CASE ANNEX TO
ICN UNILATERAL CONDUCT WORKING GROUP
Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws

The following case summaries are drawn from the response to the UCWG questionnaire and are representative examples of agency and private enforcement challenging a dominant firm's refusal to deal and margin squeeze practices over the last ten years (1999 to 2009).

BULGARIA

Decision No. 858/2008

By Decision No. 858/2008 the CPC imposed two pecuniary sanctions on "International Fair Plovdiv" AD (IFP) for infringement of Article 18, p.1 of the LPC (repealed – The new Law on Protection of Competition came into force on 2 December 2008) related to imposing unfair trading conditions and price abuse in the form of margin squeeze.

The case was initiated ex-officio on the basis of received information and upon request of the "Association of Companies providing fair and exhibition services – Bulgaria".

The CPC found that IFP had a dominant position on two vertically connected markets of services – the upstream market of "right to construct" and "approval of a design plan", and the downstream market of "building of exhibition premises".

In the course of investigation, the CPC found out that the company had taken advantage of its dominant position in the market of "right to construct" and "approval of a design plan" by raising the price of the service in relation to rival companies and at the same time maintaining the price of the complex "construction" service, offered by IFP to the exhibitors. In this way, IFP deprived the other participants on the market of the opportunity to make profit, thus managing to exclude its competitors from the downstream market.

Additionally, the investigation showed lack of transparency concerning the conditions, in which the IFP can refuse to sign a construction contract, as well as the right of the company to change unilaterally the General Terms of Participation in the Fair and the participation fee rates. This has allowed IFP to impose unfair trading conditions, including prices, without taking into account the interests of the customers.

The CPC ruled on termination of the infringements. Detailed English summary of the decision can be found at http://www.cpc.bg/Competence/AbuseOfDominanceDecisions.aspx.

Decision No. 135/2006

By its Decision No. 135/2006 the CPC imposed sanction on Bulgarian Telecommunications Company (BTC) for violation of Art. 18(1) LPC (repealed). The Commission established that the BTC was abusing its dominant position by applying a price-squeezing strategy in providing unbundled local loop access for broadband ADSL services. The Commission's analysis revealed that, in the absence of feasible alternatives to its well-deployed fixed network, the BTC enjoys a quasi-monopolistic position in the wholesale market. The BTC abusively applied a price-squeezing technique by charging its unbundled local loop access services to alternative operators at wholesale prices higher than the retail prices charged by the BTC to its own subscribers. Thus, new entrants lose economic incentives to compete with the BTC in the provision of retail services to end users.

The abusive price squeezing technique of the BTC covered the entire territory of Bulgaria and raised effective entry barriers to operators willing to enter the telecommunication market for broadband data and fixed voice services by gaining local loop access. Thus, BTC competitors were disabled from building their own networks based on the copper infrastructure of BTC and using them to provide fixed voice and data transmission services similar to those of the former incumbent. The commercial and pricing policy of the BTC puts at risk the development of a competitive environment in the recently liberalized telecommunication sector, and thus truncates the choices available to end users.

Decision No. 16/2006

By its Decision No. 16/2006 the CPC imposed a pecuniary sanction on Ecopack Bulgaria AD for infringing Art. 18 of the LPC (repealed). The company was found to be using unfair practices for attracting of customers. Furthermore, Ecopack was found guilty of exercising economic coercion on companies, which are subject to waste recycling obligations under the Waste Management Act (WMA), to conclude recycling contracts exactly with Ecopack. To this end, the infringer was relying on its exclusive rights to use the Green Point mark. The Commission imposed another sanction on the company as it refused to grant Green Point sub-licenses. The Commission also ordered termination of the infringement.

The Commission's analysis revealed that Ecopack Bulgaria AD, based on its exclusive rights on the Green Point mark, was coercing the companies caught by WMA obligations to become Ecopack members, purporting that such membership was the only way for them to lawfully use the Green Point mark on the packaging of their goods. Ecopack Bulgaria AD had made use of the mark conditional on membership in its collective organisation rather than on the actual use of package recycling services. As a result the producers and importers of packaged goods had limited freedom to choose a service provider, which in turn prejudiced the interests of competitors and the competitive structure of the relevant market. The investigation also found that Ecopack Bulgaria AD refused to grant a Green Point sub-license to another countrywide collective recycling system. Based on the so established facts, the CPC imposed a sanction for abuse of dominant position and ordered the company to put an end to its anti-competitive market behaviour.

Decision No. 820/2007

By its Decision No. 820/2007 the Commission imposed a pecuniary sanction on the company Avtobusni prevozi AD, city of Pleven, for infringing Art. 18 LPC.

