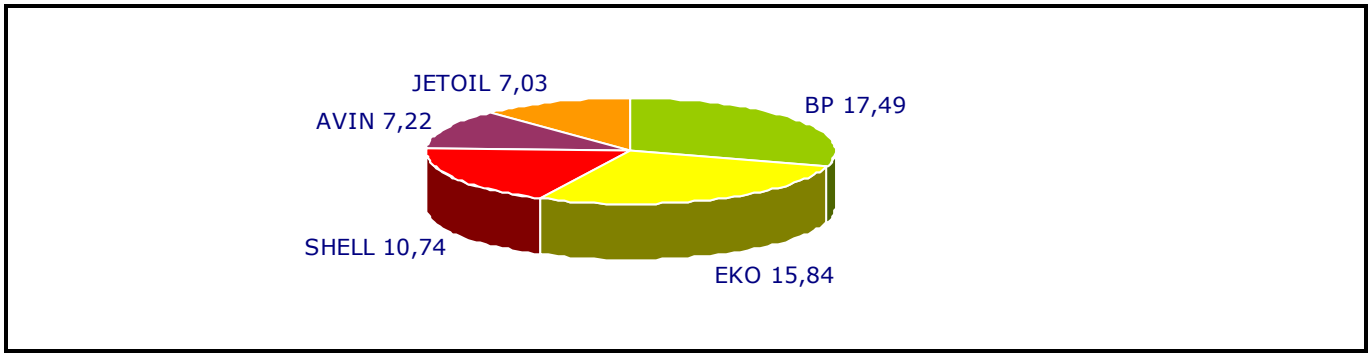
Petrol: Our Greek Partner reports that in Greece there is great concern regarding the lack of competition in petrol market and the lack of transparency in pricing petrol. Two cases engaged public opinion in 2006. The first was an ex-officio investigation, in April 2006, which was launched by the Greek General Directorate of Competition into the wholesale oil market. The Greek General Directorate of Competition investigated the existence of a common petrol discount policy by two oil companies (BP Hellas S.A and Shell Hellas S.A). Such a common discount policy was held to constitute a serious violation of the European and National competition law (Article 81 of the EC Treaty and Article 1 of the Hellenic Competition Act). The General Directorate of Competition proposed the imposition of fines on the oil companies BP Hellas S.A and Shell Hellas S.A. It should be hereby noted that the proposal of the General Directorate of Competition is not binding on the Committee, which shall decide on the case after it has taken into consideration the arguments of the concerned parties. The second development occurred In August 2006, when the Minister of Development entrusted the Hellenic Competition Committee with the task of ascertaining the level of competition in the petrol market. The Committee put the subject forward for public consultation in order to receive specific proposals for the development of competition in petrol market.

In Greece, as far as distillation concerns, two companies hold the dominant position. The first one is ELPE, which is controlled by the Greek government, with market share at 75% of the overall distillation product. MOTOR OIL has 25% market share. These two companies cover the biggest part of Greek consumption. In the retail market there is a great number of petrol – supply brands, both foreign and domestic: BP, Shell, ETEKA, Jetoil, Avin, Aegean Oil, Elinoil, Revoil, EKO, Cyclon, Dracoil, Silkoil, Sunoil, Elin, Kaoil, Kmoil, Argo, Medoil, Shell Gas, Leon Gas, Petrogas, Aspropyrgas, Vitoumina, Jetgas and El Petrol. These companies control about 8000 petrol stations all over Greece.

In Greece only petrol stations have the right to sell petrol; however, there are 25 chain supermarkets which have petrol stations. There are approximately 8,000 petrol stations countrywide; and thus 261 cars per station or seven stations per 10,000 residents. Of these

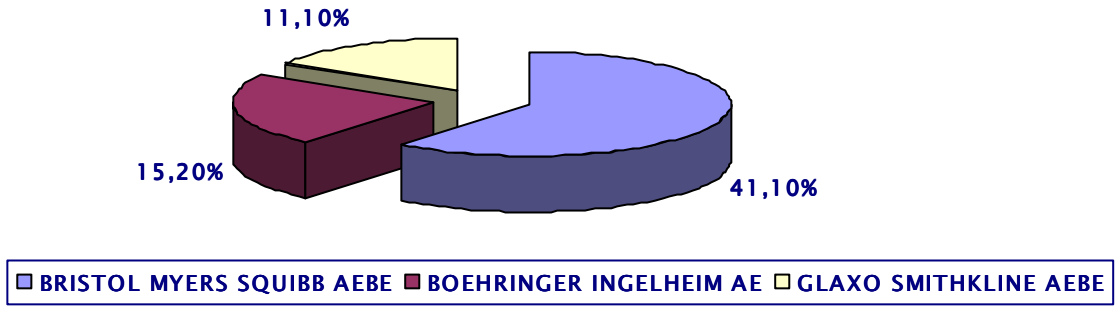
petrol stations, 4,234 belong to the supplying companies and 3,766 belong to independent station owners.

The top petrol retailers in Greece are BP, EKO, SHELL, AVIN and JETOIL, which represent the major petrol chains with stations all over Greece. Their market shares of overall petrol sales are as follows:



Printer-ink: No competition concerns were brought to the attention of our Greek partner in this market. Consumers in Greece have specific alternatives in the ink cartridges market. Most ink cartridges have a generic, depending on the vendor. Most of the independent specialist computer/electrical stores promote their own generic ink cartridge and this explains the differentiation in prices. These products are considered to be close substitutes. Consumer's choice depends on the price and the quality of the product. Original ink cartridges offer the supplier's guarantee, which accompanies the printer machine, but they are the most expensive ones. The second choice could be the generic ink cartridges, which are cheaper and their promotion takes place mainly through the brand stores. Finally, many consumers think that is cheaper to refill the ink cartridges that they have already used, but most original ink suppliers claim that refilled ink cartridges are of lower quality. Original ink cartridges are available in most supermarkets and hypermarkets, computer and electrical chains, office equipment stores, online stores and specialist ink stores. Generic products can be found in computer or electrical stores, with many branches all over Greece, which mainly trade their own exclusive brand. Internet shopping offers consumers quick access to the printer ink cartridges market. Consumers have the chance to compare prices, choose the best buy and request delivery of the products at home or office. Our Greek partner has noted that although some online shops offer consumers cheaper products, others sell ink cartridges at the same price in another shop. It also noted an unavailability of specific original or generic products in some on-line shops. There are many suppliers of printer ink cartridges in the Greek market, but HP, Cannon and Epson hold the leaders' positions in the market. These brands are available in most shops, especially in computer/electrical stores. Unfortunately, no statistical data on sales volume is registered. Consumers' preference for specialist computer stores indicates that there is a lack of trust in e–commerce in Greece; consumers feel safer when using a specific store and directly contacting a salesperson.

Paracetamol: Pharmaceutical products' (including over the counters') circulation and pricing in Greece is regulated by legislation. Medicines are sold at fixed prices set by the National Organisation for Medicines; but only pharmacies abide by this regulation. Generic paracetamol is not available in the Greek market. Paracetamol is sold mainly in pharmacies and sometimes in mini-markets. The three top suppliers of Paracetamol in Greece are Bristol Myers Squibb, Boehringer Ingelheim and Glaxo Smithkline. Their market share is as follows:



As far as the paracetamol market is concerned the following facts minimise competition:

- Most drugs including paracetamol are patented; and
- The prices are regulated by the National Organisation of Medicines. Therefore no differences in prices are observed in pharmacies.

Downloadable music: There is limited availability for downloading foreign songs from domestic internet sites in Greece. However, a consumer can find a great number of music sites or programs like Kazaa, Limewire, DC++ and eMule where he can download any song for free.

Perceptions Revealed in the Legislative Survey

The Media

All of the above cases were covered to some degree by the Greek media, especially the case concerning the supermarkets. This case in particular was considered to be a very important element for public debate with regard to competition. Even though the case detailed above in relation to petrol was considered to be a crucial one with regard to the competition law from the point of view of the media, and furthermore could be used in public debate, it was not properly evaluated in the media.

Awareness of the Substance/Importance of Competition Law

Our Greek partner would rate the general level of awareness of the importance of competition law issues as 'bad'. People in general are not aware of the importance of the competition law since they are not well informed. They are not informed by the relevant authorities nor by the media. The information people get from the media concerns general issues of competition but not of the competition law.

Our Greek partner would also rate the general level of awareness of the substance of competition law rules as 'bad'. It goes without saying that since people are not familiar with the competition law, they are not aware of its substance. The information regarding the aforementioned law is considered to be very general and sometimes vague.

The Greek authorities are trying to improve understanding and awareness of the competition law among the business community. They do so through conferences and seminars etc. The Greek authorities have not tried to improve awareness and understanding of the competition law among consumers. The consumers are only informed by the media and by consumer organisations.

Italy

Overview of the Italian Competition Law

Italy enacted the Competition and Fair Trading Act (Law no. 287/1990) (*Norme per la tutela della concorrenza e del mercato*) (hereafter 'the CFTA' or 'the Act') on 10 October 1990.[86] This Act contains provisions on agreements restricting competition, abuse of dominance, and the control of concentrations. Section 1, subsection 4 of this piece of legislation states that the Italian competition law provisions are to be interpreted in accordance with the principles of European Community competition law.

The Institutional Framework

The enforcement of the CFTA is entrusted to the Competition Authority (*Autorità garante della concorrenza e del mercato*) (hereafter 'the CA' or 'the Authority').[87] The CA is an independent body, which consists of a President and four members (Section 10(2)). The members are appointed for a non-renewable term of seven years (Section 10(3)). The Authority is allowed to recruit its own staff, but the number of posts may not exceed 170 (Section 11(1)). Within the CA there are six investigative divisions and two further departments who ensure the coordination and consistency between the divisions.[88]

After assessing the elements in its possession and those brought to its notice by the public authorities or by any other interested party, including bodies representing consumers, the Authority may conduct an investigation to ascertain any infringements of the competition law rules: Section 12(1). The Authority can also institute a general fact-finding investigation at its own initiative, or at the request of the Minister of Trade and Industry, or of the Minister of State Shareholdings, in areas of business in which 'the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted': Section 12(2).

The Authority also decides on whether a concentration should be prohibited under the rules on merger control: Chapter III of the CFTA.

In 2004, the Authority evaluated 612 concentrations, 60 agreements and 24 possible abuses of dominant position.

The Authority's Activity

	2003	**2004**	**January-March 2005**
Agreements	54	60	2
Abuses of dominant positions	14	24	2
Concentrations	577	612	117

[86] The English text is available at: http://www.agcm.it/eng/index.htm (last accessed: 5 August 2006).
[87] The Authority has a detailed English website with general information about the organisation, but also publications and press releases. The website is available at: http://www.agcm.it/eng/index.htm (last accessed: 5 August 2006).
[88] *Italy – Global Competition Review*, available at: http://www.globalcompetitionreview.com/ear/35_italy_cartels.cfm (last accessed: 5 August 2006).

Corporate separations in public utilities services	18	14	7
Fact-finding inquiries	2	3	1
Non-compliance with orders	-	3	1
Opinions submitted to the Bank of Italy	37	21	6

Distribution of the Proceedings Concluded in 2004 by Type and Outcome

	No violation of the law	**Violation of the law, conditional authorization or compliance following changes to agreements**	**Cases beyond the scope of the Authority's powers or to which the law was not applicable**	**Total**
Agreements	26	12	22	60
Abuses of dom.	23	1	-	24
Concentrations	521	-	91	612

Reporting and Advisory Activities by Sector of Economic Activity

Sector	**2004**	**January-March 2005**
Electricity, gas and water	1	
Oil industry	1	
Construction		1
Food and drinks industry	1	
Large-scale retail trade	1	
Other manufacturing activities	1	
Transportation and vehicle rental	2	
Financial services	1	
Recording industry	1	
Education	1	
Professional and entrepreneurial activities	2	
Catering		1
Recreational, cultural and sports activities		1
Tourism		1
Total	**12**	**4**

Substantive Provisions of the Competition Law

There are three substantive provisions, which deal with agreements that restrict competition, abuse of a dominant position and control of concentrations. These provisions apply to public and private undertakings (Section 8(1)). However, undertakings that are entrusted with the operation of a service of general economic interest are exempted from these provisions in so far as it is necessary to perform the task assigned to them (Section 8(2)).

Anti-competitive Agreements

Section 2 deals with agreements restricting competition. This section starts with a definition of 'agreements'. 'Agreements' are defined as accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities (Section 2(1)). Agreements that have as their object or effect the appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it (Section 2(2)) are prohibited. Agreements that are in violation of this Section are null and void (Section 2(3)).

There are some exceptions to the rule contained in Section 2(3). The fact that this section requires an 'appreciable' restriction of competition ensures that agreements that have a very small impact are not caught by the Act. Another exemption is contained in Section 4. This provision makes it possible for parties to obtain an authorisation from the Authority. In order to obtain an exception four conditions must be fulfilled (Section 4(1)):

- The agreement must improve the conditions of supply. This can be achieved by improving the quality of production or distribution or promoting technical or economic progress;
- It must lead to substantial benefits for consumers;
- It can not permit restrictions which are not strictly necessary to attain the objectives; and
- It may not permit the parties to eliminate competition in a substantial part of the market.

After receiving notification of an agreement the Authority has to rule on its validity within a period of 120 days (Section 4(3)). These rules relating to the prohibition or exemption of anti-competitive agreements are modelled according to Article 81 EC and therefore it will be possible to obtain additional guidance from the interpretation of the latter provision.

Abuse of Dominance

Section 3(1) prohibits the abuse of a dominant position within the domestic market or in a substantial part of it. The Act lists some examples of potential abuses:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair contractual conditions;
(b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
(c) applying to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; or
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This is not an exhaustive list; an abuse can also occur despite the fact that it did not fall within one of the examples. The Act does not give a definition of abuse nor of what constitutes a

dominant position so guidance will have to be found in rulings by the courts or Competition Authority or in the caselaw of the Community Courts.

Mergers

Sections 5 to 7 deal with the control of concentrations. Section 5(1) states that a concentration shall be deemed to arise when the undertakings merge, an undertaking acquires direct or indirect control of another undertaking, or when two or more undertakings create a joint venture by setting up a new company. Only concentrations that fulfil the turnover requirements of Sections 16 (1) and (2) are required to be notified to the Authority. The Authority ascertains whether the concentration creates or strengthens a dominant position on the domestic market with the effect of eliminating or appreciably restricting competition on a lasting basis (Section 6(1)). When this is the case the Authority prohibits the concentration or lays down measures that prevent such consequences (Section 6(2)).

Sanctions and Enforcement

An investigation relating to the infringement of Sections 2 or 3 can be initiated on the Authorities own initiative, by other interested parties including bodies representing consumers, or by the public authorities (Section 12(1)). If an investigation is being opened the undertakings concerned shall be informed of this. In urgent cases where there is a risk of serious, irreparable damage to competition the Authority may, if a short examination reveals the existence of an infringement, adopt interim measures (Section 14-bis(1)).

Within three months from the date the undertakings concerned are notified of the investigation they may offer commitments that would correct the anti-competitive conduct. The Authority may make them binding upon the undertaking and terminate the proceedings without reaching a decision (Section 14(1)). If these commitments are not observed by the parties the Authority may impose fine of 10 per cent of the turnover (Section 14(2)).

If the CA concludes that there has been an infringement of Sections 2 or 3 it will order the undertakings to remedy the infringement. In the most serious of cases the Authority may impose a fine of up to 10 per cent of the turnover of each undertaking in the previous financial year. When deciding on the amount of the fine it takes into account the gravity and the duration of the infringement (Section 15(1)).

Legal Protection

The decisions of the Authority can be appealed before the Administrative Court of First Instance (*TAR Lazio*) and these judgments may be appealed before the Supreme Administrative Court (*Consiglio di Stato*). Addressees of the decision can of course appeal decisions of the Authority; affected third parties are however also entitled to appeal.[89]

Annulment proceedings have to be filed with the relevant Court of Appeals (*Corte d'Appello*) that has jurisdiction (Section 33(2)). The same is true for actions for damages. These actions are governed by the general principles established in the Civil Code and the Code of Civil Procedure. A claim for damages can be based on Article 2043 of the Civil Code. The decisions of the Court of Appeals may be challenged before the Cassation Court (*Corte di Cassazione*). These principles apply as long as the actions are brought between undertakings.[90]

[89] *Italy – Global Competition Review*, *op. cit*.
[90] *Ashurst Report – Italy*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national reports/italy_en.pdf (last accessed: 5 August 2006).

If consumers bring the action they cannot go directly to the Court of Appeals; they would have to go to the *Guidice di Pace* or *Tribunale*, depending on the value of the claim. They would have to show that a right of theirs is harmed. An appeal before the Court of Appeals is then possible after which cassation may be lodged with the Cassation Court.[91]

Consumer Organisations and their Influence in Competition Cases

An investigation relating to the infringement of Sections 2 or 3 can be initiated by other interested parties, including bodies representing consumers (Section 12(1)). Therefore, consumer organisations are able to lodge a complaint with the Authority concerning anti-competitive behaviour.

It is also possible for consumer organisations to bring an action to stop ant-competitive conduct. It is not possible for consumer organisations to obtain damages (Articles 2 and 3 of Law 281/1998). There has been a bill before parliament, the status of which is not clear at present, which is going to introduce a sort of class action. This would make it possible for certain consumer organisations to bring an action to claim damages. The organisation does not need consent from the consumers it represents, but it can only obtain a judgment. After this judgment the individual consumers should bring an action to quantify its damages.[92]

Important Competition Concerns in Italy

The following represent some of the most important competition law concerns/cases which affect/have affected consumers in Italy:

Car Insurance

The Authority recently established that an agreement between Associazione Nazionale delle Imprese Assicurative (the National Association of Insurance Companies) and the Association of Adjusters regarding the fares imposed by the adjusters during the estimation of car crash damage was an anti-competitive agreement in violation of Article 81 of the EC treaty. The Authority also held that the agreed modalities and the criteria used to determine the compensation for damages were also anti-competitive and in violation of European competition law rules.

Baby Milk

On 12 October 2005, the Italian Antitrust Authority decided that the companies Heinz, Plada, Nestlè, Nutricia, Milupa, Humana and Milte had entered into a price-fixing agreement whereby the price of baby milk was kept at an artificially high level. The authority imposed a fine of € 9,743,000.

Broadband Fares

In Italy, broadband fares are more expensive than in other European countries. The average offers of the Italian providers (30 hours connection/month) are more expensive than France, the United Kingdom, Portugal, Germany and Belgium. In Italy there are 90 different providers of Internet connections and there are more than 400 different contracts; of these, ADSL have 170. Almost all of these broadband connections run on Telecom's network.

[91] See judgment number 17475/02 of the Cassation Court or *Ashurst Report – Italy*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/ italy_en.pdf (last accessed: 5 August 2006).
[92] *Ashurst Report – Italy*, *op. cit.*

Energy and Gas Fares

Despite all of the formal rules about deregulation, ENI—National Hydrocarbon Authority—along with ENEL in the same sector, is still a monopolist in Italy. Because of company interests, ENI did not foresee proper stockpiling and the Italian Goverment, being one of the ENI stockholders, put its own interests before national safety. There could be enough evidence in this case to open a parliamentary inquiry which verifies how ENI, despite warnings, went on trading and selling gas to Germany for purely economical and financial interests.

Generic Drugs

Our Italian partner recently conducted a survey among doctors and pharmacists in Italy. According to this survey nowadays in Italy only 38 patients out of 75 are able to buy generic drugs. In fact, only 21 doctors out of 75 have been prescribing a cheaper drug; among the others only 21 prescribed a brand drug which cannot be replaced by a generic one. Among the 33 drugs that can possibly be replaced, only 17 have been prescribed.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: Traditionally, Italian petrol prices were regulated by the public administration. Full deregulation occurred only in 1994, after a transitory phase. In 1985 deregulation occurred, but only for minor products and fuel oil. Full deregulation allowed the operators to establish their own prices, both according to the international market quotations of crude oil and products, and according to the internal operational costs (primary and secondary distribution, financial charges, overhead costs, manufacturing costs...), which, in Italy, are higher than in other European countries. Petrol companies, though, can only establish the so-called 'recommended price', for, according to the regulations, the actual price has to be set by the operator. The Italian market is still characterised by an excessive number of retail stores, a typology of service stations with inadequate automation technology, and a lack of facilities for the sale of non-oil products, which, in the rest of Europe, assure 50% of income of the service stations. This delayed development prevents the country from the substantial savings that characterises other European countries, and is the cause of the big difference between Italian industrial prices and European average prices (about 3-4 Euro cents for petrol). For our Italian partner, in order to adjust Italian prices to meet those of Europe, it is therefore necessary to foster a reorganisation process that will be significant and be able to remove those prescriptive bonds which limit the effectiveness of companies.

Printer-ink: No competition concerns were brought to the attention of our Italian partner concerning this market.

Paracetamol: The Italian generic drugs market has been having problems in taking off, despite a large number of companies which are apparently interested in competing in this sector. The limited dimensions of Italian companies and their inability to compete with multinationals are the main reasons why the number of generic drugs firms have been increasing in Italy. There are already companies that produce and market generic drugs, in order to limit the possible loss of market shares. The main companies existing on the market are: Doc, Dorom, Hexan, GNR, Baycare, Angelini, Recordati, Biologica Italia (belonging to Mediolanum Group), UNIFARM (whose activity is oriented towards generic drugs), GET and Anodia. Stada and Ratiopharm, both major German companies, have started the process of generic drugs registration, so that they will be prepared when the new market is set to take off. Doc is the result of a joint venture between Chiesi Farmaceutici and Zambon. Hexan resulted from a joint venture between Hexal (Germany) and Angelini. Angelini is on the market for local anesthetics, marketed by DCI, followed by the name of the company. Dorom and Searle (Monsanto) are joint-partners in the production and the marketing of 'generic drugs'. GNR belongs to the German multinational Basf-Knoll, which chose a diversification of activities within the generic drugs field. GET, a

company belonging to CT of San Remo, initially produced and marketed drug specialties; recently it has been changing its activity, entering the generic drugs market. Anodia is an affiliated company to the Swedish group Pharmacia.

Downloadable music: No competition concerns were brought to the attention of our Italian partner concerning this market.

Perceptions Revealed in the Legislative Survey

The Media

The problem of competition within different markets is an issue that is normally dealt with by the media in Italy. Government agencies and the Italian antitrust authority usually present competition law issues through the media, in particular TV, newspapers and specialized magazines. Normally, the competition topic is linked to problems of efficiency in a specific market. The main topics related to competition that are presented in the media concern: (i) the slowness of the Government in adopting rules that lead to an open market; and (ii) the defence of the advantageous market positions acquired by the economic operators. Problems regarding competition are dealt with in a general manner. There are no specific TV shows, besides a few talk shows that may perhaps dedicate one episode to a current topic. Normally, consumer associations try to explain to people the consequences of antitrust law violations, especially when these violations might cause harm to consumers and result in reimbursement actions.

Awareness of the Substance/Importance of Competition Law

Our Italian partner believes that the general level of awareness of the importance of competition law is good: in general people know that there should be fair competition among professional operators, so that they can offer consumers better and competitive products and services. The level of awareness of the substance of competition by contrast is restricted to 'insiders' and in this case is generally considered to be good.

The Italian authorities have tried to improve understanding and awareness of competition law issues among both the business community and consumers in general. They have used a number of tools at their disposal that can help them to achieve these aims; the most commonly used are publications such as brochures and newsletters. The major educational activity concerning competition law issues is conducted by consumer associations however, especially where educating consumers is concerned.

A very important Italian example in this regard is the Law n.388 23.12.2000 which foresees activities for consumers financed with the money that the Italian authorities have received from the many violations of the antitrust law. Of the total budget of €55 million in 2005, €13 million went to financing activities for consumers which were organised by consumer associations. (Most of the projects regarded the creation of automatic price comparison systems, i.e. the telephony and energy markets.)

Lithuania

Overview of the Lithuanian Competition Law

The general rules on competition law in Lithuania are expressed in the Law on Competition (*Konkurencijos Įstatymas*) (hereafter 'LoC' or 'Law');
[93] This law entered into force on 2 April 1999. According to Article 1(1) the purpose of this law is to protect the freedom of fair competition in the Republic of Lithuania. The law implements Regulation 1/2003 and furthermore seeks to harmonise the Lithuanian law regulating competition with the European competition rules (Articles 1(3) and (4)).[94] The LoC is also applicable to companies that are not registered in Lithuania so long as their activities restrict competition in the Lithuanian market (Article 2(2)). The Law lays down rules concerning anti-competitive agreements, abuse of a dominant position, unfair competition, as well as providing for a regime which controls mergers and other concentrations.

The Institutional Framework

To ensure compliance with the Law a public body called the Competition Council (*Konkurencijos taryba*) (hereafter 'CC' or 'Council') was set up.[95] The Council consists of a Chairperson and four members. The President of the Republic appoints them on the nomination of the Prime Minister. The Chairperson is appointed for a period of five years and the members are appointed for a period of six years (Article 20(1)). The appointed persons must be trained in law and economics and be citizens of the Republic of Lithuania (Article 20(2)). The Competition Council resolve the issues assigned to it which are within its competence by passing resolutions. These resolutions must be passed by a majority vote with at least three members of the Competition Council, including the Chairperson, participating. In the event of a tied vote the Chairperson has the casting vote (Article 20(6)).

According to Article 19 of the Law the Competition Council shall among other things:

(a) control the compliance by undertakings, public and local authorities with the requirements of the Law;
(b) establish the criteria and procedure for providing the definitions of the relevant market and a dominant position, investigate and define relevant markets, determine the market share of undertakings, and their position in a relevant market;
(c) give obligatory instructions to undertakings to submit financial and other documentation, including that containing commercial secrets and other information required for market investigation or fulfilment of other tasks of the Council; and
(d) investigate and consider infringements of the Law and impose penalties on infringers.

Substantive Provisions

Anti-competitive Agreements

[93] An amended version is available at: http://www.konkuren.lt/english/antitrust/legislation.htm (last accessed 16 August 2006).
[94] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).
[95] The Council has a useful English website with a lot of information. It contains press releases, legislation and regulations, annual reports, selected case, etc. The website is available at: http://www.konkuren.lt/english/index.htm (last accessed: 17 August 2006).

Section I of Chapter II of the Law deals with agreements restricting competition. According to Article 5(1) all agreements which have as their object the restriction of competition or which may restrict competition shall be prohibited and shall be void from the moment of conclusion. Such agreements include, but are not restricted to, the following:

(a) agreements that directly or indirectly fix prices of certain goods or other conditions of sale or purchase;
(b) agreements that share the product market on a territorial basis, according to groups of buyers, suppliers or in any other way;
(c) agreements that fix production or sale volumes for certain goods, as well as those that restrict technical development or investment;
(d) agreements that apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage; and
(e) agreements that make conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their commercial nature or according to usage, have no direct connection with the subject of the contract

Article 5(3) exempts agreements that are not capable of substantially restricting competition. The requirements for application of this provision are laid down in a resolution of the Council.[96] This resolution states that horizontal or mixed agreements do not fall within Article 5(1) if the combined market share of the parties does not exceed 10 per cent in the relevant market. For vertical agreements this threshold is raised to 15 per cent. The resolution also sets out certain agreements which do not benefit from this exemption.[97]

Article 6 provides a general exemption to Article 5. The text of this exemption is based on Article 81(3) EC:

- The agreement must promote technical or economic progress or improve the production or distribution;
- It must create conditions for consumers to receive additional benefit;
- The agreement must not impose restrictions which are not indispensable to attain the objectives; and
- The agreements must not give the parties the possibility to restrict competition in a large part of the market.

When an agreement satisfies these conditions it is valid without the need of approval from the CC. A party that claims the benefit of this provision has the burden of proving that it falls within it (Article 5(2)). Under the Law the Council has the right to pass regulations to create block exemptions to Article 5(1): Article 5(3).[98]

Abuse of Dominance

Article 9 of the LoC prohibits an abuse of a dominant position. A dominant position is defined as the position of one or more undertakings in the relevant market directly facing no competition or enabling it to make unilateral decisive influence in such relevant market by effectively restricting competition: Article 3(11). (This article also provides for presumptions in relation to dominance: an undertaking with a market share of not less than 40% shall be considered to have a dominant position in the relevant market; each of a group of not greater than three of the largest

[96] The resolution is available at: http://www.konkuren.lt/english/antitrust/other.htm (last accessed: 16 August 2006).
[97] *Lithuania - Global Competition Law Review,* available at: http://www.globalcompetitionreview.com/ear/39_lithuania.cfm (last accessed: 18 August 2006).
[98] There are several block exemptions available in English at: http://www.konkuren.lt/english/antitrust/other.htm (last accessed: 16 August 2006).

undertakings in a relevant market jointly holding a 70%+ share shall be considered to be in a dominant position. These presumptions may be rebutted by the allegedly dominant firm.) An abuse is defined as carrying out actions which restrict or may restrict competition, limit without cause the possibilities of other undertakings to act in the market, or violate the interests of consumers. Article 9 lists four examples of such an abuse:

- direct or indirect imposition of unfair prices or other purchase or selling conditions;
- limitation of trade, production or technical development to the prejudice of consumers;
- application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage; and
- making the conclusion of contract subject to acceptance by the other party of supplementary obligations which, by their commercial nature or usage, have no connection with the subject of such contract.

These examples do not preclude the application of the article to other abuses that are not expressly mentioned.

Mergers

A merger, acquisition or joint venture that exceeds the thresholds set out in Article 10(1) of the Law must be notified to the Council. The concentration may not be implemented until the Council adopts a resolution regarding the concentration (Article 12(1)). The Council must give its decision in relation a concentration within four months after the complete notification is received (Article 12(2)). The Council prohibits those concentrations that establish or strengthen a dominant position or those that substantially restrict competition (Article 14(3)); it can attach conditions and obligations to an approval (Articles 14(1) and (2)).

Unfair Competition

Undertakings conducting business in Lithuania are also prohibited from performing any acts contrary to honest business practices if such acts may be detrimental to the competition interests of another undertaking (Article 16). The Law provides some illustrative examples of such practices. An undertaking whose rights are affected in accordance with Article 16 may bring an action in court seeking, among other things, termination of the conduct or damages (Article 17).

Sanctions and Enforcement

The Competition Council is charged with investigating violations of the substantive provisions of the Law (Article 24(2)). Third parties are allowed to request an investigation under the Law: Article 24(1). The LoC lists three categories of 'third parties':

- Undertakings whose interests have been violated;
- Public and local authorities; and
- Associations and unions representing the interests of undertakings and consumers.

If the parties want to request the Council to carry out an investigation they must submit an application to it (Article 25(1)). The CC will decide within 30 days whether or not it will start an investigation (Article 25(3)). If it decides to initiate an investigation it must complete its work within five months (Article 25(6)).

In cases were there is sufficient evidence of an infringement the CC may prevent substantial or irreparable damage to the interests of undertakings or public interests by imposing interim measures on the parties involved (Article 28). The officers appointed by the Council shall

conduct the investigation (Article 23(2)). When the investigation is completed these officers will refer the case with their findings and proposals to the Competition Council (Article 30(1)). After a hearing the CC can impose a sanction (Article 36(1)).

The Council can impose fines of up to 10 per cent of the gross annual income in the preceding business year for: a violation of the provisions on restrictive agreements; an abuse of a dominant position; putting into effect a merger without permission; or the infringement of conditions and obligations attached to the approval of a concentration (Article 41(1)). A fine of maximum 3 per cent may be imposed for the infringement of the provisions on unfair competition (Article 41(2)). In setting the amount of the fine the Council shall take into account the following circumstances (Article 42(1)):

- Gravity of the infringement;
- Duration of the infringement;
- Circumstances extenuating or aggravating the liability; and
- Influence of each undertaking on the violation.

However, the CC may also take into account other extenuating circumstances not mentioned in this Article (Article 41(4)). Article 43 contains a possibility of leniency, which means that no, or less, sanctions will be imposed on the perpetrator if it cooperates in the proceedings or it makes the Council aware of a violation. An action for violation of the LoC may not be brought after three years from the date of infringement, or the performance of the last act of infringement (Article 40(3)).

Legal Protection

The imposition of interim measures by the CC may be appealed to the Vilnius Regional Administrative Court (*Vilniaus apygardosadministraciniam teismas*) within one month from the date of the decision. The appeal does not suspend the operation of the decision (Article 28(4)). Undertakings and other legal persons who believe their rights have been violated have the right to appeal to the Vilnius Regional Administrative Court (Article 38(1)). The application has to be made within 20 days after the delivery or publication of the resolution (Article 38(2)). The appeal does not suspend the implementation of the resolution, but the Regional Court may decide that it has this effect (Article 38(3)). The decisions of the Regional Court can be appealed to the Highest Administrative Court.[99]

Consumer Organisations and their Influence in Competition Cases

Legal persons who believe their rights have been violated by a resolution of the Council have the right to appeal to the Vilnius Regional Administrative Court (Article 38(1)). Any person whose legitimate interests has been violated by an anti-competitive act may bring an action in the competent civil courts and seek cessation of the illegal acts and/or recovery of damages suffered (Article 46(1)). These private actions are governed by the Articles 6.245 to 6.255 of the Civil Code (*Civilinis Kodeksas*).[100] The competent court to hear these actions is the Vilnius Regional Court (Article 50(1)). Appeals of this decision can be made to the Court of Appeals. Cassation is possible and is performed by the Supreme Court.[101]

[99] *Lithuania - Global Competition Law Review*, *op. cit.*
[100] *Ashurst Report – Lithuania*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/lithuania_en.pdf (last accessed: 18 August 2006), at p.2.
[101] *Ibid*.

Class actions are not recognised by Lithuanian law; neither are collective or representative actions. There is however the possibility for several persons to bring a joint action.[102] Furthermore, according to Article 6.188(8) of the Civil Code the Consumer Protection Institution is entitled to challenge consumer contracts which include unfair provisions and can address the Court on behalf of consumers whose rights under the Law on Consumer Protection (*Vartotojų teisių apsaugos įstatymas*) have been violated. However, this is only useful in case a violation of the Law on Competition is also a violation of the Law on Consumer Protection. The Institution does not have the ability to bring claims based solely on a violation of the LoC.

Important Competition Concerns in Lithuania

'Competition problems' could be classified as those having a 'direct impact' and those having an 'indirect impact'.[103] Our Lithuanian partner was made aware of the following 'direct impact' problems over the last year: quality and prices of food; quality and prices of utilities' services and fees for connection to the infrastructure networks; petrol and gasoline prices; choice, quality and prices of legal services; and misleading promotion. 'Indirect impact' problems over the last year that were brought to the attention of our Lithuanian partner include: concentration of trade chains; unfair public procurement; and manipulation of market players by state institutions.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: In 2005 the Lithuanian Competition Council completed its ex officio investigation into whether the activities of the oil refinery Mazeikiu nafta could have effected the constant rise in petrol and diesel fuel price levels in Lithuania as compared to those in other Baltic States. A related issue concerned whether the lasting price differences could have been the result of the actions of Mazeikiu Nafta in the petrol and diesel markets through the abuse of its dominant position in Lithuania. The Competition Council concluded that the company had infringed not only the Law on Competition but also Article 82 of the EC Treaty; a notification to that effect was posted in the European Competition Network. A resolution of Competition Council set the fine at LTL 32 million (1 EUR = 3.45 LTL).

Printer-ink: No competition concerns were brought to the attention of our Lithuanian partner concerning this market.

Paracetamol: No competition concerns were brought to the attention of our Lithuanian partner concerning this market.

Downloadable music: No competition concerns were brought to the attention of our Lithuanian partner concerning this market.

Perceptions Revealed in the Legislative Survey

The Media

Competition issues are only occasionally covered in the media, whether it be through newspapers, TV or radio programs (including radio programmes where listeners can ring in). Generally the issues are presented without professional analysis. Sometimes analytical articles are written in weekly magazines, but this is quite rare. Competition issues commented on are usually those involving a political element. One example that received particular media attention

[102] *Ibid*.

[103] 'Direct impact' problems are, as the term itself suggests, those problems that produce a direct impact on consumers; one example is the imposition of an excessive price. 'Indirect impact' problems, by contrast, are those activities which affect consumers in an indirect way, e.g. the foreclosure of a market to competitors which in turn results in a reduction of competition and eventually price increases.

was the pricing case involving the oil refinery 'Mazeikiu nafta', where consumers were concerned about the fact that the price of petrol in Lithuania was relatively high compared to the price of petrol in its neighbouring countries, Latvia and Estonia. The focus of such debate was the criticism of the illegal activities of the undertakings involved; the debate did not highlight criticism of a lack of thoughtful competition policy in Lithuania for example.

Awareness of the Substance/Importance of Competition Law

Awareness of the importance of competition law issues in Lithuanian jurisdiction could be rated as good as specific laws on consumer protection, services and goods in Lithuania generally include main provisions on competition law.

Other Observations Contained in the Legislative Survey

Class/representative actions would be welcome in Lithuania. But more is required than just changes in the legislative framework. Consumer organisations need more resources, for example.

Malta

Overview of the Maltese Competition Law

The competition rules in Malta are set out in Chapter 379 of the Laws of Malta. This Chapter contains the Competition Act (hereafter 'the CA' or 'the Act');[104] this act entered into force on 1 February 1995. It was amended in 2000, 2003 and 2004 in order to pave the way for the accession of Malta to the European Union. The Act now contains provisions for the application of Regulation 1/2003.[105] The rules on mergers and acquisitions are not contained in the Act; they are to be found in the Regulations on Control of Concentrations (hereafter 'the Regulations').[106]

The Institutional Framework

The Act provides for the establishment of the Office for Fair Competition (hereafter 'the OFC' or 'the Office') (*l-Ufficcju tal-Kompetizzjoni Gusta*): Section 3(1). The Office is under the control of a Director, who carries out the functions of the Office. The Director may delegate any of his powers to any person affiliated with his department (Section 3(2)). It is the duty of the Director to ensure that the provisions of the Act are complied with (Section 12(1)).

Besides the OFC, the Act also establishes a Commission for Fair Trading (hereafter 'the CFC' or 'the Commission') (*il-Kummissjoni ghall-Kummerc Gust*) that is composed of a Chairman and two other members who are appointed by the President on the advice of the Prime Minister (Section 4(1)). The Commission should be composed of a magistrate, an economist, and a certified public accountant. More than one magistrate, economist, and public accountant can be appointed, but only one of each may sit in any case at a time (Section 4(3)). The members, except for the Chairman, are appointed for a term of three years (Section 4(4)(a)). As no provision provides for the term of the Chairman it is likely that he is not appointed for a fixed term.

Maltese legislation does not oblige the authorities to publish their decisions; they are only notified to the parties involved. However, the Commission of Fair Trading has published some decisions published on its website.[107] The OFC has recently published summaries of its decision on the same site.

Since January 2002 to date there were 23 (anti-trust) decisions issued by OFC:

Year	No. of Decisions
2002	4
2003	7
2004	6
2005	6

Substantive Provisions of the Competition Law

[104] The English version of the Act can be found at: http://docs.justice.gov.mt/lom/legislation/english/leg/vol_10/chapt379.pdf (last accessed: 9 October 2006).
[105] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).
[106] The English version of these Regulations can be found at: http://www.mcmp.gov.mt/pdfs/Regns%20on%20Control%20of%20Concentrations.pdf (last accessed: 9 October 2006).
[107] http://www.mtc.gov.mt/consumer_fairtrade.asp.

Anti-competitive Agreements

Section 5(1) prohibits anti-competitive agreements. These are described as agreements, decisions by an association of undertakings, and concerted practices that have the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta. There is no definition of agreements or concerted practice in the Act, but since the text of this section resembles Article 81(1) of the EC Treaty some guidance can be obtained from the interpretation that the European Community Courts have provided in relation to Article 81(1) EC.

In the same section the Act also lists some agreements or concerted practices that will, by definition, infringe this prohibition (Section 5(1)). Section 5(2) states that all agreements or decisions prohibited by Section 5(1) are null and unenforceable. In addition to this prohibition the Act also contains some possibilities for exemption from Section 5(1). The first is contained in Section 5(3), which is practically identical to Article 81(3) EC. To qualify for an exemption under this Section four conditions must be fulfilled:

- The agreement must contribute to improving production or distribution or promoting technical or economic progress;
- The agreement must allow consumers a fair share of the resultant benefit;
- The agreement must not impose any restriction which is not indispensable to the attainment of the objectives; and
- The agreement must not give the parties concerned the possibility of eliminating or significantly reducing competition in a substantial part of the relevant market.

The burden of proving that these conditions are fulfilled rest on the party claiming the benefit of this section.

There are two other provisions that allow for an exemption of the prohibition in Section 5(1). The first one is contained in Section 6. This Section provides that agreements, decisions or practices will not be subject to the prohibition in Section 5(1) if the impact on the relevant market is minimal. The Section does not quantify this aspect of minimal impact; some guidance can be however be found in the *de minimis* notice of the European Commission.[108] Section 8 of the Act allows the Maltese authorities to adopt block exemptions.

Abuse of Dominance

Section 9(1) prohibits an abuse of a dominant position by one or more undertakings in Malta or any part of it. The Act also provides a list of certain abuses that are deemed to constitute an abuse of a dominant position (Section 9(2)): one or more undertakings shall be deemed to abuse of a dominant position, where it or they:

(*a*) directly or indirectly impose an excessive or unfair purchase or selling price or other unfair trading conditions;
(*b*) charge prices which are below the average variable cost price of a product in order to drive rival competitors out of the market;
(*c*) limit production, markets or technical development to the prejudice of consumers;
(*d*) refuse to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers;
(*e*) apply dissimilar conditions, including price discrimination to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage; or

[108] Notice on Agreements of Minor Importance [2001] OJ C368/13.

(*f*) make the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This is an illustrative list only; other conduct may thus constitute an abuse of an dominant position.

A dominant position is defined as a position of economic strength that enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, suppliers or customers (Section 2). The Act contains a presumption of the existence of a dominant position when the undertaking or undertakings alone or together hold a share of forty per cent of the relevant market (Section 9(3)).

Mergers

The Regulations on the Control of Concentrations provide for rules regarding mergers. Section 4 of the Regulations[109] states that concentrations that might lead to a substantial lessening of competition are prohibited. Concentrations must be notified to the Director of the Office not more than seven days after its conclusion, the announcement of the public bid, or after the acquisition of a controlling interest—whichever is earliest (Section 5(1)).

After examining the notifications, the Director must take a preliminary decision within six weeks of receipt of the notification. This period can be extended to two months if the parties submit commitments (Section 9(1)). After this period the Director can either approve the concentration or it can conclude that the concentration raises serious doubt as to its lawfulness (Section 6(1)). In the latter case the Director shall initiate proceedings. These proceedings must be closed by a decision (Section 8(2)) which must be taken within four months from initiation of the proceedings (Section 9(3)). This period can be suspended for a period of up to one month if the parties submit commitments and they request the suspension (Section 9(2)). In Section 12 the Regulations provide for a simplified procedure were the Director may issue a short-form decision within four weeks from the date of notification.

Sanctions and Enforcement

The Director of the Office has been granted certain powers of investigation to ensure that the provisions of the Act are observed (Section 12). When the Director, after conclusion of the investigation, finds that there has been a breach of Section 5(1) or 9(1) he will issue a decision finding an infringement (Section 12A(1)). If the Director finds a serious infringement of the competition law rules he sends a report to the Commission. The Commission then issues a decision on the matter (Section 12A(2)).