Avtobusni prevozi AD, which is a carrier, operates Pleven Bus Station. This bus station, which is the only one in Pleven, is owned by Pleven Municipality and is included in the capital of Avtobusni prevozi AD. All passenger carriers, when performing public-service transport of passengers contracted to them by their respective municipalities, have to stop at Pleven Bus Station where it is the starting, interim or terminal point of their routes. Thus the bus station is an essential facility insofar as without having access to it, the undertakings in the downstream market for bus transport of passengers by approved transport schemes can not provide service to their clients. Being given the right to operate Pleven Bus Station, Avtobusni prevozi AD enjoys freedom to conduct its business policy autonomously from its customers and is virtually able to impose on bus companies whatever conditions it wishes for the usage of the essential facility. The Commission held that Avtobusni prevozi AD had a dominant position at the relevant market, which was defined as the market for the right to use the facilities of Pleven Bus Station and provide related passenger services at the bus station.

The Commission proved that Avtobusni prevozi AD was using its dominant position to squeeze customers into contracts for bus-station services to its liking and exploit the market situation exclusively to its own benefit. The Commission qualified this behaviour as abuse of dominant position in the meaning of LPC Art. 18(1), which prohibits direct or indirect coercive imposition of prices or other unfair terms of trade. In order to impose these terms, Avtobusni prevozi AD refused access to the bus station to several carriers.

It was also found that in determining the fees for ticketing services in the contracts for 2007, Avtobusni prevozi AD applied a non-market criterion that the fee was only based on whether or not the bus lines belong to a specific transport scheme. The CPC took the view that applying different ticketing fees on the basis of this criterion was unfair. By such a practice Avtobusni prevozi AD have imposed market rules, which discriminate part of its customers and render them in a more disadvantaged position at the related market for public transport of passengers. The Commission qualified this behaviour of Avtobusni prevozi AD as an infringement of LPC Art. 18(3).

CANADA

***Director of Investigation and Research v. Chrysler Canada Ltd,* Competition Tribunal CT-1988-004 ("Chrysler")**

In the Chrysler case, Richard Brunet ("Brunet") operated a business involved in the export of automotive parts, including Chrysler parts, to South American countries. Chrysler Canada encouraged Brunet to expand the sale of its part in the export market. After a number of years, Chrysler decided to stop supplying Brunet and took active steps to stop Canadian dealers from selling him the parts, on the basis that the parts were for use by Canadian customers only, not for export. The Competition Tribunal held that Brunet was seriously affected in its business due to Chrysler's refusal to deal and ordered Chrysler to resume sales. The long association between Brunet and Chrysler, as well as Chrysler's previous encouragement of Brunet's activities, were factors in the Tribunal's decision.

***Director of Investigation and Research v. Xerox (Canada) Inc.,* ("Xerox")**

For a number of years, Xerox Canada freely sold parts for its photocopier machines to anyone willing to pay the listed price, including companies that refurbished second-hand machines for resale and provided maintenance services (referred to as independent service organizations ("ISOs"). Xerox eventually decided to stop supplying parts to these companies in an effort to capture the photocopier repair market and eliminate the second-hand market. The Competition Tribunal found that all the elements of section 75 were met and ordered Xerox to keep supplying the complainant, Exdos, and other ISOs. As with the Chrysler case, the Tribunal took note of the fact that Xerox had initially encouraged Exdos' activities.

***B-Filer v. The Bank of Nova Scotia,* Public Version of Confidential Reasons for Order dated December 20, 2006, Competition Tribunal CT-2005-006 ("B-Filer")**

This was a private application brought by B-Filer pursuant to the right of private access under section 103.1 of the Act. B-Filer's business allowed customers who held debit cards to use their cards to pay Internet merchants by debiting the customer's bank account. B-Filer applied to the Tribunal for an Order directing the Bank of Nova Scotia ("BNS") to accept B-Filer as a customer on usual trade terms. The Tribunal dismissed B-Filer's application for multiple reasons, including that B-Filer had failed to prove that it was substantially affected in its business due to its inability to obtain adequate supplies of a product, that this inability was due to insufficient competition among suppliers of the product, or that there was an adverse effect on competition. Furthermore, the Tribunal stated that it would have used its discretion against making an order even if the necessary elements were present because B-Filer's business model would have required BNS to disclose confidential banking information to B-Filer, potentially putting its customers' bank account security at risk. In B-Filer, the Tribunal also established that an "adverse effect" on competition, required by section 75, was a lower standard than a "substantial lessening or prevention of competition" used under section 79 but that it also entailed created, preserved or enhanced market power.