It is possible for third parties to file a complaint with the Director, who examines whether such complaint is admissible. Where he concludes that the complaint is *prima facie* inadmissible he will not carry out an investigation (Section 14(1)(a)). Where the complainant does not agree with the Director that the complaint is inadmissible or the finding, after an investigation, that the complaint is not justified it can request that the Director submits the case to the Commission for review (Section 14(1)(b)). If the Commission does not agree with the Director it will inform the Director accordingly (Section 14(2)).

The Commission may take interim measures on the request of the Director, an undertaking or a complainant if this is necessary to avoid a situation that is likely to (i) cause serious, immediate

[109] Please note that the sections referred to in this section all correspond to sections of the Regulations.

and irreparable prejudice to the interests of any undertaking; or (ii) harm the general economic interest (Section 15(1)).

Sections 16 to 18 provide that the person in breach of Sections 5(1) and 9(1) or Article 81 and82 of the EC Treaty shall be guilty of an offence. Section 21(1) provides that any person guilty of an offence under Sections 16 to 18 shall be liable to a fine from one to ten per cent of the turnover of the undertaking in the economic interests of whom the guilty person was acting. Certain persons shall be liable *in solidum* for the payment of the fine (Section 21(1)).

Legal Protection

After the Director of the Office has issued a decision the undertakings concerned may, within fifteen days from receipt of the decision, request that he submit the case for review by the Commission. The Director has to comply with such a request, but this shall not suspend the effect of any cease and desist or compliance order (Section 13A(1) and (2)).

If an application is made in a Court of Civil Jurisdiction against an anti-competitive agreement or the abuse of a dominant position that court shall, unless the allegation is admitted by all parties, stay the proceedings and refer the matter to the Commission. The Commission will then take a decision and the court decides the matter in accordance with such decision (Section 27).

The competence of the courts is determined by the amount of the claim and by the location of the parties. The parties that are able to initiate such a claim must show that they have a judicial, personal, direct and actual interest in the claim. It is therefore not possible to institute an action in respect of an indirect interest.[110]

Consumer Organisations and their Influence in Competition Cases

Consumer organisations can file a complaint with the Director. After receipt of the complaint he shall examine whether it is admissible. Where he concludes that the complaint is *prima facie* inadmissible he will not carry out an investigation (Section 14(1)(a)). Where the complainant does not agree with the Director that the complaint is inadmissible or the finding, after an investigation, that the complaint is not justified he can request that the Director submits the case to the Commission for review (Section 14(1)(b)).

Under Maltese law it is not possible for consumer organisations to institute actions for damages as a result of breaches of the competition law rules. They can however make a report or file a complaint (see above). If the Director of the Office starts an investigation based on this report or complaint the consumer organisation is called upon to give evidence. Furthermore, Section 7(b) of the Schedule to the Competition Act gives registered organisations the possibility of intervening in proceedings before the Commission. Such intervention can be allowed after a request from the organisation.[111]

Our Maltese partner has brought cases to the attention of the authorities in the form of complaints. The cases detailed below resulted from a complaint of our Maltese partner. That said, the following reasons were offered in the Maltese answer to the second question as to possible reasons why more complaints were not made to the authorities by consumer bodies:

(a) Lack of information: Often one gets to know that there is a competition issue when some business party feels that it is being cheated by the others, i.e. there is a leak and the

[110] *Ashurst Report – Malta*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/malta_en.pdf (last accessed: 8 October 2006).
[111] *Ashurst Report – Malta*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/malta_en.pdf (last accessed: 8 October 2006).

issue becomes public knowledge. In other instances where most are happy with their share there is omerta.

(b) Lack of resources: Resources for research can be virtually non-existent in a voluntary organisation. Moreover, even the few lawyers that are attracted to consumer affairs are not very interested in the area of competition.

(c) Lack of media interest: This has been an issue for a very long time. The media is more interested in political issues than strictly competition related issues. Moreover, the small size of the market makes the business sector very important to the media as it provides them with essential services such as advertising.

Important Competition Concerns in Malta

According to our Maltese partner, there were three major problems for consumers in Malta over the last number of years:

Digital TV transmissions: Before cable tv was introduced there were two sources—free to all and satellite. The firm that introduced cable tv also owned the cable network and used this network for its own purposes only. The advent of digital television brought about another operator. This operator had to operate on a different transmission system, the digital terrestrial system. Thus in Malta there were two operators transmitting tv on two different systems. Initially nothing seemed wrong with this as consumers had to decide to which service they wanted to subscribe. In reality, consumers were not really choosing operators, but systems. The problems became apparent due to sport transmissions, especially during the World Cup. The main problem was that once you joined a network there was no choice as there was only one operator in each system. Moreover, changing from one network to the other involved both exit and entry costs. The two providers offered different sets of channels with a common core of local channels. Real problems developed with the advent of the World Cup. Melita Cable, the cable provider, bought the exclusive rights to transmit the last phase of the World Cup. The first to be hit were the subscribers of the digital terrestrial system. They found themselves in a situation where if they wanted to see the whole last phase of the World Cup, they had to change the provider together with the network thus incurring large costs. But the situation worsened when Melita Cable wanted to extract monopoly profits even from its own customers. Those who subscribed to the Sports Channel, included in a higher premium set offered by Melita Cable, were asked to pay a further sum of money to view the last phase of the World cup. Consumers were angry at both Melita Cable and the Regulators. There were three regulators involved in this issue—the Malta Communications Authority ('MCA'), the Malta Broadcasting Authority and the Office of Fair Trading. The Regulators could only find excuses why they should not intervene. The MCA argued that it could not interfere as this would challenge the intellectual property rights of Melita Cable. The MBA argued that sometime beforehand it had issued guidelines on what should be free and not and that it would stick to it as nobody was against it at the time it was issued. It should be noted that only Melita Cable seemed to be aware of these guidelines! Finally, the Office of Fair Trading argued that Melita Cable was acting according to its contract. Consequently, no consumer redress was found through the competition laws.

Our Maltese partner argued that the intellectual property rights quoted by the MCA had limits; it also argued that the cable network should be unbundled from Melita Cable so that other operators would be able to compete. Moreover, the MCA was duty bound to see that competition should evolve in every sector of telecommunications. In this area they failed miserably. Our Maltese partner also criticised the OFT; for it Melita Cable was obviously abusing its monopoly power.

The price of Medicines: The price of medicines in Malta is perceived to be excessive by some consumer organisations. This may or may not be due to the presence of a cartel in this market.

In any case, the current situation has been compounded by two main factors. First, all medicines, including over the counter medicines, during the last twenty years, have only been available through pharmacies. The number of pharmacies is limited in practice though there is nothing from a legal perspective which prohibits new pharmacies opening; new licences are simply not granted. Moreover, pharmacists are not allowed to compete over price where medicines are involved. The other factor is the implementation of EU requirements concerning registration of all new imported medicines. This requirement resulted in high prices being incurred to import a new medicine. The reason is the small size of the market. But this had another effect as the number of different medicines was drastically reduced. This continued to build up the pressure which resulted in higher prices. It should be noted that prices increased by 12% during the last two years. Moreover, according to a survey that was conducted almost two years ago, it was estimated that the top eight local firms import about 90% of the total medicines in Malta. This problem has been highlighted by both the political opposition and by the Prime Minister himself. In fact the Prime Minister is quoted as saying that high prices in this market are due to the existence of a cartel. However, as of yet nothing has been done about this issue by the Office of Fair Trading.

Garages: If you need to have your vehicle fixed after an accident in Malta you have the right to choose the garage where the vehicle is sent for repair. Insurance companies were being faced with increasingly higher costs as it was not the first time that the consumer will take his car for repair to the garage, who would return back some of the money the garage receives from the insurance firms. Most of the time this swindle was hidden under higher labour costs. The insurance companies wanted to stop this and declared the price they would be paying for labour hour. The garages quickly organised themselves within the GRTU which is an association of small businesses and declared that they would not be ready to repair vehicles at that price. The Office of Fair Trading, upon request, intervened in the market. The OFT started meetings between the Association of Insurances and the association representing the garages. The situation was resolved without the authorities having to use any of their anti-cartel powers.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: No competition concerns were brought to the attention of our Maltese partner in this market. This does not mean that competition is functioning well. In fact the opposite is arguably true as there is a monopoly in this sector: Enemalta Corporation controls the importation of all types of fuel—a government-owned company that also is the sole producer and supplier of electricity.

According to the accession treaty between Malta and the EU, the importation of fuel for internal consumption had to be fully liberalised by January 1, 2006. The EU Commission has already issued its first warning letter to the Maltese government relating to this issue. The government, in its reply, said that it intends to remove Enemalta's monopoly during the third sector of 2007.

Consumer concerns: At present, there is little consumer choice. However, the main consumer concern relates to price. Though it is accepted that choice theoretically may bring about lower prices, there is much scepticism, as past experiences of privatisation and liberalisation rarely led to a reduction in prices.

Printer-ink: No competition concerns were brought to the attention of our Maltese partner in this market. This market is fully liberalised as all retailers can import their products. In fact, parallel importation is rampant. Consequently, the market is full of different brands of substitutes.

Paracetamol: Except for complaints regarding the price of medicines (detailed above) no competition concerns were brought to the attention of our Maltese partner in this market. There is only one importer of Paracetamol. No parallel trading is permissible and thus this importer is in fact the sole supplier. Prices are fixed by the importing firm. There seems to be some

informal agreement that pharmacies sell medicines at the recommended prices set by the importer.

Other factors that influence the market structure include:

- There are no OTCs in Malta;
- All medicines are sold in pharmacies. The number of pharmacies is restricted by the number of licences issued. In fact, this issue was taken up by the Consumers' Association in the public press some years ago. However, although the government promised to issue more licences, nothing has materialised as of yet;
- Doctors tend to prescribe branded medicines. As the relationship between a doctor and a patient is different from that of a provider of a service and a consumer, patients tend to adhere to branded medicines. This trend crosses over to other medicines, thus strengthening the impression that branded medicines are more effective than generic.
- The growth of production of generic medicines in Malta has provided a stimulus for generics to become more available; and
- Larger profit margins are being offered to pharmacists in the case of generics. Pharmacists are being offered higher profit margins in generics and thus more pharmacists are pushing them. This is a positive factor as it is the first time that branded medicines are being challenged. This challenge may provide more opening for competition to evolve and for consumer benefits to arise.

Downloadable music: No competition concerns were brought to the attention of our Maltese partner in this market; indeed, no Maltese websites selling downloadable music were found. The only sites that were found were the sites of local musicians who wished to promote their own music. The market for downloadable music, however, is not restricted to national boundaries.

Perceptions Revealed in the Legislative Survey

The Media

The level of media interest in competition law issues is generally good, at least when their direct impact on consumers can be understood. All of the problems detailed above were considered by the media, but from a totally different perspective, as follows:

TV: During the television transmission of World Cup games, the media argued that it was not fair that a firm was treating its customers so badly. Despite efforts of our Maltese partner to highlight the true nature of this conduct, none of the papers in their editorials treated this issue as a competition related issue. In fact, most of the papers took the position taken by the authorities, i.e. that there was little to do in such a situation but to pay.

Medicines: The media generally accepted the traders' view that the whole situation developed because of the high costs of registering the imported medicines.

Garages: This issue was also covered by the media; in general the media was relieved that this problem was solved amicably.

Awareness of the Substance/Importance of Competition Law

The general level of awareness of the importance of competition law issues in Malta is almost non-existent. The same is true with the level of awareness of the substance of competition law. People do realise that the cost of living is high but few associate this with the lack of competition. For most Maltese competition simply means no government interference. This perception is

also strengthened by another ‘norm’: competition issues are issues that involve only firms. A repercussion of this is that most competition issues are instituted by firms. The procedure used in most cases is not the regulatory procedure but rather court procedures.

According to our Maltese partner, the authorities have not instigated any specific programmes in order to improve the level of understanding of the substance or the importance of competition law among either the business community or the general public.

Netherlands

Overview of the Dutch Competition Law

The Dutch Competition Act (*Mededingingswet*) has been in force since January 1998.[112] This act replaced the existing Economic Competition Act (*Wet Economische Mededinging*), which allowed cartels to exist unless the Minister of Economic Affairs expressly forbade them. The Competition Act follows the same system as the European Community competition rules; cartels are prohibited unless they are expressly allowed. The legislator wanted to bring the competition rules in line with European competition rules. It has chosen the same drafting as the European rules, which mean that there is a dynamic influence.[113] The (legislative) evaluation of the functioning of the Competition Act has been the subject of intensive debate and has been going on for some years without reaching any conclusion. Part of the debate has been on the status of consumer organisations as 'interested parties' in competition cases, which is not self evident due to the formulation of this concept in Dutch Administrative Law.

The act covers not only agreements which restrict competition, but also covers abuse of a dominant position and a control on mergers. The act also provides for some exemptions, which will be dealt with when the substantive provisions are discussed. Before dealing with the substantive provisions an overview of the competition authority will be given. After this, the remedies and sanctions will be described. A short overview of the possibility of appealing a decision will be given before assessing the influence that consumer bodies can exercise.

The Institutional Framework

The implementation and supervision of the Competition Act is allocated to the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit*) (hereafter 'NMa').[114] This institution was also set up in 1998 and is since 1 July 2005 an independent administrative agency.[115] This means that the Minister of Economic Affairs can only give general instructions.

The authority must supervise the functioning of competition and make sure that undertakings do not restrict or distort competition below the thresholds set in the legislation. To detect an infringement it can start an investigation on its own or after a complaint or an application for an exemption.[116] Next to the supervision of competition and the enforcement of the Competition Act the NMa also has some specific duties and powers relating to sector specific regulation in the areas of energy and transport.

A board of three people, which are responsible for taking the decisions, heads the NMa. They are assisted by three general directorates; the antitrust department, the merger control department and the legal department. In addition to these three directorates there are also two

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[112] Act of 22 May 1997, Providing New Rules for Economic Competition. Available at http:// www.nmanet.nl/Images/14_26063_tcm16-24409.pdf (last accessed: 3 July 2006).
[113] Future clarifications by the Community Courts or the European Commission will have an influence on the Dutch act. See T.R. Ottervanger & S.J. van der Voorde, *Competition Law of the European Union and the Netherlands: An Overview*, The Hague: Kluwer Law International 2002, at p. 169.
[114] Section 2 and 3 of the act. The competition authority has a detailed and useful English website with general information, but also cases in English and there is even the possibility of making a (anonymous) complaint. See http://www.nmanet.nl/engels/home/Index.asp (last accessed: 5 July 2006).
[115] Annual Report 2005, 8. Only available in Dutch at http://www.nmanet.nl/Images/NMAU05SVD_NL%2Bomslag_tcm16-88198.pdf (last accessed: 5 July 2006).
[116] T.R. Ottervanger & S.J. van der Voorde, *op. cit.*, at p. 175.

sector specific chambers in the NMa: the Office of Energy Regulation (*Directie Toezicht Energie*) and the Office of Transport Regulation (*Vervoerskamer*).

Substantive Provisions of the Competition Law

Anti-competitive Agreements

The act has three main substantive parts. The first one is the prohibition on cartels. In Section 6(1) these are described as:

> Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have as their object or effect the prevention, restriction or distortion of competition on the Dutch market, or a part thereof, are prohibited.

It can be seen from this provision that the language shows a strong resemblance to that used in Article 81(1) EC. From the European case law it is clear that the article does not only cover price fixing agreements or market sharing agreements, but also other horizontal, vertical, tacit or written agreement.

There used to be the possibility of asking for dispensation of the application of Section 6. This has been repealed following the changes to the act to incorporate Regulation 1/2003. This regulation abolished the notification requirement for agreements and requires a self-assessment by the companies if their agreement would benefit from exemption of Article 81(1). It is now also no longer possible to ask for dispensation in the Netherlands.

It is still possible for the agreement to be exempted from the prohibition. The Competition Act gives the following exemptions:

- Agreements of little importance (Section 7);
- Agreements which are directly related and necessary to realise a concentration (Section 10);
- Certain agreements of companies charged with a task of public economic interest (Section 11);
- Agreements which are exempted by EC law or have received a dispensation (Sections 12 and 14);
- Agreements which do not fall within the scope of a Commission block exemption, but fulfil all the criteria (Section 13); and
- Agreements that are block exempted by the Minister of Economic Affairs (Section 15).

There are currently three block exemptions by the Minister of Economic Affairs in force. These are set to expire on 1 January 2008.

Abuse of Dominance

The second substantive provision is the abuse of a dominant position (Section 24). The terms of this provision are substantially similar to Article 82 EC. An explanatory note to Section 24 states that its substantive interpretation and application should follow both the decisional practice and the case law of Article 82 EC. An undertaking does not infringe the Competition Act when holding a dominant position. It only infringes the act if it abuses its position, which means that its conduct must restrict competition. Abuses include both exploitative abuses (i.e. where dominant companies exploit their position to the detriment of clients and ultimately consumers, e.g. excessive pricing) and exclusionary abuses (i.e. those aimed at eliminating actual or potential competitors, e.g. predatory pricing and refusals to supply).

The law also provides for an exemption from this prohibition. It provides that the prohibition is not applicable to undertakings which are entrusted with a task of public economic interest if the prohibition obstructs the exercise of this task. The undertaking has to apply for an exemption to the NMa and this can only grant an exemption from the prohibition if the prohibition in question truly obstructs the exercise of the entrusted task.

Mergers

The last substantive part from the Competition Act deals with mergers. It not only covers mergers, but also acquisitions and joint ventures (Section 27). Mergers, acquisitions or joint ventures generally need to be notified if they reach the turnover thresholds listed in Section 29. (There are exceptions to this rule, e.g. if the concentration falls within the jurisdiction of the European Commission by virtue of the European Community Merger Regulation.) If companies meet this threshold they have to get clearance for the merger from the NMa. The authority must assess if a dominant position could arise or be strengthened that appreciably restricts actual competition on the Dutch market or a part thereof (Section 41(2)). If the NMa refuses to clear a merger the parties apply for a licence with the Minister of Economic Affairs. The Minister must decide within eight weeks and will only grant a licence if it is in the public interest. A merger is deemed to be in the public interest if the benefits for the public outweigh the anti-competitive effects of the proposed merger (Sections 47 and 49).

Sanctions and Enforcement

For the infringement of the prohibition on agreements that restrict competition and abuse of a dominant position the NMa can impose a fine with a maximum of 10% of the turnover of the undertaking or the group of undertakings involved (Section 57). The level of the fine will be determined taking into account the seriousness and the duration of the infringement.

In addition, the authority may also impose an order subject to a penalty on a natural person to which the infringement can be attributed (Section 56). These two sanctions can be imposed simultaneously. It may also revoke a licence to merge if the parties involved have given inaccurate information and the authority would have reached another finding if the correct information were known (Section 45). The NMa may also impose fines if the parties do not provide the information, which is requested from them (Sections 69 and 73).

The enforcement of the act is divided into two phases. The first phase is the investigation phase and this covers the gathering of evidence (Chapter 6 of the act). The second phase is the prosecution and sanctioning phase. This is separated in two parts; the publication of a report and the adoption of a decision (Chapters 7 and 8 of the act). Both phases are regulated by the General Act on Administrative Law (*Algemene Wet Bestuursrecht*).[117]

The prosecution and sanctioning phase starts if there is a reasonable suspicion that there has been an infringement. In that case a report has to be produced (Section 59). When the report is published it is made available to interested parties for a period of at least four weeks. Interested parties can comment on the report in writing or verbally (Section 60). After this the authority will take a decision on whether to impose a fine or an order subject to penalty (Section 62). The act does not give a time limit for adopting a decision, but the power to impose a fine lapse five years after the infringement has ended (Section 64).

[117] T.R. Ottervanger & S.J. van der Voorde, *op. cit.*, at p. 173.

Legal Protection

If a sanction has been imposed for the infringement of Section 6 or 24 the company can submit a notice of appeal to the NMa, which will then reconsider the decision. This is known as an administrative appeal and this gives a chance for the authority to look closely at its decision again.[118] If the administrative appeal if not (fully) granted and the decision is upheld the company can appeal to the court of Rotterdam (Section 93). A further appeal is possible to the Trade and Industry Appeals Tribunal.

If a licence is refused the parties do not have to ask for an administrative appeal, but can appeal strait to the court of Rotterdam (Section 93(2)). Also in this case a further appeal is possible with the Trade and Industry Appeals Tribunal.

Consumer Organisations and their Influence in Competition Cases

Class actions and public interest litigation are not possible in the Netherlands. Collective claims and representative actions are possible but they must be instigated by special-purpose associations who have a clearly defined and actually pursued interest:[119] 'a foundation or association with full legal capacity can institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests'.[120] *Locus standi* is only granted, however, after the association/foundation has 'made a sufficient attempt to achieve the objective of the action through consultations with the defendant'.[121] In brief, consumer bodies can represent consumers, but they need to obtain their consent and to show to the court that they are entitled to represent them. The legal person will not be entitled to claim damages; the action shall only 'have as its object that an order against the defendant to publish or cause publication of the decision in a manner to be determined by the court and at the expense of the party or parties, as directed by the court. Its object may not be to seek monetary compensation'.[122]

The limitations of this procedure can be circumvented by either: (i) instructing the same lawyer; or (ii) assigning the individual claims to one (legal) person. Both options will ensure that there is a bundle of claims brought to court by one authorised person. These claims may then be joined procedurally.[123]

Consumers' organisations are not allowed to bring an appeal against a decision on behalf of consumers.