***Nadeau Poultry Farm Ltd. v. Groupe Westco*, Reasons for Order and Order dated June 8, 2009, CT-2008-004 ("Nadeau")**

Westco refused to sell live chickens to Nadeau on the basis that it had entered into an agreement with another company to process chickens. Production of live chickens is subject to national and provincial regulation that controls both prices and supply to some extent. The Tribunal rejected the application on the basis that several elements of section 75 were not met. Nadeau failed to show that it was unable to obtain adequate supply due to insufficient competition, that the product was in ample supply, or that the refusal was likely to have an adverse effect on competition. The lack of supply of live chickens was found to be largely due to the supply management system put in place by governmental authorities, and that there were a number of live chicken producers with no one producer exercising significant market power.

***Director of Investigation and Research v. Bank of Montreal et al.*, CT-1995-002 ("Interac")**

The Interac Association ("Interac") and its Charter members (consisting of Canada's major financial institutions) were alleged to have abused their position of joint dominance. Interac provided a shared electronic cash dispensing service whereby cards issued by one member of Interac could be used to obtain cash from an automated banking machine owned by another Interac member, and an electronic funds transfer service at the point of sale allowing consumers to make purchases at participating retail outlets. Individual financial institutions' proprietary networks, and small or regional shared electronic networks were, by comparison with Interac, inadequate substitutes. Financial institutions, and increasingly non-financial institutions, needed to connect to the Interac network to compete effectively in Canada in markets such as retail banking and credit cards. Part of the resolution set out in the consent agreement required Interac to open its network to potential participants on a non-discriminatory basis. However, the Tribunal did not use the term "essential facility" in its reasons for the order.

***Director of Investigation and Research v. Warner Music Canada Ltd.*, ("Warner Music")**

In Warner Music, the Director sought an order that Warner issue licenses to BMG Direct Ltd., a mail order record club, under usual trade terms so that BMG could make compact discs from Warner master recordings, thus allowing BMG to compete in the mail order record club business in Canada. The only competitor was Columbia House, which was half-owned by Warner and to which Warner had granted licenses for sound recordings made from its master recordings. The Tribunal held that although a copyright license can be a product under the Act, exclusive legal rights over IP cannot be considered a product in the context of section 75. The exclusive nature of IP rights contradicts the section's requirement that there be "ample supply" of a product, and the usual trade terms requirement may not be satisfied since there cannot be usual trade terms when licenses may be withdrawn. Furthermore, the Tribunal noted that there was nothing in the legislative history of section 75 that suggested Parliament intended it to be used as a compulsory licensing provision for IP.

***Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, Competition Tribunal CT-2007-001**

Sears Canada Inc. ("Sears") applied to the Tribunal for an order against Parfums Christian Dior Canana Inc. ("Dior") and Parfums Givenchy Canada Ltd. ("Givenchy"). Dior and Givenchy had supplied Sears with their prestigious lines of fragrance and cosmetic products until 2007 when they ended the supply relationship. The Tribunal dismissed the application for leave on the basis that Sears failed to establish a substantial effect on its business as a department store. Evidence presented to the Tribunal showed that Dior and Givenchy products comprised $16 million of Sears' total annual sales revenue of $6 billion. See para. 7. The Tribunal stated that the impact of refusal on the entire business of Sears as a department store retailer should be examined for the purpose of the application as opposed to an individual store segment represented by Dior and Givenchy products.

***Sono Pro Inc. v. Sonotechnique P.J.L. Inc.,* Competition Tribunal CT-2007-004**

Sono Pro, a company dealing with professional audio products, complained that Sonotechnique refused to sell Dolby products to it. Sonotechnique had established a business policy under which it sold Dolby products only to end-users, and so was willing to sell to Sono Pro only at end-user prices. The Tribunal refused leave to apply pursuant to section 103.1 on the basis that Sono Pro failed to show it was directly and substantially affected in its business by the refusal to deal. Sono Pro painted too vague a picture of its business and did not explain the importance of Dolby products.

***Construx Engineering Corporation v. General Motors of Canada,* Competition Tribunal CT-2005-004**

General Motors prohibited its dealers from selling vehicles to Construx on the basis that its policy was to disallow sales to companies in Canada that would resell the vehicles at home or abroad. The Tribunal dismissed the case on the basis that there was insufficient evidence to show that Construx's business had been substantially affected.

***Quilan's of Huntsville v. Fred Deeley Imports,* Competition Tribunal CT-2004-009 (aka Deeley Harvey Davidson)**

In applications filed in June and July 2004, respectively, Robinson Motorcycle Limited and Quinlan's of Huntsville Inc. alleged that Fred Deeley Imports Ltd. was refusing to supply them with Harley-Davidson products, despite having had a long sales relationship with them. Both retailers sought an order from the Tribunal requiring Fred Deeley Imports Ltd. to accept them as customers and dealers of the products on the usual trade terms. Leave to apply was granted by the Tribunal. After other procedural issues and an interim order, the parties finally reached an agreement and discontinued the application.

***Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.,* Competition Tribunal CT-2003-009**

Morgan's Furniture was a dealer for Laz-Z-Boy furniture for a period of over 25 years. Its sales of La-Z-Boy products had recently been declining, which Morgan blamed on restrictions to access. Laz-Z-Boy terminated the arrangement, citing the low sales figures as evidence that Morgan was not sufficiently promoting its products. Leave to apply under section 103.1 was granted, but the parties settled among themselves and the case was discontinued.

***Barcode Systems Inc. v. Symbol Technologies Canada ULC,* Competition Tribunal CT-2003-008**

Barcode alleged that Symbol was refusing to supply it with barcode scanning technology. Barcode was granted leave to apply. However, due to a change in circumstances between the time that leave being granted and the application was filed, Barcode entered receivership and became a shell company. As a result, Symbol successfully applied for summary disposition of the application.

CHILE

***Telefónica Móviles de Chile S.A* ("TMCH")**

In October 2009, the Competition Tribunal fined the mobile network operator company, Telefónica Móviles de Chile S.A (TMCH) for infringing the Chilean Competition act, abusing its dominant position through margin squeeze and refusal to deal conducts against several GSM gateways operators. GSM gateways are devices that contain one or more subscriber identity modules (SIMs) for one or more mobile networks, which enable calls from fixed telephones to mobile telephones to be routed directly into the relevant mobile network . A call made via a GSM gateway appears to the mobile network to have originated from a mobile phone registered to that network and so will have a cheaper call rate than an ordinary fixed to mobile call.

To provide their services, the GSM gateways operators have to purchase numerous subscriptions with each different mobile network operator in order to route the landline originated calls of their costumers to the respective called party in the respective mobile network.

The activity of GSM gateways operators was originated due to a market distortion created by the price difference between the interconnect price – the price the mobile network operator request from its interconnecting partners (off-net tariffs) – and the price that the network operator charges its subscribers (the minute price paid by the subscribers using their own SIM cards) (on-net tariffs).

In this case, the Tribunal identified two markets: the respective mobile network in the upstream market (TMCH's mobile network), and the fixed to mobile on-net call termination services market in the downstream one. The Tribunal found that TMCH held a dominant position on the upstream market and that such position provided TMCH with significant advantages in the downstream market. Furthermore, the Tribunal deemed that the subscriptions to TMCH's mobile network in the upstream market constituted an input that was essential for the complainants to provide the downstream in-net call termination services.

The Tribunal ruled that by discriminating prices against costumers and by increasing the subscription prices paid the complainants (the input), TMCH was in fact margin squeezing the latter thus not allowing them to compete in the downstream market of in-net call termination services. The Tribunal also found that TMCH had abuse its dominant position by refusing to deal with the defendants.

The Tribunal imposed a fine on TMCH of approximately US$2.5 million. It further prohibited the company to charge discriminatory prices to GSM gateways operators with respect to those charged to the rest of its mobile network customers; and ordered it to refrain from practicing any discriminatory conduct unless such discrimination is justified on objective circumstances.

CZECH REPUBLIC

Česká Rafinérská S142/2002

The Office dealt with a case of refusal to deal in the area of petrochemical material production. An original gigantic company mostly built in the second half of the 20th century was divided into two independent companies through privatisation. Oil cracking and production of basic refinery material became the task of ČESKÁ RAFINÉRSKÁ, a. s., while the production of further inputs for the petrochemical industry (such as rubber production, agro-chemistry, production of building and coating materials, synthetic fibre, etc.) became the main activity of CHEMOPETROL, a.s. Agreements were signed between both companies on the mutual delivery of material while the production of the CHEMOPETROL competitor was fully dependent on deliveries from the refinery. In such a situation of mutual interconnection of operations even a brief delivery breakdown may have a grave impact on further production and the client's equipment condition. The material provider's negotiating position was strengthened by the possibility to threat with the suspension or stopping of deliveries.

Subsequently, both companies failed to reach an agreement on the prices of deliveries. The period when deliveries were based on temporary contractual arrangements had lasted many months and the supplier, ČESKÁ RAFINÉRSKÁ, elected to use a negotiation tool – prohibited to a dominant player on the market – the threat and execution of RTD.

For this reason the Office was forced to initiate an administrative procedure on the basis of a suspected abuse of dominant position by the refinery. In its decision the Office stated that the party to the proceeding, ČESKÁ RAFINÉRSKÁ, abused its dominant position on the petrochemical materials market by stopping the delivery of materials to its long-term client, CHEMOPETROL, for approximately 39 hours on 31 May 2002 at 24 hrs, during the talks on conditions for the delivery of petrochemical materials for the period starting on 1 June 2002, without any objectively justifiable reason. By this it violated the provision of Section 11 paragraph 1 of the Competition Act to the detriment of CHEMOPETROL and other competitors purchasing petrochemical products from this company.