A very important way to influence the NMa is by filing a complaint. This can be done (anonymously) via the NMa website. It is however better to file a complaint via letter as the complainant is then entitled to a reasoned response. Dutch law sees the complaint as an application for a decision.[124] The applicant has to show sufficient interest. If the complainant is dissatisfied with the outcome it can make an objection to the authority, which has to consult an advisory body, and must decide within eight weeks. If necessary a complainant may appeal to

[118] This is covered by Section 7:1 of the General Act on Administrative Law.
[119] See: *The Ashurst Report: The Netherlands*, 2004, available online at the following website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html, at p.2.
[120] Article 3:305a of the Dutch Civil Code.
[121] *Ibid.*
[122] *Ibid.*
[123] See: *The Ashurst Report: The Netherlands*, 2004, *op. cit.*, at p. 3.
[124] Section 1:3(3) of the General Act on Administrative Law.

the Court of Rotterdam.[125] If it does not have sufficient interest the authority can still decide to pursue the case, but in that case the complainant cannot appeal the decision nor is it entitled to a reasoned opinion.[126]

Important Competition Concerns in the Netherlands

One of the main competition concerns in the Netherlands relates to the liberalisation of the energy markets and its associated problems. In fact, the Netherlands Competition Authority has recently invited the energy sector to respond to a consultation document on mergers in the energy sector.[127] As energy markets are in a state of flux, both nationally and internationally the NMa considers it important to reassess these markets with a view to its merger control policy. In the consultation document, the NMa explores which conditions should govern national and cross-border concentrations at the present stage of development. Reactions to the consultation document will be processed in an NMa vision document, which is due for publication later this year.[128]

The energy market is not the only sector that has exhibited competition concerns in the Netherlands. Other markets that were examined/commented on by the competition authority since 2000 include the construction industry, the food industry, children's toys, mobile phones, debit cards and concert tickets, to name a few:

Concert Tickets (2006)

Ticket Service, TicketBox and Mojo have either removed exclusivity clauses from their contracts or promised to do so shortly. As a result, the NMa believes that opportunities for entry in the concert and ticket branch will increase. (Ticket Service and TicketBox focus on the presale of tickets for music, sports and dance events. Mojo is active in the market for artist contracting and events organisation.) The NMa believes that the removal of the clauses will allow other parties easier access to the concert and ticket branch. The NMa has thus terminated its investigation of these undertakings in relation into possible infringements of the Dutch Competition Act.[129]

Smiths's Acquisition of Duyvis (2006)

Earlier this year Smiths Food Group, a division of PepsiCo, was authorised by the NMa to proceed with its plans to acquire Duyvis. Smiths Food Group produces crisps and other kinds of savoury snacks; Duyvis specialises in cocktail snacks and peanuts. The NMa ascertained that in combination the parties will establish a strong position in the savoury snacks market, but that a merger will not lead to economic dominance or a further enhancement thereof. According to the NMa, after the merger consumers will in fact continue to have a sufficient choice of savoury snacks, including private label and branded products. Besides, supermarkets will retain sufficient countervailing powers to address the new market player.[130]

[125] OECD, *Background Report on: The Role of Competition Policy in Regulatory Reform*, available at http://www.oecd.org/dataoecd/3/42/2497317.pdf (last accessed: 4 July 2006).
[126] T.R. Ottervanger & S.J. van der Voorde, *op. cit.*, at p. 175.
[127] See: 'Consultation Document on Mergers in the Energy Sector', 26 June 2006, available at: http://www.nmanet.nl.
[128] See: 'NMa Consults Market Parties on Mergers Energy Sector', NMa Press Release, 14 June 2006, available at: http://www.nmanet.nl.
[129] See: 'More Room for Entry in Concert and Ticket Branch', NMa Press Release, 20 July 2006, available at: http://www.nmanet.nl.
[130] See: 'Smiths's Acquisition of Duyvis Cleared', NMa Press Release, 25 April 2006, available at: http://www.nmanet.nl.

The Construction Industry (2006)

The practices complained of in this sector consisted of virtually all construction companies in the Netherlands having the habit of organising a private tender beforehand amongst the interested parties of the public tender to see who was prepared to offer the lowest bid. The Dutch Parliament, the Department of Justice, and the Dutch competition authority all launched parallel investigations into this case. In March 2003, the Parliament delivered its report which sparked an explosion of damage claims (about 1,200 individual damage claims were brought). In February 2004, further details about the magnitude of these practices were published in the newspapers. Consequently, the big six construction companies applied to the NMa for leniency and handed over further crucial information. The central government then decided to motivate the entire sector to come forward with evidence about all their illegal practices, by announcing that it would blacklist any construction company of which it could be established that they had been involved in bid rigging practices but which had not applied for leniency before the 1st of May. As a result, the NMa received over 400 additional leniency applications from construction companies in various sectors. The NMa published specific fining guidelines for each sector of the construction industry, starting with the first sector to be investigated, and those fining guidelines included several specific incentives for the construction companies to assist the NMa in cleaning up the entire situation as quickly as possible. First, the NMa introduced an accelerated sanction process—a 'fast track' procedure—whereby the companies that would take part would be rewarded with a 15% reduction in their fine. Second, the NMa provided for an additional reduction of the fine if the construction sector, as a sector, reached a civil settlement with the government before a certain date. An individual company participating financially in the funds to settle these damages in the civil procedure could receive a reduction of the fine with a maximum of 10% of their total fine. The co-ordinated approach by the central government and the NMa, which included both sticks and carrots, led to settlement negotiations first between the construction sector and the claimants, mostly the governmental bodies. In June 2005 a settlement was reached. The sector organisation that led the negotiations guaranteed that total compensation of 50 million Euros would be paid before November 2005.[131]

The Toy Market (2006)

In March 2006 it was reported that the toy chain Toys 'R' Us and Blokker Holding B.V., owner of the toy formulas Intertoys, Toys2Play and Bart Smit, had taken measures which promote competition on the toy market in the Netherlands. They had been requested to do so by the NMa. The measures ensure that Toys 'R' Us can be active on the toy market as a fully-fledged competitor of Blokker. Consequently, NMa decided to cease its investigation into a possible infringement of the Dutch Competition Act. The toys market, which is defined by a high degree of concentration, will continue to be monitored by the Dutch competition authority.[132]

Interpay (2004)

In early 2004 the NMa imposed a fine of EUR 30,183,000 on Interpay for charging excessive rates for the provision of network services for debit-card transactions. (These are the rates which retail traders pay Interpay per transaction.) In its decision the NMa adopted an approach to excessive pricing different to the one applied by the European Court of Justice and the European Commission.[133] Instead of comparing the selling price of the product with the production costs of the product (and in the absence of costs data, the sales price of competing

[131] The above information was obtained from a presentation given by Weijer VerLoren van Themaat at the British Institute of International and Comparative Law, London on 3 February 2006.
[132] See: 'More Competition on the Toys Market', NMa Press Release, 16 March 2006, available at: http://www.nmanet.nl.
[133] See: 'Current Developments in Member States: The Netherlands', (2006) 2 *European Competition Journal* 238, at 238-239.

products in other geographic markets), the NMa compared the realised return with the standard return, on a lasting basis.[134]

The Shrimps Sector (2003)

At the beginning of 2003, NMa imposed fines on eight shrimp wholesalers, four Dutch and three German producers' organisations, and one Danish producers' organisation for entering into prohibited agreements on catch quotas and prices for North-Sea shrimps in regular consultations between Dutch, German and Danish producers' organisations and wholesalers (the so-called Trilateral Consultation). The Dutch producers' organisations and traders were also fined for obstructing the entry to the fish auction of a new wholesaler. This evidence was upheld in the administrative appeal, except in relation to the five smallest shrimp wholesalers.[135]

Mobile Phone Operators (2002)

In December 2002 the NMa imposed fines totalling EUR 88,000,000 on Ben Nederland B.V., Dutchtone N.V., KPN Mobile N.V., O2 (Netherlands) B.V. and Vodafone Libertel N.V. NMa established that these companies colluded in relation to the reduction of dealer fees for post-paid mobile telephone subscriptions. Further, they exchanged sensitive information relating to competition in the area of prepaid packages.[136] The NMa later reduced the size of the fines imposed as it appeared on the basis of new information provided that the turnover realised by the telecommunications companies through the sale of subscriptions, to which the dealer bonus applied, was lower.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: The Dutch petrol market is dominated by a few large oil companies, e.g. Shell, BP, Esso and Texaco. These companies currently take a large part of the market for petrol along the highways in the Netherlands. The market shares of these companies are growing for two main reasons: (i) they own the majority of the petrol stations along the highways; and (ii) the petrol stations owned by these companies are usually located in the best positions along the highways. Such was the perceived competition problem in the petrol market that the Dutch Government decided to take specific measures aimed at promoting competition and encouraging new entrants. One of the new rules introduced is that petrol stations on the highways need to be auctioned every 15 years in a closed auction where the highest bidder wins. (Another consequence of government action was that the big oil companies had to give up 50 petrol stations before January 2005.) According to our Dutch partner these new regulations have resulted in a slight chance in the petrol market along the highways. That said, and despite the fact that there have been a few successful newcomers (e.g. Samba Oil, Gulf and G8), the big oil companies still comprise most of the market for petrol.

Paracetamol: In the Netherlands paracetamol is sold without a prescription, i.e. it is an 'over-the-counter' product. Nowadays, this product is sold not only in pharmacies but also in supermarkets and department stores. There was however at least one rule that applies here: a shop selling paracetamol must employ a qualified pharmacist. This rule has recently been abolished.

[134] The standard return is determined by the Weighted Average Cost of Capital (WACC); the realised return by contrast is determined by the Return on Invested Capital.
[135] See: 'NMa Confirms Prohibition on Cartel Agreements in the Shrimp Fishery Industry', NMa Press Release, 28 December 2004, available at: http://www.nmanet.nl.
[136] See: 'Mobile Operators in the Netherlands', NMa Press Release, 30 December 2002, available at: http://www.nmanet.nl.

Printer-ink: According to our Dutch partner, original cartridge brands experience tough competition from generic cartridges in the printer-ink market. Accordingly, printer manufacturers have made it difficult to refill or repair original cartridges. Epson for example has placed a chip in their cartridges in order to make them difficult to refill. (It should be noted however that in 2002 the European Parliament accepted a resolution which would prohibit manufacturers of printers from adding technical components that would prevent the re-use of old cartridges.)

Downloadable music: In the Netherlands it is legal to download music, even if the music is received through a person-to-person network. However, it is forbidden to upload (i.e. offer) music through a person-to-person network. There are sites where music can be bought legally. Our Dutch partner recently complained to the NMA about Apple because of its (alleged) abuse of market power and its misleading selling techniques with its on-line-selling point for music (I-tunes). Songs downloaded from I-tunes can only be listened by an I-pod MP3Player. Our Dutch partner has also sent a complaint to the authority for consumer rights. If these authorities agree with our partner's complaints, our Dutch partner will demand that Apple deliver music from I-tunes without any restrictions.

Perceptions Revealed in the Legislative Survey

The Media

The level of media coverage of competition law issues in the Netherlands is relatively high. The Dutch competition authority, the NMa, regularly updates its website with press releases related to competition investigations and cases. Several papers national newspapers have also dealt with the competition law concerns/cases identified above. The financial paper, the Financieel Dagblad, in particular has carried several articles in relation to these issues. Dutch Internet sites have also given sufficient treatment to these cases/concerns.

The specific competition concerns highlighted above in relation to the product markets chosen by the partners were also covered by the media. According to our Dutch partner several papers, sites and magazines gave particular attention to these problems in their articles.

Awareness of the Substance/Importance of Competition Law

According to our Dutch partner the level of awareness of the importance and the substance of competition law both rate at the higher end of the scale.

The authorities have tried to improve understanding and awareness of competition law issues among the business community. Indeed, the NMa regularly tries to involve the business community in competition issues. For example this authority recently produced a consultation document on mergers in the energy sector and invited those interested in the document (presumably mainly those from the energy business community) to respond to and give their opinions on the substance of this document.

The authorities have also tried to improve understanding and awareness of competition law issues among consumers in general. In particular, the NMa regularly attempts to inform consumers via the Internet about any new legislation, decisions and even the usefulness of various websites relating to competition. In a recent survey of Internet price comparison websites for electricity and gas, for example, the NMa concluded that Dutch energy price comparison websites are of good quality.[137] The NMa also uses press releases to inform consumers of competition law issues, especially concerning their application in new on ongoing investigations.

[137] See: 'Consumer May Rely on Price Comparison Websites for Electricity and Gas', NMa Press Release, 18 April 2006, available at: http://www.nmanet.nl.

Other Observations Contained in the Legislative Survey

(1) At the moment a political debate is going on in the Dutch Parliament with regard to the current Dutch Competition Act. An important issue is whether or not consumer organisations should be granted the status of 'interested party' in the area of competition law. Our Dutch partner is strongly in favour of this idea. An explicit and clear legal basis is necessary to address this legal barrier in order to end the current legal disputes and uncertainty relating to this matter.[138] Legal instruments to obtain financial compensation on behalf of consumers would still, however, be absent from Dutch competition law.

(2) Recently a bill passed through the Dutch Parliament which makes it possible to go to court where private parties have already reached a settlement in those situations where 'massive damages' have occurred. Consequently the parties would be able to request that the court make this settlement binding for all parties/consumers involved (with the possibility for them to opt out). According to our Dutch partner these rules are insufficient as they do not solve the real legal problems and barriers consumer organisations face when they seek collective redress for consumers. For all cases where there is no settlement—i.e. where there is dispute over liability and/ or damages, which is by far the majority—the bill does not provide any solution. In addition the bill in practice works to oppose reaching an actual settlement. The defendant knows that when a settlement is reached, legal instruments would allow for a relatively swift handling of the 'massive damages'. According to our Dutch partner, this is not a very stimulating incentive from the perspective of the defendant.

(3) Private enforcement of competition rules urgently needs to be strengthened in various ways in order to ensure that those affected by anti-competitive behaviour are empowered to claim compensation for their losses. One idea that needs to be promoted is the use of a collective/representative procedure which would allow a single representative organisation to obtain monetary damages on behalf of consumers. This problem needs to be addressed; it is not limited to competition cases.

[138] The problem is not limited to competition cases. In order for our Dutch partner to be considered an interested party in consumer protection law enforcement matters (for example vis-à-vis the Consumer Authority or the Health Care Authority) it is necessary to explicitly be designated as an 'interested party' in the specific law that regulates the subject of enforcement for these specific enforcement bodies.

Poland : The information in this section reflects the data collected at the same time as the other surveys (2005-6). The information in the Polish section in Annex I was updated in September 2007 to reflect the new Act on Competition and Consumer Protection which came into force in April 2007

Overview of the Polish Competition Law

The rules for the development and protection of competition are contained in the Act on Competition and Consumer Protection (*Ustawa o Ochronie Konkurencji i Konsumentów*) (hereafter 'ACCP') in Poland.[139] This piece of legislation contains rules relating to anti-competitive agreements, abuse of dominance, and mergers. Rules on the protection of interests of consumers are also contained in the ACCP. As with other new Member States, the Polish competition law rules are highly influenced by EC competition law and policy.

The Institutional Framework

The institution that is charged with the protection of competition and consumers is the President of the Office for Competition and Consumer Protection (*Prezes Urzedu Ochrony Konkurencji i Konsumentów*) (hereafter 'the President of the OCCP' or 'the President of the Office'): Article 24(1).[140] The Prime Minister appoints the President of the OCCP for a period of five years (Article 24(2)). Upon a motion of the President of the Office the Prime Minister may appoint and dismiss Vice-Presidents of the Office (Article 25).

The Council for Good Economic Practices acts as an advisory and opinion-making body to the President of the Office (Article 29a). The Council consists of fifteen members of whom five are from consumer organisations, five are from entrepreneurial organisations, and five are chosen because of their knowledge, expertise or experience (Article 29b(1)). The members of the Council are appointed by the President of the Office (Article 29b(2)).

Between 2000-2004 Poland has recorded over 2600 competition cases; these cases involve in particular agreements that restrict competition and abuses of a dominant position. Merger investigations have related to wide range of markets: the food industry; the chemicals industry; the media (press, cable TV); oil and energy industries; and many others.

Substantive Provisions of the Competition Law

Anti-competitive Agreements

Agreements that have as their object or effect the elimination, restriction or any other infringement of competition on the relevant market are prohibited by Article 5. The term agreement includes concerted practices and resolutions of associations of undertakings (Article 4(4)). The relevant market is the market of products which are regarded as substitutes and are offered within an area in which the conditions of competition are sufficiently homogeneous (Article 4(8)). This Article is drafted to resemble Article 81 EC and therefore the caselaw interpreting that Article will provide guidance in interpreting Article 5 of the ACCP. Agreements that fit this profile are, in their entirety or in the respective part, null and void unless an exemption applies (Article 5(2)).

[139] An English translation of the consolidated version is available at http://www.uokik.gov.pl/en/legal_regulations/national_legal_acts/competition_protection/ (last accessed: 29 August 2006).

[140] The Office has a useful English website with general information about the Office, press releases, legal acts and regulations, etc. The website is available at: http://www.uokik.gov.pl/en/ (last accessed: 29 August 2006).

The exemptions are contained in Articles 6 and 7. The former is a *de mininis* exception and excludes agreements from the scope of Article 5 if:

- The combined market share of the parties does not exceed 5% when the agreement is concluded between competitors; or
- The combined market share of the parties does not exceed 10% when the agreement is concluded between undertakings operating on different levels of the economic process.[141]

The second possibility of exemption is contained in Article 7; four conditions must be satisfied:

- The agreement must promote technical or economic progress or improve production or distribution;
- The agreement must ensure the buyer or user receive a fair share of the benefit;
- The agreement must not impose restrictions which are not indispensable to achieve the objectives; and
- The agreement must not afford the parties the possibility to eliminate competition in a substantial part of the relevant market.

If these conditions are fulfilled the Council of Ministers may adopt a regulation in which they exempt agreements which fulfil these conditions (i.e. the e Council may, in certain circumstances, adopt block-exemptions).

Abuse of a Dominance

The ACCP also contains a prohibition of the abuse of a dominant position on a relevant market (Article 8(1)). Article 4(9) defines a dominant position as a position that allows the company to prevent efficient competition on the relevant market and thus enables it to act to a significant degree independently of other economic operators or consumers. This definition is similar to that defined by the Community Courts under Article 82 EC and therefore this caselaw will provide useful guidance on the interpretation of this term. Article 4(9) also gives a presumption that a dominant position exists if the firm holds a market share of 40 per cent or more. Legal actions, which constitute an abuse, are null and void (Article 8(3)).

The abuse of a dominant position may, in particular, consist in:

(i) direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low, significantly delayed payment terms or other conditions of purchase or sale of products;
(ii) limiting production, supply or technical development to the detriment of contractors or consumers;
(iii) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition;
(iv) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of agreement;
(v) counteracting formation of conditions necessary for emergence or development of the competition;
(vi) imposition by the entrepreneur of onerous contract conditions, yielding to this entrepreneur unjustified profits;
(vii) creating for consumers onerous conditions of redress; or
(viii) division of market according to territorial, product, or entity-related criteria.

[141] There are exceptions to these rules; see Article 6(2) of the Act.

Mergers

Article 12(1) of the Act states that an intention to merge has to be notified to the President of the Office if the combined turnover of the parties exceeds € 50 million. This notification requirement applies to mergers, acquisitions and the creation of joint ventures (Article 12(2)), and also to those particular cases listed in Article 12(3).[142] If the concentration does not result in the restriction of competition on the market, in particular by way of the creation or strengthening of a dominant position, the President of the Office may allow the undertaking(s) to complete the transaction (Article 17). The President may attach obligations to this approval (Article 18). The President must reach a decision within two months (Article 97(1)).

Sanctions and Enforcement

The proceedings before the President of the Office shall be conducted as explanatory investigations aimed at determining initially if an infringement of the Act has occurred (Articles 42(1) and 43(2)). They may be initiated on the President's own initiative and shall be opened and concluded by way of a decision (Articles 43(1) and (3)). The President and the employees of the Office have a number of investigatory powers, which are described in Articles 55 to 62.

The proceedings can also be opened by way of a motion from one of the parties listed in Article 84(1). This motion must be submitted in writing and must contain a justification and an indication of a legal basis (Article 84(2)). The President of the Office can refuse to open the investigation in the cases listed in Articles 85 and 85a. A party that files a motion is allowed to participate as a party in the proceedings.[143] The entity that participates in the proceedings has a right to view the files and propose documents and make statements regarding the case (Articles 87(3) and (4)).

The President of the Office can issue a decision finding a practice is a violation of Articles 5 or 8 and is not exempted pursuant to Articles 6 or 7 (Article 9). If it is plausible that a violation of Article 8 has taken place and the party agrees to take actions aimed at ending and preventing those infringement the President of the Office can issue a decision imposing the obligation to exercise the undertaken commitments (Article 11a(1)).

If there are no reasons for continuing the investigation the President of the Office shall terminate the proceedings by way of a decision (Articles 66 and 67). An investigation cannot be opened if more than five years have elapsed since the end of the year in which the infringement took place (Article 68). The President of the Office can order the loosing party to pay the other parties' costs (Articles 69(1) and 72). The President can decide on costs by way of a resolution that can be included in the decision terminating the proceedings (Article 75).

The President of the Office may, by way of a decision, impose a financial penalty on the undertaking with a maximum of 10 per cent of the revenue earned in the preceding financial year if there is an infringement of Article 5 or 8 of the ACCP, Articles 81 and 82 EC and if a concentration has been implemented without consent (Article 101(1)). Lower fines may be imposed for other infringements of the Act (Articles 101(2) and 102). A fine of up to fifty-fold the average salary may be imposed on natural persons holding a managerial post if they have not complied with a decision or judgment, if they have not notified an intention to concentrate, or if they have provided unreliable or misleading information (Article 103(1)).

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[142] *Poland – Global Competition Review*, available at: http://www.globalcompetitionreview.com/ear/42_poland.cfm (last accessed: 30 August 2006).
[143] *Ibid.*

In fixing the amount of the fine the President shall, in particular, take into account the duration, gravity and circumstances of the previous infringement if the ACCP (Article 104). Article 103a provides for leniency if one cooperates with the President of the Office; it is thus possible to get a reduction in the fine imposed.