Among other things the Office proved that in case of this refusal to deal it was almost impossible, out of technical as well as economic reasons, for CHEMOPETROL to find a substitute supplier of the required amount of raw materials to be able to continue the production within a reasonable time. In order to respond in this way the company would have had to invest considerable amounts and would have needed more time to adjust the production technology and local conditions to this situation (the railway siding capacity, etc.). ČESKÁ RAFINÉRSKÁ communicated the first information on realising its threat only about three months previously. Under the circumstances CHEMOPETROL was unable to secure such amount of material for production from other sources under comparable conditions to be able to fulfil its own contractual obligations toward its customers. This dependence was then reflected in many subsequent production operations in the petrochemical and agro-chemical industries and other competitors whose production depends on the delivery of products from CHEMOPETROL (provided that some of these competitors are connected to CHEMOPETROL with their pipe lines).

In the situation where there was no written agreement stipulating the conditions of delivery in line with the supplier's articles of association, nothing prevented the execution of deliveries on the basis of mutual agreements expressing the will to deliver and purchase the raw material. In order to overcome the basic disagreement – failure to agree on the material delivery price formulas – both parties adopted short-term agreements temporarily covering certain periods. Such agreement was not achieved for the period starting on 1 June 2002 by the expiration of the last valid agreement (at 31 May 2002). The Office stated that both the supplier and the purchaser did not exhaust all possibilities in their effort to reach such an agreement. Proposals by both parties were gradually converging during the talks in May 2002 and the possibility to agree on a mutually acceptable compromise solution was confirmed in an agreement at last. The refusal to deal, however, caused damage as a result of a dominant player's conduct on the market and it should not have been used as a negotiation argument. The Office classified the delivery suspension notice – in months – as too short for the fully dependent purchaser to find an alternative source of deliveries.

In the first instance decision the Office imposed a fine for violating the Act on the Protection of Competition and, subsequently, the decision in the first instance was materially confirmed by the Chairman of the Office and the imposed fine amounted to CZK 6 million (ca. EUR 210 thousand).

The decision was dismissed by the Regional Court, the Office appealed to the Supreme Administrative Court, which dismissed the judgments of the Regional Court, which decided again and dismissed the decision of the Office. Now the case is pending and the Office is preparing new decision.

ČSAD Liberec S12/2005

The Office had to deal with the question whether it was legally possible to abuse the dominant position of a competitor in the form of refusal to deal (RTD) without denying the access to essential facilities (EF) at the same time, i.e. whether RTD and EF are two separate concepts.

In 2005 the Office issued a decision declaring the abuse of dominant position by ČSAD Liberec, a. s. on the market of services provided by the bus station in Liberec. These services are rendered to entities operating public bus transport. After applying a legal appeal this decision was materially confirmed by the Chairman of the Office and, subsequently, the administrative court.

In the first half of 2005, ČSAD Liberec abused its dominant position on the market specified above by refusing to talk about the use and, subsequently, disabling a proper use of the bus station operated by this company to STUDENT AGENCY s. r. o. for the purpose of operating domestic public transport service on the Prague – Liberec line in both directions, even though it enabled other competitors operating on the same bus line to use the station.

By such conduct the party to the proceeding violated the provision of Section 11 paragraph 1 of the Competition Act to the detriment of STUDENT AGENCY which was discriminated in the competition on the market of services provided by carriers operating domestic public transport service on the Prague – Liberec line and also to the detriment of end consumers – passengers who demanded services of domestic public transport on the Prague – Liberec line in the period in question. The Office prohibited ČSAD Liberec to behave in this manner and a fine of CZK 2 million was imposed (ca. EUR 69 thousand).

During the investigation the Office was identifying, among other things, whether there was any other bus station or similar facility in the Liberec territory, which also determined the geographic relevant market in this case, that could have competed with the bus station operated by the party to the proceeding, i. e. a station that would facilitate the party's objection that it did not occupy a dominant position on the market. The party referred to many sites where the Prague – Liberec bus line operator, STUDENT AGENCY, could park the vehicles, where passengers could get on and off and where luggage could be handled. The Office's task was to find out whether a similar site was in existence in Liberec and, at the same time, whether the capacity of the bus station operated by the party was really fully occupied, so that it was impossible to receive STUDENT AGENCY buses in it (which was another objection raised by ČSAD Liberec). It was identified in a local investigation that in Liberec there were several places where buses could be parked, that they were more or less accessible by public transport and that they provided room for the waiting of passengers. None of these places, however, was an adequate substitute for the bus station operated by ČSAD Liberec.