Legal Protection

The decision of the President of the Office to initiate or end proceedings or a decision concerning the imposition of fines can be appealed to the Court for Consumer and Competition Protection (*Sad Ochrony Konkurencji I Konsumentów*) within two weeks from the date the decision has been delivered (Article 78(1)). Appeal is then possible before the Court of Appeal. Cassation is possible before the Supreme Court of Poland.[144]

Consumer Organisations and their Influence in Competition Cases

Consumer organisations can submit a motion to the President of the Office to open an investigation into alleged anticompetitive behaviour (Article 84(1)). If the Office decides to initiate proceedings the organisation is allowed as a party in the proceedings. The President can also allow a consumer organisation that has proved its legal interest or who may contribute to the clarification of the case to participate as a party in the proceedings even if it has not filled a motion (Article 87(1)(3)). The organisation that participates in the proceedings has a right to view the files, propose documents and make statements regarding the circumstances of the case (Articles 87(3) and (4)).

In Poland there is the possibility of collective action, but an award is made to the individual members of the group in relation to their losses suffered.[145] This makes it harder to initiate proceedings, as all individuals must join.

The amended Act of 15 December 2000 on Competition and Consumer Protection enables the President of the OCCP to issue a decision regarding whether a particular business activity is a practice which infringes the so-called 'consumers collective interest'.

According to Article 63 of the Act of 17 November 1964, the Code of Civil Proceedings (Office Journal No. 43, item 296, with subsequent changes), 'organisations ... may present to the court their view significant to the case in the form of resolution or statement'. This provision however applies to consumer cases and not to competition cases as such.

Our Polish partner operates mainly in the field of legal advice and education; its limited human resources are the main barrier preventing it from bringing complaints to the authorities.

Important Competition Concerns in Poland

The most common anti-competitive cases are related to the telecommunications market. Over the last 10 years the OCCP has imposed on Polish Telecommunication (the incumbent operator) over 20 financial penalties, in total amounting to over 100 mln PLN (25 mln EUR). The reasons were usually as follows:

- changes in services which had a negative impact on consumers; and
- refusals to cooperate with other telecommunication operators.

[144] *Ibid.*
[145] *Ashurst Report – Poland*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/poland_en.pdf (last accessed: 30 August 2006).

The financial burden imposed on TP SA may seem high; however it actually didn't affect the TP SA as much as one could think. TP SA in most of the cases made an appeal to the Antimonopoly Court which often cancelled or significantly reduced the penalties.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: In Poland high petrol prices are to a large extent a consequence of the large tax burden imposed on petrol. However the market structure shows that high prices may be also caused by the insufficient level of competition. PKN Orlen (the leading Polish petrol company) has a 29% share in the retail market and the biggest network of stations but more importantly it has approx. 80% in the wholesale market, which means that even if consumer buys petrol from the other brand, it's very likely to be PKN Orlen petrol. Whenever PKN Orlen increases its prices it gives the increase in oil prices as a justification. But when the oil prices come down the prices on Orlen stations are not being reduced at the same pace or they are not reduced at all.

Many times companies have been suspected of colluding on the local markets, but this has not been proved. For example in 2001, a local consumer advocate from Koszalin has lodged a motion to the OCCP, in which he pointed out that prices on the local market are being set at the same level and the changes are being made at the same time, which could mean that there is a collusion between petrol distributors. The OCCP conducted an antimonopoly investigation but did not find sufficient evidence of collusion. OCCP stated that there was an oligopoly on the relevant market which involves mutual price dependence. In other words, a decision made by one company may significantly influence the sale of other companies; therefore companies have to regularly monitor the market and behaviour of competitors. Following the price decisions of a competitor is not sufficient evidence to establish the existence of an anticompetitive agreement.

On the other hand, in 2006 in Rzeszów the President of the city urged the City Communication Enterprise to reduce the price of petrol at its petrol stations. As a response all other petrol distributors reduced the prices on their stations which may mean that the prices were artificially increased before.

The development of hypermarket stations may have an impact on the petrol prices of other brands. This is however very immature market in Poland and there aren't many stations of that type yet.

Printer-ink: The prices of original cartridges in Poland are very low when compared to prices of the respective printers. However there are various compatible cartridges being made (with various ink capacity and print quality). In addition there are points which fill the empty cartridges. So according to our Polish partner, there are no real competition problems in Poland.

Paracetamol: Our Polish partner has observed the major anticompetitive processes going on in Poland recently. This relates to lobbying actions and legal attempts to reduce competition (e.g. attempts to introduce a ban on online sales; attempts to limit the number of pharmacies operating in particular districts). Both chain and online pharmacies are an important source of competition for traditional pharmacies; therefore they have been subject to various criticism and legal actions (e.g. a new draft of the pharmaceutical law). It's not yet known what the results of those actions will be.

Downloadable music: According to our Polish partner there is no competition problem as far as the downloadable music market is concerned; this is very young market in Poland and there are only a few websites offering such services. There is a huge problem however on the CD market. Music CDs in Poland are very expensive not only in relation to average salary but also in absolute numbers.

Perceptions Revealed in the Legislative Survey

The Media

Competition problems, especially those related to telecommunications, are widely covered by the press media in Poland: the main daily newspapers usually give short regular updates on particular competition cases; sometimes there are more comprehensive articles in magazines. Discussion of competition law issues is less present on TV and radio news. Although competition issues are present in the press (in the sense that competition law, like any other law, is being regularly described in specialized magazines), in the opinion of our Polish partner there is no real public debate on competition issues and consequently there is no pressure from the media to open particular markets to the competitive process.

Awareness of the Substance/Importance of Competition Law

In case of both the Office for Competition and Consumer Protection and the Court for Competition and Consumer Protection, the level of awareness of the importance of competition law issues is very high. As for the ordinary courts in Poland the level of awareness is lower, with the exception of cases directly related to competition, for example in the field of combating unfair competition.

The authorities in Poland have tried to improve understanding and awareness of competition law issues among the business community. They have done this through organising conferences, meetings/training sessions, various publications. (There was, for instance, a government publication that dealt directly with the leniency programme introduced by the Office for Competition and Consumer Protection). It also has to be emphasised however that a large majority of the authorities' actions focus on strictly consumer issues and the competition aspect is rarely discussed.

Portugal

Overview of the Portuguese Competition Law

The competition rules in Portugal are contained in the law of 11 June 2003, No. 18/2003 which revoked the Decree-Law nº 371/93 of 29 October 1993. This relatively new law (hereafter the Competition Act) provides the legal framework for competition (*regime jurídico da concorrência*). It details the competition law rules in relation to anti-competitive agreements, abuse of a dominant position and anti-competitive mergers. The present law is applicable to competition practices and to merger transactions that occur within Portugal or that have, or may have, effects within its territory. The Act follows the rules of the European Community in many respects. Therefore, the interpretation by the European Court of Justice will have an important influence on the interpretation of the provisions of this Act.

In the next section the institution enforcing the competition rules will be described. This authority is governed by another Decree-Law so any articles mentioned in that section shall refer to that Decree-Law and not the Competition Act. In the rest of the chapter the references shall be to the Competition Act, unless stated otherwise.

The Institutional Framework

The Portuguese Competition Authority (*Autoridade da Concorrência*) (hereafter PCA) is the entity responsible for enforcing the competition rules (Article 14).[146] The Authority was created by Decree-Law 10/2003 of 18 January 2003.[147] It replaced the Competition Council and the Directorate General of Competition and Trade both of which were formally entrusted with competition law enforcement; it is an independent and financially autonomous institution (Article 2). The PCA has regulatory powers on competition over all sectors of the economy, including the regulated sectors, the latter in coordination with the relevant sector regulators (Article 1).

The Competition Authority is divided into two institutional bodies: a board (*Conselho*) and a single auditor (*Fiscal Único*) (Article 10 of the Statutes). The board consists of one Chairperson and two to four other members. The members are chosen for a period of five years by the Council of Ministers on the proposal of the Minister responsible for the economy (Article 12 and 13 of the Statutes). The functions of the board are described in Article 17 of the Statutes. The single auditor controls the Authority's financial and asset management and acts as a consultative and advisory body (Article 23 of the Statutes). The PCA is subject to the administrative supervision of the Minister responsible for economy (Article 33 of the Statutes).[148]

Substantive Provisions of the Competition Law

The Act is applicable to all economic activities in every sector, which may have effects in the territory of Portugal (Article 1). In its substantive provisions it refers to undertakings. It defines this concept in a similar way as the Court of Justice: an undertaking is any entity exercising an economic activity that consists of the supply of goods and services in a particular market, irrespective of its legal status or the way in which it functions (Article 2).

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[146] The Authority has a detailed English website. It contains the texts of the relevant legislation, decisions, press releases, annual reports, etc. It can be found at: http:// www.autoridadedaconcorrencia.pt/index.aspx (last accessed: 9 August 2006).

[147] Available at: http://www.autoridadedaconcorrencia.pt/vImages/statutes.pdf (last accessed: 9 August 2006). The text of the Decree also contains the statutes of the PCA.

[148] 'Portugal – Global Competition Review', available at: http://www.globalcompetitionreview.com/ear/ 43_portugal.cfm (last accessed: 9 August 2006).

The Competition Act also contains a special provision for public undertakings and undertakings to which the state has granted special or exclusive rights. Article 3 states that they are covered by the Act (paragraph 1). However, it makes an exemption for undertakings charged with services of general economic interest or which have the character of a legal monopoly. Those undertakings are only subject to the Act in so far as it does not obstruct the particular task entrusted to them (paragraph 2). This article resembles Article 86 EC and therefore it is very likely that the interpretation of the Court of Justice will have an important influence on the explanation of this article.

Anti-competitive Agreements

Article 4 of the Competition Act prohibits agreements that have the object or effect of preventing, distorting or restricting competition on the whole or a part of the national market. The article declares that these practices are null and void unless they can be justified. The justification is in Article 5. That contains the same elements as 81(3) EC and has therefore two positive and two negative criteria, which are:

- The practice must contribute to improving production or distribution or promoting technical or economic development;
- They should offer the users (i.e. consumers) a fair share of the resulting benefit;
- It does not impose any restrictions that are not indispensable to attain its objectives; and
- It does not provide an opportunity to suppress competition on a substantial part of the market in question.

If these conditions are met the Authority can approve the agreements provided it has adopted a regulation setting out the procedure (Article 5(2)). The PCA has done this in Regulation 9/2005, which was enacted under this provision. It does not relate to practices that effect trade between Member States.[149] If the agreement has no such effect the parties may ask for a prior assessment of the agreement by the Authority.[150] The Competition Act also states that any block exemptions adopted under Article 81(3) EC may applicable to an agreement within the meaning of Article 4 of the Competition Act—even if it does not effect trade between Member States—provided that the agreement satisfies all the remaining criteria of the block exemption in question (Article 5(3)).

Abuse of Dominance

The second substantial provision of the Act covers an abuse of a dominant position. This is prohibited by Article 6, which states that the abusive exploitation of a dominant position with the object or effect of preventing, distorting or restricting competition is prohibited. The article also gives a clarification of what is to be understood as a dominant position. An undertaking which faces no significant competition or which predominates over its competitors is to be regarded as occupying a dominant position. The same holds true for two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over competitors (Article 6(2)).

The Competition Act expressly lists the possibility that a refusal to supply by an undertaking that controls an essential network of infrastructure is an abuse if this would prevent the undertaking from obtaining access to compete in the upstream or downstream market. This provision thus

[149] 'Annual Report on Competition Law Developments in Portugal', available at: http:// www.autoridadedaconcorrencia.pt/vImages/Portugalcompreview.pdf (last accessed: 9 August 2006).
[150] There is no obligation to notify and the notification is subject to the payment of fees. 'Portugal – Global Competition Review', available at: http://www.globalcompetitionreview.com/ear/ 43_portugal.cfm (last accessed: 9 August 2006).

ensures that the refusal to supply access to an essential facility is caught by the Act (Article 6(3)). It is also considered to be an abuse when the undertaking exploits the economic dependence on it by a supplier or client because they have no alternative source of supply (Article 7). There is no alternative available if there are a restricted number of undertakings or the supplier or client cannot get identical conditions from other commercial partners in a reasonable space of time (Article 7(3)).

Mergers

Section III of the Act deals with concentrations between undertakings. A concentration is deemed to exist when there is a merger between two or more independent undertakings, when an undertaking acquires control of another undertaking or when a joint venture which is capable of fulfilling the functions of an independent economic entity on a lasting basis is created (Article 8). Concentrations are only subject to prior notification if the market share and turnover thresholds of Article 9 are met. The notification must take place within seven days of the conclusion or announcement (Article 9(2)). A concentration may not be put into effect before it has been notified and a decision of non-opposition has been obtained (Article 11(1)). The concentration will be assessed in order to determine the effect on the competitive structure, having regard to the need to preserve and develop effective competitive on the Portuguese market, in the interest of the intermediate and final consumer (Article 12(1)). The concentration will be prohibited if it creates or strengthens a dominant position that results in significant barriers to effective competition (Article 12(3)). This test incorporates the test of the old European Community Merger Regulation so it is likely that this provision will be interpreted in the same way.

The parties may also lodge an extraordinary appeal with the Minister responsible for the economy, who can authorise the concentration if the benefits to fundamental national interests exceed the negative impact on competition. The Minister may however attach conditions and obligations to this decision.

Sanctions and Enforcement

The PCA has a number of powers of investigation and inspection. These are listed in Articles 17 and 18. The procedure for adopting decisions follows the common administrative procedure from the Administrative Procedure Code (*Código do Procedimento Administrativo*) if the Competition Act does not provide otherwise.

The Authority shall initiate investigations whenever it becomes aware of possible practices contrary to Articles 4, 6 and 7 (Article 24). After this inquiry is complete the PCA shall take a decision stating that it shall take no further action or that it will initiate proceedings by notifying the undertakings involved that there is sufficient evidence of an infringement (Article 25(1)). If an interested party provoked the investigation the Authority cannot annul the proceedings before making its views known to the party and granting it a reasonable time to respond (Article 25(2)).

If it decides to initiate proceedings it will allow the accused a reasonable period to make its position known. The parties may also request a hearing (Article 26). If there is the risk of imminent damage, which is serious and irreparable or difficult to rectify, the Authority may order interim measures with which the parties have to comply (Article 27). After the proceedings have come to an end the PCA may issue a decision to order the offender to stop the infringement and impose fines and other penalties (Article 28).

The PCA may impose fines up to a maximum of 10% of the turnover of the previous year of the undertakings concerned for the infringement of the prohibition on restrictive agreements or the abuse of a dominant position (Article 43(1)). The same fine can be imposed when it executes a

concentration without the consent of the Authority or when it does not comply with interim measures or conditions and obligations imposed. Certain procedural offences may attract fines of not more than 1% of the turnover of the previous year of the undertakings concerned (Article 43(3)).

When determining the fine the Authority takes into account certain circumstances that are listed in Article 44 (e.g. the gravity of the infringement; the advantages that the offending undertakings have enjoyed; the repeated or occasional nature of the infringement; the extent of participation; cooperation with the Authority; and the offender's behaviour in eliminating the prohibited practices and repairing the damage caused). If the gravity of the infringements justifies it the PCA can publish the decision in the Official Gazette (*Diário da República*) or a national newspaper at the offender's expense (Article 45).

Legal persons are held responsible if the offences have been carried out in their behalf, on their account or in the exercise of their duty by members of their corporate bodies, their representatives or their employees (Article 47(1)). Directors are held responsible when they knew, or should have known, of the infringement yet failed to take appropriate measures to terminate the infringement (Article 47(2)). There are certain limitation periods in Article 48. In cases where the maximum fine of 10% can be imposed the limitation period is five years.

Legal Protection

Decisions to apply fines or other penalties can be appealed with the Lisbon Commercial Court (*Tribunal de Comércio de Lisboa*) and shall have suspensive effect (Article 50). Other decisions may be appealed with the same court, but in this case the appeal shall not suspend the decision. A further appeal is possible with the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*) if the decision of the Commercial Court is appealable (Article 52). A further appeal on matters of law is possible with the Supreme Court of Justice (*Supremo Tribunal de Justiça*) (Article 55(1)). If the appeal from the Commercial Court's decision only concerns a point of law it should be lodged directly with the Supreme Court (Article 55(2)).

Consumer Organisations and their Influence in Competition Cases

In a case of a concentration the consumer organisation could act as an interested third party since the Act specifically notes that it will take account of the interest of final consumers (Article 12(1)). Within five working days after the notification becomes effective the Authority will publish the essential elements of the concentration in two national newspapers. Interested parties can submit their observations within 10 working days (Article 33).[151]

A consumer organisation can lodge a complaint to the PCA about anti-competitive practices. If this complaint contains information of possible violations of the Act the PCA may decide to start an investigation (Article 24). If a consumer organisation provoked the investigation the Authority cannot annul the proceedings before making its views known to the party and granting it a reasonable time to respond (Article 25(2)).

A form of collective/representative action is available in Portugal, although its use in not very common. It is called *acção popular* or *acção para a tutela de interesses difusos* ('action for the protection of diffuse interests'). Although codified in Portuguese legislation (Article 26A of the Code of Civil Procedure) it finds its source in Article 52 of the Portuguese Constitution (as well as Law No. 83/95 of 31 August 1995). Article 52 provides that any person or any association/foundation has the right to claim the discontinuation or the prevention of infractions

[151] 'Portugal – Global Competition Review', available at: http://www.globalcompetitionreview.com/ear/43_portugal.cfm (last accessed: 9 August 2006).

against *inter alia* public health, consumers rights, quality of life, environment or the public domain. Encompassed within this right is the right to obtain compensation for the damages they have suffered as a result of the violation of the enumerated interests (Article 22 of Law No. 83/95). Law 83/95 does not mention competition law directly; however, the list provided for in Article 52 of the Portuguese Constitution is not exhaustive and thus may include other interests such as the protection of the competitive process. Those who do not wish to be bound by the ruling may expressly opt out.

Joint actions are also possible under Portuguese law. Article 275 of the Civil Procedure Code allows the judge to join different cases namely when intervention of all the interested parties is necessary to preserve the useful effect of the decision or when different claims have the same grounds or are interrelated, even when the cases are pending before different jurisdictions, unless the stage of the proceedings or other special reasons recommend otherwise.[152]

The concept of the *amicus curiae* brief is relatively unknown and as such is not used in Portugal. That said, the Law of Consumer Defence-Law No 24/96, 31 July 1996, gives consumer associations certain rights (e.g. the right to represent consumers in public hearings—which occurs when sensitive decisions are likely to be taken which may affect the interests and rights of consumers; or the right to be explained on the formation of the prices of goods and services, whenever they request it).

Our Portuguese partner has a good working relation with the PCA. Every time our Portuguese partner becomes aware of situations which may possibly violate the competition law rules, it duly informs this authority. Examples include: perceived problems in the vehicle insurance market and the fixed (land-line) telephone market. Our Portuguese partner's competition law activities have, however, generally focused on providing the public with warnings about situations which it perceives as violating the competition law rules. It regularly uses its magazines *Pro Teste* and *Dinheiro & Direitos* to alert and warn consumers, corporations and the authorities themselves on matters that violate the competition law rules (e.g. relating to bank activities, insurance, telecommunications, fuel, gas, electricity, prices in the supermarkets). Our partner has also carried out training sessions for judges, lawyers and jurists concerning issues of competition law and policy, especially in the ways consumers, users of public services, wage earners, taxpayers and citizens in general can benefit from the results of competition and the role competition law can play in this process.

Important Competition Concerns in Portugal

Of the numerous cases that were taken by the CPA, the following are its most significant, at least in terms of their potential impact on consumers:

<u>Cartel Arrangements in the Milling Industry – Rises in the Price of Bread</u>

The CPA has detected a cartel in the milling industry which had the effect of increasing the price paid by consumers for bread. The CPA concluded that the undertakings concerned had coordinated prices between December 2000 and September 2004; consequently it imposed a fine of between 8 and 9 million euros on the undertakings concerned. For the CPA bread should be considered an essential good and thus any relative alterations in its price, quantity or quality affects all consumers in society.

<u>Fixing of Fees by the Professional Bodies</u>

[152] See: *The Ashurst Report: Portugal*, 2004, available online at the following website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html,, p.5.

The competition authorities of Portugal have on a number of occasions found professional bodies/societies who fix the fees of their professional members to be in breach of the relevant competition law rules.

In 2000 the then Competition Council imposed a fine on the Chamber of Chartered Accountants whose code of conduct stated that associates were obliged to charge minimum fees. The Lisbon Court of Appeal upheld this decision on 5 February 2002.

The CPA has also imposed a fine of over 160,000 euros on the Order of Dentists for fixing a minimum fee for dental services in Portugal. According to the CPA, fixing independent dentists' fees in accordance with a table of maximum and minimum charges and prohibiting the establishment of fees by market forces have a number of negative effects on competition:

- It results in restriction of dentists' freedom to compete on the supply side, which is reflected in a restriction on the freedom to set fees;
- The use of tables of maximum and minimum charges allow dentists, in their activity on the market, to have a concrete idea of the prices charged by their competitors.
- The imposition of minimum charges also creates entry barriers to the market for newly qualified dentists who do not have the benefit of a consolidated professional reputation but are prevented from acquiring patients by charging lower prices.
- Furthermore from the point of view of demand, i.e. all those who wish to use dentistry services, there are also restrictions since the obligatory maximum and minimum charges mean that it is impossible to negotiate the conditions on which these services are provided. Patients are thus prevented from trying to obtain the best trading conditions for the services they require.

Finally, the CPA imposed a fine of almost 76,000 euros on the Order of Veterinarians on the grounds that the imposition of minimum charges for veterinary services had been proven. This was the CPA's first decision involving the violation of the competition rules set out in the Treaty establishing the EC. It was issued under the new decentralised system for applying Community competition rules as provided for by Regulation 1/2003.

Anti-competitive Practices in the Health Sector

The competition authorities in Portugal have been concerned about collusion in the health sector. In fact, the CPA has imposed larger fines on undertakings in this industry on a number of occasions. After careful consideration of the evidence, the CPA concluded that undertakings present in the blood reagent market in Portugal had engaged in anti-competitive practices (price-fixing) and imposed a fine of over 3 million euros on five different defendants. In a different case the CPA imposed a fine totalling approximately 16 million euros on five companies for price-fixing in open procurement procedures for goods in the hospital segment.