For the passengers the bus station is important since it enables the changing of buses, as the bus station concentrates a large number of public transport lines and thus the bus station is an irreplaceable public transport hub for passengers. Furthermore, the bus station offers a number of additional services to the passengers, on a smaller or larger scale, such as information boards and counters, waiting room, left-luggage, toilets, tickets sale and seat reservation office, roofed platforms, fast food stands, cash dispenser, telephone, news stand, exchange office, barrier-free access to the station, local radio, parking area, etc. The services listed above together with the possibility of changing buses mean that from the passengers' point of view the bus stations are not fully interchangeable with other places – facilities that serve or can serve as bus stops, etc. This fact, in consequence, affects the perception of substitutability of bus stations with other places by companies operating public bus transport services.

For carriers the most significant service provided by a bus station is the possibility to use arrival and departure platforms for the purpose of getting on, getting off and changing of passengers using the domestic or international lines or occasional lines (with a minimum parking time guarantee) or the possibility to park on the bus station premises. The carrier information publishing is another important service. For carriers and their drivers the bus stations usually feature a dispatch service, cleaning at the station, relaxation room, toilets, canteen, car wash and other services, filling station, etc. The Office stated that from the carrier's point of view the bus station is not adequately replaceable with other sites that do not provide services connected with a bus station operation. Further, it was identified that the capacity of the bus station in question was not fully utilized and it enabled the use by other Prague – Liberec bus line operators, one of such carriers being the station operator, i. e. the party to the proceeding, ČSAD Liberec. In this context the Office carried out a detailed analysis of the timetables of all carriers using the bus station and the Office staff members spent one full day at the station monitoring the capacity utilization.

The Office's conclusions concerning the party's abuse of its position on the market of services provided by its station while attempting to harm its competitor on the market of bus transport services on the Prague – Liberec line were confronted with the allegation by ČSAD Liberec that abuse of dominant position is achieved only by the fulfillment of facts in issue of denying access to essential facilities (EF) without which other competitors cannot operate on the market. The party pointed out the fact that the allegedly harmed competitor continued to provide its services and operate its line, even though passengers are served on the road close to the bus station. The bus station therefore cannot be a facility satisfying the EF definition.

The Office was of the same opinion as the party to the proceeding, yet it stated an abuse of its position. After gathering all materials relevant for the decision the Office reached the conclusion that companies operating public bus transport services do not need to use a particular stop as an essential facility (even if it is a bus station at the terminal point of the line) in order to compete on the market of services provided by public bus transport operators. On the other hand, however, it was identified that the possibility to use the previously described terminal point of the line represents a significant part of the carriers' activity and also part of services offered to consumers – passengers. Without this quality the particular carrier, STUDENT AGENCY, can compete with its competitors and offer services to customers – passengers but with difficulty, which fact discriminates this company in the competition on the market and, at the same time, it damages this competitor as well as consumers – passengers for whom the bus station represents unique comfort during their travel. The party to the proceeding had a dominant position, as in relation to the carrier it was in the position of the sole operator of the bus station in Liberec. This bus station does not have an adequate substitute on the defined geographic (local) market that STUDENT AGENCY could possibly use.

The Office and, at a later stage, the court concluded that the party to the proceeding did not operate a facility in the sense of essential facility, because even without access to this facility STUDENT AGENCY (or any other carrier) could compete on the market, i. e. could offer its services to customers. On the other hand, on the market of services provided by the bus station in Liberec to entities operating public bus transportation the party to the proceeding was in a dominant position which it was not allowed to abuse – if there were no objectively justifiable reasons for doing so. Such reasons were not identified.

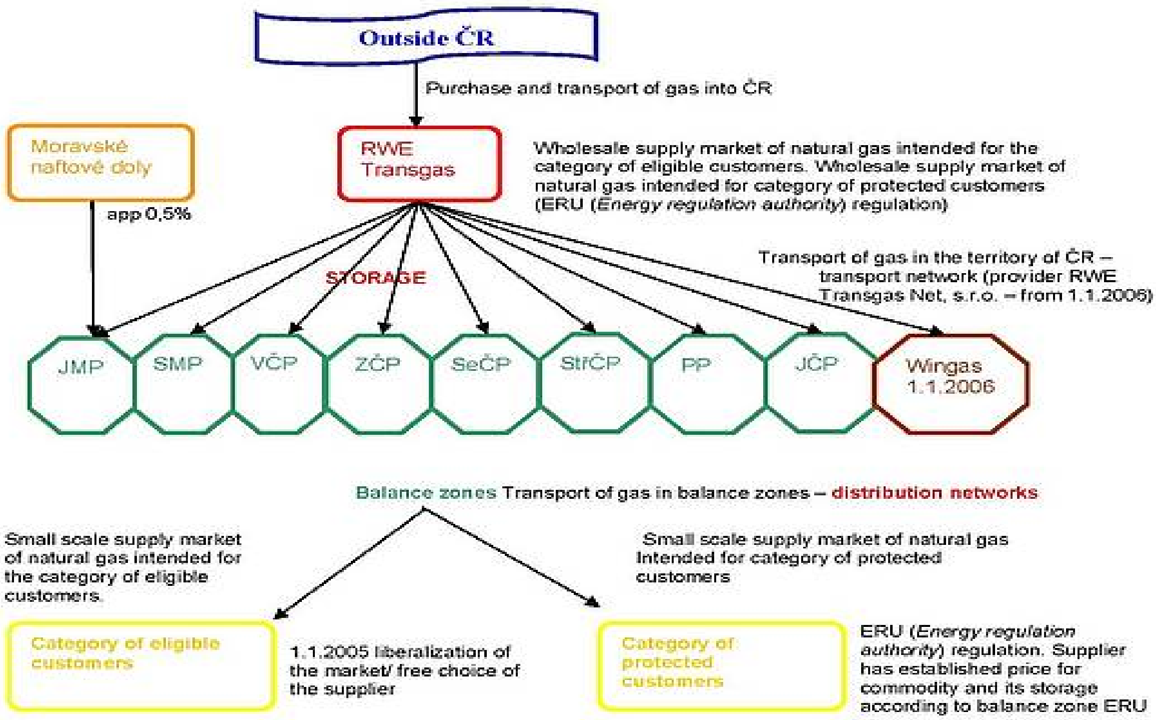
This case gave an answer to the question whether an abuse of dominant position by denying access to a facility or refusing to deal must always take the form of denying access to an essential facility (EF) or whether the subject facility does not necessarily have to meet the conditions in the EF definition and still, by an unjustified denial of access to it, the competitor can abuse its position. Both the Office and the administrative court drew the conclusion that the answer is affirmative. Even though the bus station does not meet the EF definition conditions and carriers can provide their services without access to the station, at the same time, it represents an obvious quality that affects the transportation service standard. The dominant competitor apparently did not face competition by fair means and in order to eliminate its competitor it took advantage of the fact that it was the sole provider of services connected with the Liberec bus station operation. So as to qualify its behavior as a refusal to deal (RTD) it is sufficient to use the general clause prohibiting the abuse of the dominant position to the detriment of another competitor provided that the subject facility does not necessarily have to meet the conditions of the essential facility (EF) definition.

The conclusion may be that RTD and EF are closely related and frequently connected competition doctrines (where EF is in the position of a special fact in issue of dominance abuse), however, these doctrines are not fully identical and the existence of EF is not a necessary condition for the declaration of RTD, even if the subject behavior of the dominant entity takes the form of denying access to a facility. Currently the case is pending at the Supreme Administrative court.

RWE Transgas S53/2005

In March 2007 the Office imposed a fine of CZK 240,000,000 on RWE Transgas, the dominant gas supplier for an abuse of dominant position. In the period from November 5, 2004 to August 8, 2006 the above mentioned company was not allowing the providers of competing regional distribution networks to enter into an agreement about the conditions of sale/purchase of natural gas and in this way was not allowing them to effectively compete with providers of regional distribution networks of RWE holding. Companies Jihočeská plynárenská and Pražská plynárenská were therefore put in disadvantageous position in the competition for so-called eligible customers.

RWE was also refusing to supply natural gas elsewhere than into so-called balance zones of individual regional distributors and in this way it was blocking and restraining the establishing of the competitive environment. In situation when regional distributors are buying natural gas when entering the balance zone, they are forced de facto to accept the conditions set unilaterally by one party of the proceeding. For example, Jihočeská plynárenská has been interested in supplying outside its balance zone but it has been repeatedly refused by RWE Tansgas. Competitor in dominant position has been therefore creating artificial barriers for other competitors to enter into the market, or creating barriers to expansion for existing competing regional distributors in the market.



The above mentioned behaviour of the party to this proceeding needs to be evaluated as even more serious as it has been committed in the very beginning of the gas industry liberalization in the Czech Republic. It has negatively influenced market that was gradually opening to competition and where every exclusionary practice of the competitor in dominant position could slow or in other way endanger the positives for the consumers connected with liberalization and better competition.

The sector with key importance for the provision of energy to consumers and also for economics as a whole has been influenced at the same time. The sector where any kind of anticompetitive behaviour has very serious consequences. Such behaviour can directly or indirectly influence various areas of life of any company or consumer.

As regards the amount of fine, it has been reduced by 130 million CZK in comparison to the first instance decision. Chairman (chairman is the first appellate instance within the Office) has based his decision on number of reasons. Decision of RWE, that its sister companies (regional distributors) will not carry out business outside the balance zone, cannot be considered as a breach of law. Further the proceeding regarding possible breach of law has been ceased in question whether RWE eligibly set the price for storage of the gas for the category of eligible consumers in the same way as the price for category of protected customers in 2005. Such potential breach of law has not been clearly and sufficiently proved.