Competition Concerns In the Product Markets Chosen by the Partners

No cases were taken up by the CPA in the sectors chosen by the partners.

Petrol: Although no cases were taken up by the CPA in the petrol market, the Portuguese authorities keeps up to date with recent events in the fuels market (both the wholesale and retail branches) and regularly sends out newsletters concerning this market.[153] In fact the CPA has issued several recommendations on various markets, including the fuels market (e.g. Recommendation 3/2004 for the Government on the Fuels Market, after a period of public

[153] A detailed list of such newsletters was provided by our Portuguese partner in its answer to the second legislative survey.

consultation). Recommendations include the creation of new legislative tools which would allow for the creation of conditions conducive to promoting and encouraging more dynamic competition in the fuels market. As a result of the actions of the CPA petrol stations are obliged to advertise in a visible manner the current prices of al fuels sold. Display panels with fuel prices should also be located outside of the petrol stations so that consumers may choose whether or not to fill up before entering the station. As far as highways and SCUTs (highways in the interior of Portugal) are concerned the display panels should all look the same and be located in the main entrances of the petrol stations at distances defined by legislation. It is believed that these measures provide information and transparency of prices—something that is fundamental to consumers if they are to exercise their choices freely in a competitive market.

Printer-ink: No competition problems were brought to the attention of our Portuguese partner in this area.

Paracetamol: Competition in the sale of over the counter medicines (OTC) has been widely debated and has received a considerable amount of media coverage. Until the end of 2005 consumers could only purchase medicine from pharmacies. However, since the 1st of January 2006, consumers can purchase medicines from other outlets besides pharmacies.[154] These establishments are obliged to have professional and qualified personnel to assist customers. The new law aimed to benefit consumers not only in terms of price but also in terms of accessibility.

Downloadable music: No competition concerns were brought to the attention of our Portuguese partner concerning this market.

Perceptions Revealed in the Legislative Survey

The Media

All of the above mentioned cases in the section on 'competition concerns' received special attention from the media (press, radio and television), especially the decisions relating to the bread and pharmaceutical industries which resulted in several television debates. Commentary on the price of fuel is an issue that is currently widely debated from a competition point of view. This issue has been widely debated and came to the attention of the public due to the fact that petrol stations represent 80% of the retail petrol market but yet have higher prices than supermarkets/hypermarkets (which only have 2-3% of the market). The sale of over the counter medicines (and its related competition problems) has also received wide media attention.

The decisions, press releases and recommendations of the CPA are published on its own detailed website (www.autoridadedaconcorrencia.pt). These decisions, press releases and recommendations have sometimes received extensive media coverage (e.g. those concerning the energy sector).

Awareness of the Substance/Importance of Competition Law

According to our Portuguese partner, the media attention surrounding the heavy fines imposed in both the milling and the pharmaceutical industries in 2005 has led to an improvement in the public awareness of the importance of competition law. In previous years the Portuguese population had felt relatively indifferent to competition law issues; any advances in competition law resulted from Portuguese adhesion to the EU and were viewed with the indifference typical when lack of information is involved. The discussions and debates following the fines in 2005 improved this situation; consequently, consumers are gradually starting to become aware of the importance of the rules surrounding competition and of the body responsible for its enforcement.

[154] See: Decree-Law 134/2005 (16 August 2005).

There have been programmes that educate judges in competition law matters in Portugal. These programmes have the support of DG Comp and of the Supreme Magistrates Council in Portugal. Large and medium sized enterprises are also becoming increasingly aware of the competition law rules. This may be due to the detailed information that is available on the CPA website. Conferences and seminars have also been directed to professionals/businessmen and enterprises in general.[155] Besides these activities the CPA regularly publishes the following:

- Newsletters with information about a given market, e.g. fuels, electronic communications, iron and steel; and
- Monthly newsletters on various subjects related to competition law.

Competition law is still a difficult subject for consumers in general; there are many people that do not know the basic competition rules and their importance for the good functioning of the market. The present high profile and visibility of the CPA has helped consumers and the general public somewhat to take notice of the importance and the substance of these rules. Consumers have also been targeted by the CPA through its website. In fact one can find on the CPA website various articles and papers which are directed specifically at consumers.

Other Observations

Portuguese competition legislation in and of itself does not present any great obstacles to the presentation of complaints on behalf of consumers. The primary obstacles which consumers are confronted with when presenting claims/lodging a complaint concern the lack of knowledge about competition rules, the apathy of consumers and complexity of competition law issues. Indeed, competition law is a complex subject that requires an in-depth technical know-how, encompassing both legal and economic knowledge. Consequently consumers do not tend to present complaints based on the violation of the competition law rules.

[155] A detailed list of such seminars was provided by our Portuguese partner in its answer to the second legislative survey.

Slovenia

Overview of Slovenian Competition Law

Article 74 of the Constitution of the Republic of Slovenia prohibits practices restricting competition in a manner contrary to the law. Detailed competition rules are contained in the Prevention of the Restriction of Competition Act 1998 as amended (*Zakon o preprečevanju omejevanja konkurence*) (hereafter 'PRCA').
[156] This Act applies to legal and natural persons performing economic activities, irrespective of their legal status. The application is extended to associations of undertakings, any activity performed in the market for payment and public undertakings and public legal persons performing economic activities (unless they are excluded by law) (Article 2). The Act covers not only cartel agreements; abuse of a dominant position and merger control are both covered in Parts II to IV. The Act also provides for some block exemptions.

The Institutional Framework

Article 4 declares that the Competition Protection Office (*Urad Republike Slovenije za varstvo konkurence*) (hereafter 'CPO' or 'the Office') shall be set up to carry out the tasks in accordance with the PRCA.[157] The Office is in charge of the supervision of the application of the Act. It can also submit opinions to the National Assembly and the Government on general issues under its competence. It is also allowed, according to Regulation 1/2003, to enforce the violations contained in Articles 81 and 82 EC (Article 15).[158]

The Office is independent and autonomous (Article 14(1)). A Director, who is responsible for the activities carried out by the Office, manages it and can issue acts under the Office's competence (Articles 14(2) and (3)). Within the Office there is a Consultative Committee, which is appointed by the Government at the proposal of the Director (Article 16(1)). The Committee can, at its own initiative or that of the Director, deal with general issues under the competence of the CPO and shall submit its standpoints to the Director (Article 16(4)).
The following table records the number of decisions and open cases handled by the CPO since 2000:

	2000	**2001**	**2002**	**2003**	**2004**	**2005**[159]	**Total**
Decisions	52	49	54	57	68	54	334
Open Cases	43	62	56	71	60	——	

Source: The Slovenian Competition Protection Office (2006)

Substantive Provisions of the Competition Law

[156] The text of the statute is available at: http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOmK__neuradno_precisceno_besedilo__-_ang.pdf (last accessed: 3 August 2006).
[157] The Office has an English website which contains limited general information and activity reports by the OPC. The website is available at: http://www.uvk.gov.si/index.php?id=1438&L=1.
[158] Council Regulation 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, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf (last accessed: 20 July 2006).
[159] This table records decisions rendered before the 5th of December, 2005. The complete overview is accessible on: http://www.gov.si/uvk/index_eng.php.

Anti-competitive Agreements

Article 3 provides that the provisions on the agreement between undertakings shall also apply to decisions by associations of undertakings and to concerted practices, unless otherwise stated. Part II covers the restriction of competition by agreements. It contains a prohibition of agreements which have as their object or effect the prevention, restriction or distortion of competition (Article 5(1)). The agreements include in particular agreements:

- fixing purchase or selling prices or other trading conditions;
- limiting or controlling production, markets, technical development or investments;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to the other parties' acceptance of supplementary obligations that have no connection with the subject of their contracts; and
- sharing market or other sources of supply.

The Act states that these agreements shall be null and void. In Article 5(3) an exemption is provided. This exemption is based on Article 81(3) EC; it includes a requirement that consumers be allowed a fair share of the resulting benefits of an agreement. As the prohibition of Article 5(1) is also based on Article 81(1) EC, European competition rules have a lasting influence on the interpretation of these provisions.

The Act contains a *de minimis* exemption, which excludes agreements between undertakings where the aggregate market share of the undertakings does not exceed 10 per cent in case of undertakings operating at the same level of production and trade or 15 per cent where the undertakings operate at different levels of production or trade (Article 6(2)). In Article 6 paragraphs 3 and 4 there are some exceptions to the *de minimis* rule: it does not apply to horizontal agreements that aim to fix prices or restrict production or sales or share markets or sources of supply, or to vertical agreements that aim to fix retail prices or grant territorial protection to the participating undertakings or to third persons.

It used to be possible to apply for an individual exemption or a negative clearance (i.e. a ruling that Article 5 has not been violated), but these procedures have been abolished to bring the Act in line with the European rules. However, the PRCA provides for the possibility of adopting block exemptions. These exemptions must be adopted by the Government and must be incorporated in a decree (Article 9). Article 9 also lists several categories of contracts which shall be regulated by a block exemption. The CPO can remove the benefit of the block exemption for particular agreements (Article 9(5)). Block exemptions cannot cover hard-core restrictions of competition.

Abuse of Dominance

The Part III of the Act deals with the second substantive provision. It contains a prohibition on the abuse of a dominant position. For the definition of a dominant position the Act does not rely on the European competition rules, but instead formulates its own rules. It states that a dominant position exists when the undertaking has no competitors, the existing competition is insignificant, or it has a substantially better position *vis-à-vis* its competitors (Article 9(2)). There is a presumption of dominance when the market share in the Republic of Slovenia exceeds the 40 per cent threshold (Article 9(3). Although 'an abuse' of dominance is not defined in the Act, the following practices are illustrative of prohibited behaviour:

- directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- unjustifiably increasing or reducing prices;

- limiting production, markets, or technical development;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of their contracts.

Mergers

The last substantive part of the PRCA deals with the control of concentrations (Part IV). This prohibits a concentration when it strengthens the power of one or more undertakings, as a result of which effective competition on the relevant market would be significantly impeded or excluded (Article 11(1)). This is similar to the test contained in the old European Merger Regulation and therefore the European case law exercises a significant influence on the interpretation on this provision. A concentration includes mergers, acquisitions and full-function joint ventures (Article 11(2)). The Act contains some thresholds above which the parties are required to notify the transaction to the CPO (Article 12(1)). The participants must notify a concentration to the Office within one week of the conclusion or announcement of the transaction (Article 12(2)). The Office is required to investigate the concentration and must take into account the competition parameters, the most important of which are listed in the Act (Article 13 (1)). The CPO can prohibit the merger or approve it, possibly with conditions attached (Article 13(2)). The concentration must not be put into effect before the Office has had the chance to investigate the merger (Article 13(3)). The Office can issue a decision that the concentration is incompatible or compatible with the competition rules (Article 41 (1) and (3)). When it declares a concentration compatible with the competition rules it can attach conditions and obligations (Article 41(2)).

Sanctions and Enforcement

In exercising its supervision of the Act the CPO can request reports and information on all relevant issues (Article 17(2)). Proceedings before the Office are initiated with an order on the commencement of procedure. This can be done at its own initiative or at the request of a party (Article 21). A party can submit an application, which must demonstrate its legal interest, from which a probability arises that the provisions of the PRCA have been violated. If these requirements have not been satisfied the Office can issue an order to dismiss the application (Article 23(2)).

After the order on the commencement of procedure is publicised according to Article 25, any natural or legal person that shows a legal interest can apply for participation in the procedure within 30 days of the publication (Article 26). Articles 27 to 31 contain information on the investigative actions the CPO can take and the procedure regarding these actions. It also gives a sanction for the failure to cooperate (Article 30). If there is an investigation concerning Articles 81 or 82 EC the parties may propose commitments which eliminate the alleged violation (Article 33a). The Office will issue a decision if all the elements of the alleged violated are fulfilled (Article 34).

For a violation, by a legal entity, of Articles 5 (anti-competitive agreements) and 10 (abuse of dominance) the minimum fine is 125,000 Euro and the maximum fine is 375,000 (Article 52(1)). A single entrepreneur who commits one of these violations is fined between 42,000 Euro and 210,000 Euro (Article 52(2)). An individual of the legal entity who is responsible for committing the violation is fined between 4,200 and 12,600 Euro (Article 52(3). A fine of between 2,000 and 6,300 Euro (Article 52(4)) may be imposed on a responsible person of the sole entrepreneur

who has violated the provisions of the Act. The Act contains a limitation period of two years (Article 55).[160]

Legal Protection

Judicial protection against a decision is ensured via administrative proceedings (*upravnem sporu*) (Article 42). This appeal will not stay execution (Article 43(2)). An appeal can also be filed against an order on investigative actions. If this is done the Office must not issue a decision before the appeal has been decided (Article 43(3)). The person who has suffered damage from an action prohibited by the Act may claim compensation in accordance with the law of obligation rules (Article 44).

Consumer Organisations and their Influence in Competition Cases

Consumer organisations have limited options to exercise influence on the decision-making process of the Office. Class actions or other collective actions for example are not available to consumer organisations in Slovenia. Consumer bodies can, however, submit an application to the CPO provided two conditions are fulfilled: (i) the party must demonstrate 'its legal interest for carrying out the procedure'; and (ii) it is probable—'a probability arises'—that the provisions of the PRCA have been violated: Article 23(2). After the Office has published an order on the commencement of procedure a consumer organisation can apply for participation in the procedure within 30 days of the publication if it can show a legal interest (Article 26). According to our Slovenian partner, this requirement to prove a 'legal interest' in a case has been interpreted very strictly. Further, due to an amendment of the PRCA the term is more restrictive nowadays than it was before.

Joint actions are however possible. In other words, it is possible for several plaintiffs to file a complaint jointly or for a plaintiff (or more) to file a complaint against several defendants.[161] Claims may also be joined by the judge.

Our Slovenian partner has stated however that public and media pressure may result in the CPO starting an investigation, especially in those cases where damage to consumers is particularly high. In fact, our Slovenian partner has done so quite successfully (e.g. concerning bank commissions for cash withdrawals).

There is one particular procedure under Slovenian law which allows for consumer organisations to act on behalf of consumers. Article 74 of the Consumer Protection Act enables consumer organisations to have various illegal contractual terms declared null and void, including those which breach the competition law rules.

Important Competition Concerns in Slovenia

The principal 'competition problem' in Slovenia relates to unclear priorities concerning the objectives of competition policy, i.e. whether the competition laws should be used to protect the 'national interest' or 'competition on the market'.

Although constant lip service is paid to the ideal of competition on the Slovenian markets by all the relevant actors, the actual practice has often been quite different. Since independence, economic policy has focused on preventing the national companies from being bought off by

[160] See also the US Department of State 2006 Investment Climate Statement on Slovenia, available at: http://www.state.gov/e/eb/ifd/2006/62033.htm (last accessed: 4 August 2006).
[161] Article 300 of the Civil Procedure Act ('*Zakon o pravdnem postopku'*). See also: See: *The Ashurst Report: Slovenia*, 2004, available online at the following website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html, at p.4.

foreign investors in order to protect the 'national interest'. Recently theories have been presented claiming that long-term economic growth and stability largely depend on the control of national companies by national owners. The arguments on 'national champions' presented by president Chirac and Chancellor Schroeder in 2005 have found many followers in the Slovenian Government, which is attempting to keep a '25% + x' share in key industries, while assuring that the majority of the capital remains in hands of national owners. Of course, what constitutes a 'key industry' is a matter for debate—indeed, almost every industry in the economy can be proclaimed to be a 'key' industry.

A further concern relating to the implementation of the competition laws is the Government's willingness to tolerate a lack of domestic competition in the form of monopolies and high market concentrations in many sectors of the economy.

Further, many apparent breaches of competition rules never appear at the Competition Protection Office. For our Slovenian partner, the protection of competition on the market is only a secondary objective in Slovenia. Consumers' concerns are regularly subordinated to the interests of national industrial groups. Competition policy is not yet understood as a subset of consumer protection policy but rather as a policy of protection of job providers and producers from competition of 'unfriendly' external competitors.

Some recent cases highlight the priorities of the CPO in competition matters as well as their hesitancy when it comes to launching investigations:

Commissions for cash-withdrawal on ATM-machines (2006)

The Competition Protection Office started an investigation on 17 May 2006 concerning alleged breaches of the competition rules by the five largest Slovenian banks. These banks had introduced a commission for cash-withdrawal on ATM machines for consumers who use ATM-machines of other banks. The investigation was initiated as a result of suspicions arising from the fact that all the banks introduced the commissions for the same amount (0.33 Euro) on the same day (20 February 2006), as well as in the same amount. Although the decision to kick off an investigation is well founded, it is worrisome that the CPO took three months to start it. It is also possible that this decision was only made because of the pressure placed on the CPO by the public following an intensive campaign against the tariff policy of the banks, which was organized by the Slovene Consumers Organization.

Mercator/Era (2006)

Mercator, the largest Slovenian retailer of foodstuffs, has taken over a smaller chain, Era, and by this increased its market share to 44%. The CPO procedure was initiated because of a complaint by other retailers. These retailers claimed that the transaction was an anticompetitive horizontal merger contrary to the merger control rules. On 3 May 2006, CPO decided that the market concentration did not violate these rules. The CPO was widely criticised because of this case: it was accused of regularly allowing the further strengthening of national companies' market position.

'Bankredit' (2005)

The CPO began an investigation on the 17 May 2005 against the Slovene Banking Association (SBA) because of their suspicions that the SBA had violated Article 5(1) of the PRCA. On 9 March 2005, the SBA had advised its members to cancel their contracts relating to standing orders with their banks in the retail sector as a means of payment in supermarkets, in order to replace it with a new consumer credit product ('Bankredit') which is more profitable for the banks. The problem here is again the amount of time (one year) that passed between the alleged anticompetitive act and the decision of the CPO to start an investigation.

Internet service providers (2004)

Medinet accused Telekom Slovenija, the state company owning the ADSL-net, of discriminating between internet services providers which compete with its subsidiary company, SIOL. The CPO held that the discrimination amounted to an abuse of a dominant position on the relevant market.

Laško Brewery/Union Brewery (2003)

In 2003 Laško Brewery won an acquisition battle against the Belgian company Interbrew for ownership of Union Brewery. The CPO decided that competition was not endangered because of the merger; the openness of the Slovenian market and the outsourcing of the company parts that produce nonalcoholic beverages led the CPO to this conclusion. As a result of this case an intense discussion started on the necessity of national champions in Slovenia, referred to as 'the war of breweries' by the media.[162]

Competition Concerns In the Product Markets Chosen by the Partners

There have been no formal investigations by the CPO of any of the markets chosen by the partners. According to our Slovenian partner, however, competition concerns do exist in relation to some of these markets.

Petrol: Petrol prices in Slovenia are controlled by the Government and are kept at an artificially low level due to inflation control connected with the introduction of the Euro. An overwhelming share of the market belongs to the state-owned retailer and distributor, Petrol (68% in retailing for example). The Government hasn't shown any intention of providing for more competition in this sector in the future and has systematically hindered foreign competitors from entering the market. As the profit margin for retailers is also fixed, any increase in the wholesale price of petrol is transferred directly into the retailing price. Although the profit margin is quite low—7 cents, which is about 70% of the EU average—one could expect that stronger competition would force the retailers to lower the margin and diminish the effect on the Slovenian retail market of price movements in petrol on the global market. Allowing for more competition in petrol retailing may increase prices in the short term; however, long-term price development would be more positive for the consumers after abandoning the administrative price controls (as these price controls make monopolistic pricing of the dominant company possible).

Printer-ink: No competition problems were brought to the attention of our Slovenian partner in this area.

Paracetamol: Competition in relation to paracetamol is restricted in Slovenia. This is true for two main reasons: (i) paracetamol can only be sold in pharmacies; and (ii) the Chamber of Pharmacy[163] determines the prices to be charged for this product. The Slovene Parliament has recently passed a law allowing for over the counter drugs to also be sold in specialised stores. This law would increase the number of outlets that would be able to sell these drugs. The National Agency for Drugs has not yet finalised the list of over the counter (OTC) drugs to be included in this new regime. Our Slovenian partner is thus not yet sure whether paracetamol will

[162] See: Nicole Lindstrom and Dóra Piroska (2004), 'The Politics of Europeanization in Europe's Southeastern Periphery: Slovenian Banks and Breweries on S(c)ale', Queen's Papers on Europeanization No 4/2004, at pp 14-16.

[163] The Slovenian Chamber of Pharmacy is an independent organisation in which all public and hospital pharmacies in Slovenia are members. It was founded on 11 November 1992 by the Law on Pharmaceutical Activity with the objective of protecting professional reputation, assuring professionalism and safeguarding the commercial interests of members.

be included in this list. In any case, it is hoped that the new governmental measure will introduce an element of competition into the OTC drugs market. Besides fixing prices, the Chamber of Pharmacy is also very secretive about any data on paracetamol retailing and pharmacies' market shares. Consequently, few concrete conclusions can be reached concerning this market.

Downloadable music: No competition concerns were brought to the attention of our Slovenian partner concerning this market. Currently no data exists concerning: (i) where Slovenian consumers obtain downloadable music; and (ii) the actual level of illegal downloading in this sector of the music business.

Perceptions Revealed in the Legislative Survey

The Media

Slovenia's leading financial newspaper has covered the activities of the competition authority in 813 articles since 3 November 2001. Delo, the most read general Slovenian newspaper, has published 679 articles on this topic since the beginning of 2002, while Mladina, a popular weekly magazine, has produced 28 articles since June 2003. Radio and television coverage have been comparatively intense.

The media in Slovenia is increasingly reporting on competition problems and criticising the lack of autonomy and ineffectiveness of the CPO. For example: the Government has been harshly criticised for apparently serving the interests of national industrial groups at the expense of the consumer and taxpayer. It has been criticised for allowing breaches of domestic competition law rules by large, mostly state-owned, telecommunications, energy and retailing groups. In the last year the media has been intensively covering oligopolistic behaviour of the two largest (state-owned) banks after the transaction fees and personal banking costs have risen up to 100% without any cost-based justification. Our Slovenian partner considers this to be a positive development.

That said, however, competition in the media sector itself has been recently decreasing radically because of the Slovenian Government's intervention in the print media and broadcasting sectors. This intervention is generally facilitated by the Government's large shareholding in various interests in these sectors. Consequently, the media tends to reflect the Government's position on national economic priorities.

According to our Slovenian partner the competition problems in the markets chosen by the partners were very poorly covered by the media—if indeed they were covered at all. This reflects the relatively poor understanding of both the public and the media of competition law and policy, especially how they affect key sectors such as energy and the drugs markets.

Awareness of the Substance/Importance of Competition Law

The general level of awareness of the importance of competition law issues is relatively poor. The main reasons put forward for this are: the general lack of knowledge in the field; insufficient experience of the CPO and the courts; lack of consumer awareness of rights; and the fact that politicians care more for protecting the interests of suppliers than consumer welfare. Although competition law is discussed in Slovenia, its actual importance is severely undervalued and is often manipulated. Two factors have perhaps undermined the importance of competition law for the public and have led to confusion in general about the benefits of a competition law: (i) the traditional Slovenian approach to manufacturing and agriculture (i.e. one involving high concentration); and (ii) an anti-foreigner prejudice concerning the privatisation of Slovenian businesses.

Companies on the other hand appear to be well informed on the substance of competition law rules. For example: the rules concerning notification of mergers to the CPO are on the whole followed by the undertakings concerned. The under-enforcement of the competition law rules by the CPO, whether through a lack of resources or a lack of political will, ensures however that companies will continue to attempt to violate the law.

The authorities themselves have not done anything to increase the awareness of competition issues, mainly because they themselves are not aware of their importance. By protecting competition-restricting companies, the authorities have actually obstructed the process of awareness raising.

Other Observations Contained in the Legislative Survey

(1) The protection of consumer welfare is not dealt with sufficiently in the Slovenian Prevention of Restriction of Competition Act, while no corresponding court judgments exist which could serve as precedents in this area.

(2) The main impediment to the protection of consumers' interests under the competition legislation is that class actions, or other collective actions, are not possible.

(3) Private enforcement of competition law can contribute to the protection of the consumer interest and should be encouraged. Measures put forward by the Slovenian partner for facilitating improved private enforcement of the competition law rules include:

- Improvements in the general awareness of competition issues;
- The establishment of a specialised competition court (or an exclusively competent court) in order to avoid court delays and provide for higher expertise; and
- The introduction of a more plaintiff-friendly manner of damage calculation (e.g. by taking into account the defendants profits).

(4) Proceedings would be faster (and therefore more appealing to potential plaintiffs) if the national courts used their powers to decide upon violations of national competition laws themselves instead of staying proceedings and ordering the plaintiffs to first initiate proceedings before the CPO, which then decides whether there was a violation to begin with.

(5) Obligatory merger control has ensured that the resources at the disposal of the CPO are not sufficient for effective enforcement of the competition law rules enforcement. Only 20% of the cases handled by the CPO are anti-trust cases, even though these cases, especially hardcore cartels may be the most egregious of competition law breaches.

Spain

Overview of the Spanish Competition Law[164]

The Spanish competition rules are contained in the Competition Act 16/1989 as amended (*Ley 16/1989, de Defensa de la Competencia*) (hereafter 'CA'). [165] This piece of legislation contains rules relating to anti-competitive agreements, abuse of a dominant position and merger control. These provisions are very similar in their scope and substance as the EC competition law rules.

The Institutional Framework

In Spain there are two competition enforcement bodies. The first one is the autonomous body called the Competition Court (*Del Tribunal de Defensa de la Competencia*) (hereafter 'CC' or 'Court'): Title II, Chapter I of the Act.[166] Its objective is to preserve the competitive functioning of the markets and to ensure effective competition (Article 20(2)). The CC is formed by one President and eight members who are appointed for a five year term by Royal Decree (Article 21(1) and (2)). The members and the President form the Plenary Session, which decides by absolute majority. In case of a tied vote of the chairing member decides (Article 24(2)).

The tasks of the Court are listed in Article 25. These include, among others:

- Exempting certain agreements from the operation of the rules on anti-competitive agreements: Article 3 (see below);
- Deciding cases based on Article 7;
- Applying Articles 81 and 82 EC; and
- Imposing sanctions on undertakings and individuals.

The other competition defence body is the Competition Service (*Del Servicio de Defensa de la Competencia*) (hereafter 'CS' or 'Service'), which is a part of the Ministry of Economy (see Title II, Chapter II of the Act).[167] The functions it carries out are listed in Article 31. The only 'decision making' powers it has is that it can decide not to forward a merger to the Court, thereby approving it (see Article 15b(2)). It can also decide not to act on a complaint (see Article 36(3)).

The following figures represent the number of completed competition law cases over the last number of years in Spain:

Year 2000:	86
Year 2001:	166
Year 2002:	199
Year 2003:	141
Year 2004:	112

[164] During the survey a draft bill was being drafted and came into force in September 2007. Please see annex IV for information on the changes.
[165] The English text is available at: http://www.dgdc.meh.es/legislacion/legislacion_16_89_(inglés)2.htm (last accessed: 24 August 2006).
[166] The Competition Court only has a Spanish website. If one reads a bit of Spanish one can find the legislation section and there some acts that are available in English. The website is available at: http://www.tdcompetencia.es/ (last accessed: 24 August 2006).
[167] The Service only has a Spanish website, but some legislation is available in English and the annual reports to the OECD are also available in English. The website is available at: http://www.dgdc.meh.es/ (last accessed: 24 August 2006).

Substantive Provisions of the Competition Law

Anti-competitive Agreements

Article 1(1) of the Act prohibits any agreement, decision, or concerted practice that has the effect of restricting (or makes it possible to restrict) competition in any part of the domestic market. The infringement could be limited to a small part of the country and does not need to cover a certain minimum area before it can be caught. If the agreement does not fall within one of the exemptions described below it is automatically void (Article 1(2)). The competition enforcement agencies may decide not to act against agreements that have an insignificant effect on competition (Article 1(3)).

Article 3(1) provides an exemption based on Article 81(3) EC and contains the same elements:

- The agreement must promote technical or economic progress or improve production or distribution;
- The agreement must create conditions for consumers to receive additional benefits;
- The agreement must not impose restrictions which are not indispensable to attain the objectives; and
- The agreements must not give the parties the possibility to restrict competition in a large part of the market.

Article 3(2) provides another possible exemption for agreements referred to in Article 1 if they are justified by the general economic situation and the public interest and if they:

- Aim to defend and promote exports, as long as they are compatible with the obligations resulting from the international agreements that have been ratified by Spain;
- Lead to a sufficiently important increase in the social and economic level in underprivileged areas or sectors; or
- Are relatively unimportant and unable to exert a significant effect on competition.

To benefit from both exemptions the parties will have to get authorisation from the Competition Court (Article 4(1)). The Court determines the date from which the agreement is valid and the period of time of exemption and it may impose modifications, conditions or obligations after consultation with the undertakings concerned (Article 4(2)). Article 5 allows the authorities to enact block exemptions for certain types of listed agreements.

Abuse of Dominance

In Article 6 the abusive exploitation by one or more undertakings is prohibited. This can be the abuse of a dominant position or the abuse of a situation of economic dependence (subparagraphs a) and b) of Article 6). The Act provides that this shall also apply where the dominant position is established by a legal provision (Article 6(3)). Acts of unfair competition are prohibited if they seriously distort the competitive conditions in the market and affect the public interest (Article 7(1)).

Mergers

Chapter II of the CA deals with the control of economic concentrations.[168] Article 14(1) gives some market share and turnover thresholds that have to be met before the provisions are applicable. The provisions are applicable to mergers, acquisitions, and full-function joint ventures (i.e. joint ventures that perform on a lasting basis the functions of an independent economic entity and that do not have the objection to coordinate the behaviour of other undertakings): Article 14(2).[169] When a concentration satisfies these criteria it must be notified to the Competition Service before it is implemented. It may not be implemented before clearance is given (Article 15(1)).

The Minister of Economy may, upon request from the CS, forward a notified transaction that may hinder the maintenance of effective competition to the Competition Court to issue its judgment on the matter (Article 15b(1)).[170] The Competition Service must forward the notification within one month or it is deemed to have cleared the concentration (Article 15b(2)). The CC must decide within two months on the notification (Article 16(1)). After the Court has decided it shall forward its decision to the Minister of Economy. This Minister shall bring the decision before the Government who has one month to prohibit or clear the merger (possibly with conditions or obligations attached): Article 17(1).

Sanctions and Enforcement

A procedure is initiated by the Service on its own initiative or at the request of an interested party (Article 36(1)). If there are no indications of an infringement it will shelve the file (Article 36(3)). Before initiating the sanction proceedings the Competition Service may decide to gather more information (Article 36(3)). If the CS decides to start an investigation it appoints an Instructor (and sometimes also a Secretary) of which the interested parties will be informed (Article 36(4)). The Service must inform the Court of these proceedings (Article 36(7)).

If the Services considers that the Act is violated it will notify a writ of findings to the parties; the parties have fifteen days to respond to these allegations (Article 37(1)). The CS will then submit the case to the Competition Court (Article 37(3)). The Service also does the preparatory work in case of a request for authorisation of an agreement (Article 38). Once the proceedings have been submitted to the Court it will decide if all the relevant information is supplied and will order the Service to conduct necessary inquiries if not all of relevant information has been provided (Article 39). After concluding the proceedings the Court will give a Resolution within twenty days, which signifies the end of the administrative proceedings (Article 43(2) and (3)).

Fines of up to 10 per cent of the turnover may be imposed on those persons that deliberately or through negligence breach the terms of Articles 1, 6, or 7, or failed to comply with a condition or obligation imposed in the approval of a merger (Article 10(1)). When determining the amount of the sanction the following factors may be taken into account:

- The type and scope of the restriction of competition;
- The dimension of the market affected;
- The market share of the corresponding undertaking;
- The effect on actual and potential competitors, consumers and users; and
- The duration of the restriction.

[168] There is a Royal Decree that gives more details on the procedure than the Act. This Decree is available in English at: http://www.dgdc.meh.es/legislacion/Legislacion_RD_1443_(inglés).htm (last accessed: 24 August 2006).
[169] This list is not exhaustive; see *Spain - Global Competition Law Review*, available at: http://www.globalcompetitionreview.com/ear/47_spain.cfm (last accessed: 25 August 2006).
[170] *Ibid*

Legal representatives or members of the management bodies that have intervened in the agreements or decision may be fined up to € 30.050,61. Members who did not attend the meetings or who withheld their votes are excluded from these sanctions (Article 10(3)). The Act also provides for time limits after which the offence cannot be prosecuted or after which the sanction can not longer be enforced. There is a general time limit of four years, which is interrupted by a formal notice from the Competition Court or Competition Service (Article 12). There is also the possibility of requesting compensation for damages by injured parties (Article 13).

Legal Protection

Direct or indirect decisions of the Competition Service, such as those not to initiate proceedings or not to forward the concentration to the CC, may be appealed before the Competition Court within ten days if they cause irreparable damage to legitimate interests or rights (Article 47).[171] Merger decisions by the Council of Ministers may be appealed before the Supreme Court (*Tribunal Supremo*).[172] The Resolutions of the Court are not subject to any administrative appeal; they may be appealed before the civil courts (Article 49).

Injured parties may also sue for damages in the courts (Article 13). The competent courts to hear these cases are the civil courts. The judgments of these courts can be appealed, in last instance, before the civil section of the Supreme Court.[173]

Consumer Organisations and their Influence in Competition Cases

Consumer associations are entitled to bring actions to protect the rights and interests of their members and of the association itself (Article 11(1) of the Law on Civil Procedure). Articles 11(2) and (3) of this Law give other possible actions for consumer organizations (see Annex III for more information on these actions). However, these Articles are only available for the protection of the rights of consumers and end-users who, for example, have suffered loss as a result of anti-competitive behaviour.[174] Under the Law on Civil Procedure any award is made in respect of an individual claimant. Therefore, each applicant must apply to the Court to be recognized as a member of the group and must quantify its damages.[175]

Our Spanish partner does not take up complaints on behalf of customers. This is because it is an organization that is dedicated to education, documentation and consultation, rather than because of a lack of ability or willingness.

Important Competition Concerns in Spain

The following represent the main competition law cases in Spain in the last number of years which have had a direct impact on consumer welfare:

Complaint by the Spanish Federation of Food and Drink Industries (FIAB) against the commercial entities Alcampo S.A., Group Carrefour, Group El Corte Inglés and Mercadona S.A.

[171] Declaring contract against the CA null and void may be done by persons who are not harmed by the agreement. See *Ashurst Report – Spain*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/spain_en.pdf (last accessed: 25 August 2006).
[172] *Spain - Global Competition Law Review*, available at: http://www.globalcompetitionreview.com/ear/47_spain.cfm (last accessed: 25 August 2006).
[173] Although the actions for damages based on EC competition law are heard by the Mercantile Court (*Juzgados de lo Mercantil)*. See *Ashurst Report – Spain*, *op. cit.*
[174] *Ashurst Report – Spain*, *op. cit.*
[175] *Ibid.*

This case concerns an agreement between the above companies to impose on their suppliers a uniform safety system by means of anti-robbery labels for all those products that justify it due to their size, cost, strategic value and importance. The agreement signed by the four distribution companies was prohibited by Article 1(1) CA, as the inter-company understanding involved the coordination and fixing of commercial conditions, i.e. the imposition of a uniform safety system to the suppliers by means of anti-robbery labels for particular products. The Competition Court fined the entities Alcampo S.A., Group Carrefour, Group el Corte Inglés and Mercadona S.A. 75.000 EUR each and informed the fined companies that they should abstain from such conduct in the future.

Action against Sanofi-Winthrop S.A., Laboratorios Leti S.A., Instituto Berna de España S.A., Evans Medical de España S.A., Rhône Poulenc-Rorer S.A., Laboratorios Nezel S.A. and Instituto Llorente S.A.

The above companies were found guilty of violating the anti-competitive provisions of the Competition Act in that they fixed the prices of flu vaccines supplied to the Andalusian Health Service. Fines of different amounts have been imposed; the convicted companies have been ordered to stop this type of prohibited conduct and to abstain from such conduct in the future.

Driving Schools

A restrictive competition practice, prohibited by Article 1 of the Law 16/1989 of 17th July, consisting of carrying out an agreed practice or a consciously parallel conduct to fix prices in order to obtain the driving licence B was found by the Spanish competition authorities to have existed between the following driving schools operating in the cities of the Province of Badajoz: Ambar, Autopista, Badajoz, Dario, Guadiana, Nasa, Noca and Siglo XXI; and in the Province of Mérida: San José, Emérita, Proserpina, Atenea and Mérida. Each of them fined 6.000 EUR and the Provincial Association of Driving Schools of Badajoz was fined 60.000 EUR as the author of the prohibited conducts of price agreements.

Group Gas Natural

It has been declared by the Spanish competition authorities that the Group Gas Natural has committed a practice prohibited by the Article 6 of the Law for Competition Defence and by the Article 82 of the Treaty on European Union; it obstructed, by contract, the access of third-party to the capacity of re-gasification, an essential facility for the gas supply on the Spanish market. The parent company and the head of the Group Gas Natural, Gas Natural SDG, was fined 8 million Euro.

Case against Sociedad Estatal De Correos Y Telégrafos, SA

This case arose out of a complaint by the Association of Professional Press against against Sociedad Estatal De Correos Y Telégrafos, SA alleging violation of Articles 1, 6 and 7 of the Competition Act. Sociedad Estatal De Correos Y Telégrafos, SA was found to have exploited its dominant position by imposing exploitative, excessive prices and by operating a discriminatory policy towards the editors of periodical publications. The According to the Association of Professional Press, these practices have been carried out by the post office because they hold a share ‘in the postal distribution market of periodical publications, in no case inferior to the qualifiable 85%, consequently, and without any doubt as power position, especially in face of the non-existence of an equivalent postal operator that could be an authentic alternative’. The post office was ordered to abstain from carrying out these types of practices in the future and was fined 900,000 Euros.

Competition Concerns In the Product Markets Chosen by the Partners

Petrol: There have been two competition law cases of importance in relation to petrol in Spain.

In 2001, the Competition Court adopted a resolution in which it: (i) declared that Repsol SA had committed a practice prohibited by Article 1(1) of the Competition Act when it fixed the customer sales prices of fuel to the suppliers which act under a supposed system of commission or agency; (ii) ordered Repsol SA to stop fixing prices with service stations to which they are linked due to a contract with similar characteristics; and (iii) fined Repsol SA 500 millions Pesetas (3.005.060,52 Euro) because of its anti-competitive practices. Repsol S.A. lodged a judicial-administrative appeal against this resolution. In April 2006, the Competition Court decided to execute the decision of the resolution of 2001 and fine Repsol S.A. 3.000 EUR per each day of delay.

November 2004 saw the rejection of the appeal lodged by Disared de Servicios Petrolíferos, S.A. (oil-bearing services) against the resolution of the Court of Competition Defence of 31st May 2002 (legal proceedings no. 520/01, Disared). The conduct declared contrary to Article 1(1) of the Competition Act and to Article 81(1) EC consisted of including in contracts the following clauses not allowed by Regulation 1984/83 nor by Real Decree 157/92: those elating to excessive duration of the contracts; exclusivity of lubricant sales; fixing of resale prices; allowing Disa to inspect service stations; and the prohibition of industrial activities not allowed by Disa.

According to our Spanish partner, there is competition in this market. Since 1998, petrol prices in Spain are no longer regulated, but the reality is that the liberalisation of the petrol market has had poor success, as in Spain, three labels (Repsol YPF, Cepsa and BP) have the biggest market shares. In fact, some of them, like Repsol YPF and Cepsa, have been fined by the Court of Competition Defence because they have fixed prices. The productive and distributive capacity of the big oil companies are decisive elements for final petrol prices. The reality is that the big companies fix prices and all other petrol stations follow them. Furthermore, the petrol stations of the big companies in most cases are self-service stations and obtain more profit because they do not recruit staff. The autonomous taxes and the closeness of the refineries are, among others, factors affecting the final price.

Printer-ink: No competition concerns were brought to the attention of our Spanish partner concerning this market. According to our Spanish partners, there is real competition in this market. There are many labels and second labels, with significant differences in prices. There are also several labels in the shopping centres, especially white labels.

Paracetamol: No competition concerns were brought to the attention of our Spanish partner concerning this market. According to our Spanish partners, there is no real competition in this market. Paracetamol is a product that can be purchased without prescription, but only in pharmacies.

Downloadable music: No competition concerns were brought to the attention of our Spanish partner concerning this market. There are only few Spanish sites from which to download music legally. In Spain, most sites to download music are international ones. There are also intermediate options like those offered by some shopping centres in their music stores where the user can consult a catalogue (usually at the internet corner), choose the songs and take a CD recorded with the selected songs. The anti-pirating plan of the Government and the General Society of Authors and Editors (SGAE) is failing, as, in the year 2006, already more than 500 millions illegal downloads could be registered. In Spain, songs from an original CD bought by the user can be copied legally for private use. The concept of private copies is not clearly defined, so that it is supposed that supplying them to family or friends or storing them on the computer to be exchanged with other users via peer-to-peer programmes is not allowed. But these types of programmes also allow one to download without sharing anything that which is not expressly prohibited by the law. Although for the record industry, the exchange of files via the Internet is illegal, judges have acquitted internet users because they think that this is not an

offence. They think that this practice is not an offence if there is no profit and if it is protected by the right of private copy.

Perceptions Revealed in the Legislative Survey

The Media

According to our Spanish partner most competition law issues, at least those that directly affect consumers, are usually covered by all media and are largely dealt with in a comprehensive manner. Usually the companies involved, the reason behind the decision/judgment and the imposed sanctions are set out. In the above mentioned cases, the media has covered the cases of the Spanish Federation of Food and Drink Industries and of the Driving Schools in more depth than the case of the Press Association against the Post Office; obviously the former cases were more interesting for the citizens because they affected them more directly. The petrol issue detailed above has also been largely treated and discussed by all types of media in Spain.

Awareness of the Substance/Importance of Competition Law

Our Spanish partner would rate the general level of awareness of the importance of competition law issues in Spain as 'very good'. Consumers pay more attention to competition law issues that relate to products or services that they use. The general level of awareness of the substance of competition law rules by contrast is not very good. In general, when competition law cases are discussed it is not very common that the legal provisions in question are detailed.

Our Spanish partner is not aware of any specific governmental campaigns to educate either the Spanish business community or consumers in general on competition law issues. The Court of Competition Defence however does issue reports and resolutions that are available t all companies and consumers. When these reports and resolutions deal with subjects of general interest, they are published in the mass media.

ANNEXE I

LIST OF PARTNERS

COUNTRY	ORGANISATION
CYPRUS	CYPRUS CONSUMER ORGANISATION
CZECH REPUBLIC	SOS CONSUMERS DEFENCE ASSOCIATION OF THE CZECH REPUBLIC
DENMARK	DANISH CONSUMER COUNCIL
FRANCE	CONSOMMATION (CLCV)
GERMANY	FEDERATION OF GERMAN CONSUMER ORGANISATIONS (VZVB)
GREECE	INKA (GENERAL CONSUMERS FED. OF GREECE)
ITALY	REGIONAL TECHNICAL CENTRE FOR RESEARCH ON EUROPEAN CONSUMPTION (CTRRCE)
LITHUANIA	LITHUANIAN NATIONAL CONSUMERS FEDERATION
MALTA	CONSUMERS' ASSOCIATION OF MALTA
NETHERLANDS	CONSUMENTUMBOND (CONSUMERS ASSOCIATION OF HOLLAND)
POLAND	ASSOCIATION OF POLISH CONSUMERS (ACP)
PORTUGAL	PORTUGUESE ASSOCIATION FOR CONSUMER PROTECTION (DECO)
SLOVENIA	SLOVENE CONSUMERS ASSOCIATION (ZPS)
SPAIN	MAG CONSUMERS STUDIES CENTRE

LEGISLATIVE SURVEY PART I

1. What is the name of your government's competition act and when was it last amended?

2. Which body/bodies are given the authority to supervise and make decisions based on the competition legislation in force?

3. Is there specific mention of consumer interests in your national competition legislation?
   3a. If so, please describe it.

4. Does your government have a separate agency for consumer protection?
   4a. If yes, what is its name and when was it established?

5. Are there any provisions in your national competition law that are stricter that those proscribed under EC law?

6. How many competition cases has your competition authority brought since 2000?
   6a. What are the major cases and their outcomes?

7. Were these cases publicized in the media, e.g. general or specialist newspapers and magazines, television and radio? Please provide examples if possible.

8. Does the media ever cover competition issues?

9. Does the Competition Act include merger control?
   9a. If so, what thresholds are involved?
   - Market value?
   - Market share?

10. Please list any major merger investigations since 2000 and their outcomes to date.

LEGISLATIVE SURVEY PART II

General

1. What particular 'competition problems' were brought to your attention over the last year?[176] Please be as detailed in your answer as possible. If explaining cases, please give a short abstract of the relevant legal issues, the judgment and the reasoning behind it, if possible. (Please note Question 7 below before answering.)

2. Were these particular 'competition problems' covered by the media in your jurisdiction? If so, how were they dealt with? (i.e. how comprehensive was the media's treatment of the competition law issues?) Was the issue considered by the media to be an important element in the public debate on competition policy? If so, why? If not, why not?

3. How would you rate the general level of awareness of the *importance* of competition law issues in your jurisdiction (e.g. very good, good…non-existent)? Please elaborate.

[176] **Note: By 'competition problem' in this questionnaire we not only mean formal (competition law) cases, but also any other important problems/concerns regarding allegations of anticompetitive business that have come to your attention involving competition law/policy. These concerns could be raised by for example industry newsletters, consumer groups, the media in general etc.

4. How would you rate the general level of awareness of the *substance* of competition law rules in your jurisdiction (e.g. very good, good…non-existent)? Please elaborate.

5. Have the authorities in your jurisdiction tried to improve understanding and awareness of competition law issues among the *business community*? If so, how?

6. Have the authorities in your jurisdiction tried to improve understanding and awareness of competition law issues among *consumers in general*? If so, how?

Sector Specific

7. What particular 'competition problems' were brought to your attention over the last year (or more) concerning the particular *product markets chosen by the partners*, i.e. petrol, printer-ink, paracetamol, downloadable music…etc.? Please be as detailed in your answer as possible. If explaining cases, please give a short abstract (no longer than one paragraph) of the relevant legal issues, the judgment and the reasoning behind it, if possible.

8. Were the 'competition problems' mentioned in Question 7 above covered by the media in your jurisdiction? If so, how were they dealt with? (I.e. how comprehensive was the media's treatment of the competition law issues?) Was the issue considered by the media to be an important element in the public debate on competition policy? If so, why? If not, why not?

Legal Procedures and Substance

9. Do you or any other consumer organisation bring (competition) complaints before a court or a competition authority on behalf of consumers?

10. If so, what were the most important cases that you brought in the last 1-2 years?

11. If not, why not? Please be as detailed as possible. (Possible reasons include: no legal recourse, scarce resources, lack of information on anticompetitive practices…)

12. Are 'class actions' possible in your jurisdiction?[177]

13. If so, is the class action procedure an 'opting in' or an 'opting out' procedure?[178]

14. If so, what conditions need to be fulfilled in order to bring a class action?

15. Is it possible for consumer organisations to be involved in cases that have come before the courts, for example through the use of *amicus curiae*[179] briefs? If so, what particular

[177] A class action lawsuit is a lawsuit in which a person or business acting as the plaintiff in a lawsuit represents a larger group of people that have similar legal claims against a particular defendant or group of defendants.

[178] Essentially an 'opt in' class action is one where the potential claimants must expressly elect to be a member of the class. If they do not they will not be able to recover any of the damages awarded to the class. They may however bring their own claim. An 'opt out' class action by contrast is one where all potential members of the class (i.e. those that meet the definition of a class member under the relevant law) are considered members unless they expressly opt out of the class. With an 'opt out' procedure potential members must be given an opportunity to opt out. The award to that class is binding on all potential members except those who have expressly opted out. Only those who have opted out of the class can bring their own claim against the defendant(s).

mechanisms are available to the consumer organisation? Please be as detailed as possible.

16. What substantive provisions of your competition law do you think are particularly useful in bringing complaints on behalf of consumers? Please elaborate.

17. What substantive provisions of your competition law do you think are *not* particularly useful in bringing complaints on behalf of consumers? Please elaborate.

18. What particular standard of harm is pursued by the competition authorities in your jurisdiction? For example: harm to the competitive process; a consumer harm standard; substantial lessening of competition; significant impediment to effective competition…etc.

[179] *Amicus curiae* is a legal Latin phrase, literally translated as 'friend of the court', that refers to a person or entity that is not a party to a case that volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it. The information may be a legal opinion in the form of a brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case. The decision whether to admit the information lies with the discretion of the court.

ANNEX II

POLAND (Updated information 2007) to reflect the new Act on Competition and Consumer Protection which came into force in April 2007.

Overview of the Polish Competition Law

The rules for the development and protection of competition are contained in the Act on Competition and Consumer Protection (*Ustawa o Ochronie Konkurencji i Konsumentów*) (hereafter 'ACCP') in Poland.139 This piece of legislation contains rules relating to anticompetitive agreements, abuse of dominance, and mergers. Rules on the protection of interests of consumers are also contained in the ACCP. As with other new Member States, the Polish competition law rules are highly influenced by EC competition law and policy.

The Institutional Framework

The institution that is charged with the protection of competition and consumers is the President of the Office for Competition and Consumer Protection (*Prezes Urzedu Ochrony Konkurencji i Konsumentów*) (hereafter 'the President of the OCCP' or 'the President of the Office'): Article 29(1)The Prime Minister appoints the President of the OCCP for a period of five years (Article 29 (3)). Upon a motion of the President of the Office the Prime Minister may appoint and dismiss Vice-Presidents of the Office (Article 30) .

Between 2000-2004 Poland has recorded over 2600 competition cases; these cases involve in particular agreements that restrict competition and abuses of a dominant position. Merger investigations have related to wide range of markets: the food industry; the chemicals industry; the media (press, cable TV); oil and energy industries; and many others.

Substantive Provisions of the Competition Law

Anti-competitive Agreements

Agreements that have as their object or effect the elimination, restriction or any other infringement of competition on the relevant market are prohibited by Article ~~5~~ 6. The term agreement includes concerted practices and resolutions of associations of undertakings (Article 4(5)). The relevant market is the market of products which are regarded as substitutes and are offered within an area in which the conditions of competition are sufficiently homogeneous (Article 4(9)). This Article is drafted to resemble Article 81 EC and therefore the caselaw interpreting that Article will provide guidance in interpreting Article ~~5~~ 6 of the ACCP. Agreements that fit this profile are, in their entirety or in the respective part, null and void unless an exemption applies (Article 6(2)).

The exemptions are contained in Articles 7 and 8. The former is a *de mininis* exception and excludes agreements from the scope of Article 6 if:

- The combined market share of the parties does not exceed 5% when the agreement is concluded between competitors; or
- The combined market share of the parties does not exceed 10% when the agreement is concluded between undertakings operating on different levels of the economic process.141

The second possibility of exemption is contained in Article 8; four conditions must be satisfied:

- The agreement must promote technical or economic progress or improve production or distribution;
- The agreement must ensure the buyer or user receive a fair share of the benefit;
- The agreement must not impose restrictions which are not indispensable to achieve the objectives; and
- The agreement must not afford the parties the possibility to eliminate competition in a substantial part of the relevant market.

If these conditions are fulfilled the Council of Ministers may adopt a regulation in which they exempt agreements which fulfil these conditions (i.e. the e Council may, in certain circumstances, adopt block-exemptions).

Abuse of a Dominance
The ACCP also contains a prohibition of the abuse of a dominant position on a relevant market 9(1)). Article 4(9) defines a dominant position as a position that allows the company to prevent efficient competition on the relevant market and thus enables it to act to a significant degree independently of other economic operators or consumers. This definition is similar to that defined by the Community Courts under Article 82 EC and therefore this caselaw will provide useful guidance on the interpretation of this term. Article 4(9) also gives a presumption that a dominant position exists if the firm holds a market share of 40 per cent or more. Legal actions, which constitute an abuse, are null and void (Article 9(3)).

The abuse of a dominant position may, in particular, consist in:
(i) direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low, significantly delayed payment terms or other conditions of purchase or sale of products;
(ii) limiting production, supply or technical development to the detriment of contractors or consumers;
(iii) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition;
(iv) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of agreement;
(v) counteracting formation of conditions necessary for emergence or development of the competition;
(vi) imposition by the entrepreneur of onerous contract conditions, yielding to this entrepreneur unjustified profits;
(vii) creating for consumers onerous conditions of redress; or
(viii) division of market according to territorial, product, or entity-related criteria.

Mergers
Article 13(1) of the Act states that an intention to merge has to be notified to the President of the Office if the combined turnover of the parties exceeds € 50 million. This notification requirement applies to mergers, acquisitions and the creation of joint ventures (Article 13(2)), and also to those particular cases listed in Article 14 142 If the concentration does not result in the restriction of competition on the market, in particular by way of the creation or strengthening of a dominant position, the President of the Office may allow the undertaking(s) to complete the transaction (Article 18). The President may attach obligations to this approval (Article 19). The President must reach a decision within two months (Article 96(1)).

Sanctions and Enforcement
The proceedings before the President of the Office shall be conducted as explanatory investigations aimed at determining initially if an infringement of the Act has occurred (Articles 47(1) and 48(1)). They may be initiated on the President's own initiative and shall be opened and concluded by way of a decision (Articles 42(1(and (3)). The President and the employees of the Office have a number of investigatory powers, which are described in Articles 60 to 69.

The President of the Office can issue a decision finding a practice is a violation of Articles 6 or 9 and is not exempted pursuant to Articles 6 or 7 (Article 10). If it is plausible that a violation of Article 8 has taken place and the party agrees to take actions aimed at ending and preventing those infringement the President of the Office can issue a decision imposing the obligation to exercise the undertaken commitments (Article 11(1)).

If there are no reasons for continuing the investigation the President of the Office shall terminate the proceedings by way of a decision (Articles 74 and 75). An investigation cannot be opened if more than five years have elapsed since the end of the year in which the infringement took place (Article 76). The President of the Office can order the loosing party to pay the other parties' costs (Articles 77 and 78). The President can decide on costs by way of a resolution that can be included in the decision terminating the proceedings (Article 80).

The President of the Office may, by way of a decision, impose a financial penalty on the undertaking with a maximum of 10 per cent of the revenue earned in the preceding financial year if there is an infringement of Article 6 or 9 of the ACCP, Articles 81 and 82 EC and if a concentration has been implemented without consent (Article 106(1)). Lower fines may be imposed for other infringements of the Act (Articles 106(2) and 107). A fine of up to fifty-fold the average salary may be imposed on natural persons holding a managerial post if they have not complied with a decision or judgment, if they have not notified an intention to concentrate, or if they have provided unreliable or misleading information (108(1)).

In fixing the amount of the fine the President shall, in particular, take into account the duration, gravity and circumstances of the previous infringement if the ACCP (Article 111). Article 109 provides for leniency if one cooperates with the President of the Office; it is thus possible to get a reduction in the fine imposed.

Legal Protection
The decision of the President of the Office to initiate or end proceedings or a decision concerning the imposition of fines can be appealed to the Court for Consumer and Competition Protection (*Sad Ochrony Konkurencji I Konsumentów*) within two weeks from the date the decision has been delivered (Article 81(1)). Appeal is then possible before the Court of Appeal. Cassation is possible before the Supreme Court of Poland.144

Consumer Organisations and their Influence in Competition Cases
See Art 49(1)

In Poland there is the possibility of collective action, but an award is made to the individual members of the group in relation to their losses suffered.145 This makes it harder to initiate proceedings, as all individuals must join.

The amended Act of 15 December 2000 on Competition and Consumer Protection enables the President of the OCCP to issue a decision regarding whether a particular business activity is a practice which infringes the so-called 'consumers collective interest'.

According to Article 63 of the Act of 17 November 1964, the Code of Civil Proceedings (Office Journal No. 43, item 296, with subsequent changes), 'organisations ... may present to the court their view significant to the case in the form of resolution or statement'. This provision however applies to consumer cases and not to competition cases as such.
Our Polish partner operates mainly in the field of legal advice and education; its limited human resources are the main barrier preventing it from bringing complaints to the authorities.

Important Competition Concerns in Poland
The most common anti-competitive cases are related to the telecommunications market. Over the last 10 years the OCCP has imposed on Polish Telecommunication (the incumbent operator) over 20 financial penalties, in total amounting to over 100 mln PLN (25 mln EUR). The reasons were usually as follows:
- changes in services which had a negative impact on consumers; and
- refusals to cooperate with other telecommunication operators.

The financial burden imposed on TP SA may seem high; however it actually didn't affect the TP

SA as much as one could think. TP SA in most of the cases made an appeal to the Antimonopoly Court which often cancelled or significantly reduced the penalties.

Competition Concerns In the Product Markets Chosen by the Partners
Petrol: In Poland high petrol prices are to a large extent a consequence of the large tax burden imposed on petrol. However the market structure shows that high prices may be also caused by the insufficient level of competition. PKN Orlen (the leading Polish petrol company) has a 29% share in the retail market and the biggest network of stations but more importantly it has approx. 80% in the wholesale market, which means that even if consumer buys petrol from the other brand, it's very likely to be PKN Orlen petrol. Whenever PKN Orlen increases its prices it gives the increase in oil prices as a justification. But when the oil prices come down the prices on Orlen stations are not being reduced at the same pace or they are not reduced at all.

Many times companies have been suspected of colluding on the local markets, but this has not been proved. For example in 2001, a local consumer advocate from Koszalin has lodged a motion to the OCCP, in which he pointed out that prices on the local market are being set at the same level and the changes are being made at the same time, which could mean that there is a collusion between petrol distributors. The OCCP conducted an antimonopoly investigation but did not find sufficient evidence of collusion. OCCP stated that there was an oligopoly on the relevant market which involves mutual price dependence. In other words, a decision made by one company may significantly influence the sale of other companies; therefore companies have to regularly monitor the market and behaviour of competitors. Following the price decisions of a competitor is not sufficient evidence to establish the existence of an anticompetitive agreement. On the other hand, in 2006 in Rzeszów the President of the city urged the City Communication Enterprise to reduce the price of petrol at its petrol stations. As a response all other petrol distributors reduced the prices on their stations which may mean that the prices were artificially increased before.

The development of hypermarket stations may have an impact on the petrol prices of other brands. This is however very immature market in Poland and there aren't many stations of that type yet.
Printer-ink: The prices of original cartridges in Poland are very low when compared to prices of the respective printers. However there are various compatible cartridges being made (with various ink capacity and print quality). In addition there are points which fill the empty cartridges. So according to our Polish partner, there are no real competition problems in Poland.
Paracetamol: Our Polish partner has observed the major anticompetitive processes going on in Poland recently. This relates to lobbying actions and legal attempts to reduce competition (e.g. attempts to introduce a ban on online sales; attempts to limit the number of pharmacies operating in particular districts). Both chain and online pharmacies are an important source of competition for traditional pharmacies; therefore they have been subject to various criticism and legal actions (e.g. a new draft of the pharmaceutical law). It's not yet known what the results of those actions will be.

Downloadable music: According to our Polish partner there is no competition problem as far as the downloadable music market is concerned; this is very young market in Poland and there are only a few websites offering such services. There is a huge problem however on the CD market. Music CDs in Poland are very expensive not only in relation to average salary but also in absolute numbers.

Perceptions Revealed in the Legislative Survey

The Media
Competition problems, especially those related to telecommunications, are widely covered by the press media in Poland: the main daily newspapers usually give short regular updates on particular competition cases; sometimes there are more comprehensive articles in magazines.

Discussion of competition law issues is less present on TV and radio news. Although competition issues are present in the press (in the sense that competition law, like any other law, is being regularly described in specialized magazines), in the opinion of our Polish partner there is no real public debate on competition issues and consequently there is no pressure from the media to open particular markets to the competitive process.

Awareness of the Substance/Importance of Competition Law
In case of both the Office for Competition and Consumer Protection and the Court for Competition and Consumer Protection, the level of awareness of the importance of competition law issues is very high. As for the ordinary courts in Poland the level of awareness is lower, with the exception of cases directly related to competition, for example in the field of combating unfair competition.
The authorities in Poland have tried to improve understanding and awareness of competition law issues among the business community. They have done this through organising conferences, meetings/training sessions, various publications. (There was, for instance, a government publication that dealt directly with the leniency programme introduced by the Office for Competition and Consumer Protection). It also has to be emphasised however that a large majority of the authorities' actions focus on strictly consumer issues and the competition aspect is rarely discussed.

ANNEX III

More information on Consumer Organisations and their Influence in Competition Cases[180]

The legal framework for "class actions" and "collective claims"5 in Spain stems from Article 11 of the CPL. As a general rule, consumer and user associations are entitled to bring actions to protect the rights and interests of their members and of the association itself, and those pertaining generally to consumers and end-users (Article 11.1 of the CPL). Articles 11.2 and 11.3 provides that:
(i) The parties which are entitled to claim for the protection of "collective interests ("intereses colectivos")" before a court (when those affected by an act causing loss are a group of consumers or end-users whose members are readily ascertained or easily ascertainable) are:
(A) consumer and user associations;
(B) legally constituted entities which have as their purpose the defence or protection of consumers and users; and
(C) groups of affected persons (in such cases the members of the group would have to represent at least half the total number of affected persons).
(ii) The parties which are entitled to claim for the protection of "diffuse interests ("intereses difusos") (when those affected by an act causing loss are an unascertainable group of consumers and end-users or one whose members cannot be easily ascertained) are consumer associations which according to law represent general consumer interests ("representativas").
"Class actions" and "collective claims", as referred to by Article 11.3 and 11.2 of the CPL, respectively, are only available for the protection of the rights of consumers and end-users who, for example, have suffered loss as a result of anti-competitive behaviour (i.e. consumers or end-users of the products or services of a company which has abused its dominant position by raising prices, or by forming a cartel), provided that the requirements set out in Article 11 of the CPL are met. Other types of affected groups (e.g., an association formed by the defendant's competitors, distributors or customers which are not consumers or end-users), cannot rely on Article 11 to bring a class action. If the parties suffering loss, who are not consumers or end-users (i.e. competitors, distributors or customers of the offender), wish to bring a claim, they will have to do so individually by granting powers of attorney to the same barrister for the latter to represent them jointly in the proceedings (this is the case in "joint actions", as defined in the comparative report). Then in this case, the judgement will only affect the injured parties which are represented during the proceedings, and not all those persons who did or could have elected to participate in them.
With regard to the type of loss caused, Article 11 of the CPL could be considered to be intended only for those cases where the group of affected consumers or endusers has suffered physical or moral injury (for example, disease or death caused by defective products), and not economic loss. Our view however is that Article 11 of the CPL does not limit the availability of "class actions" and "collective actions" in this way. Under the CPL, in "class actions" and "collective claims" any award that is made, is made in respect of each individual claimant and not in respect of the class or group as a whole. Following the judgment made in respect of the "class action" or "collective claim", each applicant must then apply to the Court: (a) to be recognised as a member of the class or group; and (b) to quantify individual damages. This is the main difference between Spanish "class actions" and "collective claims" and genuine class actions and collective actions, as defined in the comparative report6. There are no reported cases in Spain where a consumer and user association, or a group of consumers or end-users, has collectively claimed damages suffered as a result of an infringement of EC or national competition rules and therefore the ability to do so remains unexplored. Equally, there are no reported cases in Spain of claims filed by other affected groups".

[180] From the *Ashurst Report – Spain*, available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/spain_en.pdf (last accessed: 25 August 2006).

ANNEX IV

Recent legislative changes in Spain:

During the project's investigation, there was a draft bill in process of being drawn up, which finally has been approved and came into force on 1st September 2007. Consequently some aspects mentioned in the study have recently changed. Please find here below a summary of some of the most significant aspects of the new Law 15/07, 3/7/07, of Competition Defense, published in the Boletin Oficial del Estado (Spanish-Government Publication) 4/7/07.

The main change, which brings this new law, is that the Service of Competition Defense (Servicio de Defensa de la Competencia), until now in charge of the case instructions, and the Court of Competition Defense (Tribunal de Defensa de la Competencia), responsible for the resolutions, have become only one institution: the National Commission of Competition (Comisión Nacional de Competencia).

This new institution is an entity of public law with own legal personality and full public and private capacity, assigned to the Ministry of Economy and Finance. It acts as consultative body on questions related to the competition defense and can be consulted regarding competition by the organizations of consumers and users.

This new body allows to simplify the processes, to shorten the deadlines and reduce the number of interlocutors and the administrative load to the companies.

The law also introduces that the maximum deadline to pronounce and notify the resolution, that puts an end to the penalizing proceedings due to restrictive conducts of the competition, amounts to 18 months.

It has also been included a leniency proceeding, similar to the one in force in the Community field, by virtue of which the companies that, having taken part in a cartel, report its existence and provide substantial proofs for the investigation will be exempted from the payment of a fine.

The new text keeps the prohibition of agreements between companies, of abuses of dominant position and of distortion of the free competition by unfair acts. It eliminates the specific reference to abuse of economic dependence which is already regulated in the Law 3/1991, of Unfair Competition