On appeal the decisions was cancelled by the Regional Court. The reasoning of the Regional Court is based on an assumption that the legal interests protected by the Czech and the EC law are identical (i.e. they have the same object) and that the Community dimension of a behavior determines in a mutually exclusive way whether national or EC substantive law is to be applied to it. The Supreme

Administrative Court dismissed the judgment of the Regional Court and upheld the decision of the Office. The decision was returned to the Regional Court, which dismissed the decision of the Office and returned it back for new hearing.

The decision was dismissed by the Regional Court, the Office appealed to the Supreme Administrative Court, which dismissed the judgments of the Regional Court, which decided again and dismissed the decision of the Office. Now the case is pending and the Office is preparing new decision.

Dopravní podnik Ústeckého kraje S227/2006

By its first-instance decision the Office imposed on Dopravní podnik Ústeckého kraje (DPÚK) a fine of CZK 700 thousand for abuse of dominance. As of August 1, 2006, DPÚK suspended bus transportation in the Ústecký Region for financial reasons, and gave Ústecký Region a mere five-day notice of the suspension. In total, the operation of over 2,000 bus lines operated mainly under the public service obligation was suspended with immediate effect.

In the opinion of the Competition Office, the actual suspension of operation is not in conflict with the Competition Act, as DPÚK found itself in a financial situation that objectively prevented it from further operation of the lines. However, a dominant undertaking providing regular long-term services to consumers cannot suspend the provision of such services without giving adequate prior notice of such suspension, so as to allow for a timely adaptation to the new business strategy of the service provider. Given the nature of public bus transport and the area serviced by lines discontinued by DPÚK, the merely five-day notice given on July 26, 2006 to the Ústecký Region cannot be deemed to constitute an adequate and timely notice. Through its conduct, the transportation company caused detriment to end consumers, i.e., passengers using public bus transport in the Ústecký Region. The harm was further aggravated by the fact that the suspension affected the entire Ústecký Region, and the fact that the bus lines concerned fulfil basic transportation requirements of the passengers. The decision was confirmed by the chairman, now days the case is pending at the Supreme Administrative Court.

DENMARK

***Pradan Auto Import A/S'* (2001)**

A customer complained that Pradan Auto Import (importer of spare parts for cars) refused access to a database of product codes. The Competition Council found that access to the database was not necessary to achieve information on product codes.

***'Sækko A/S'* (2002)**

The Competition Authority received a complaint about Sækko A/S' refusal to supply incontinence products to a small private operator. The complaint was dismissed as the plaintive who resells incontinence products could obtain substitutable products from alternative suppliers.

***Refusal to grant access to Communication Systems for Gaming Machines* (2003)**

The Competition Authority dealt with a complaint that two major gaming machine manufacturers, CompuServe Game A / S (CG) and the Danish Automat Expert A / S (DAE), denied a third corporation to use the two large producers communication boxes, called CG Link and DatBoks, in connection with the complaining company's gaming machines. The Competition Council found that the two producers' refusal to allow access to their communication boxes did not constitute an abuse under the Danish Competition Act § 11, since it is neither impossible or unreasonably difficult for a firm on the Danish market, alone or with other undertakings to make its own communication system with the same solutions DAE's and CG's Communication boxes.

***SIS International a/s* (2003)**

The CJC Group, who among other things deals furniture for use in the educational system, submitted a complaint regarding SIS International A / S, a manufacture of furniture for offices and for the education sector. The CJC Group had been terminated as a distributor of SIS International's products, and SIS International therefore ceased to supply the CJC Group. The Competition Authority found that SIS International did not hold a dominant position in the relevant market and dismissed the complaint.

***Batavus Bicycles* (2004)**

The case concerned the market for bicycles where Falkon Cykler (a bicycle dealer) complained that HF Christiansen A / S and Denmark Batavus had ceased the supply of bikes. The Competition Authority did not find grounds to intervene in light of the available information, since the two suppliers of bicycles did not have a dominant position in the relevant market.

***Dansk Reklamefilm A/S* (2005)**

Dansk Reklame film A/S (Danish Advertisement Film), a cinema screen collector in Denmark changed its minimum requirement of number of sold tickets from 10,000 to 15,000 per year for a theatre to be eligible for signing a contract, a so-called standard agreement, with Danish Advertisement Film. This meant that 19 cinemas were not able to let their screen out on hire. The Commission Council found that this was actually a matter of 'refusal to supply' with that special feature that Danish Advertisement Film was actually a buyer. However the Council also found that it was not an abuse as the change in minimum requirement of sold tickets was objective as Danish Advertisement Film operated at a loss in cinemas who sold between 10,000 and 15,000 tickets a year.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2005/konkurrenceraadets-moede-den-22-juni-2005/dansk-reklame-film-danish-advertisement-film/

***The Expanded Fight against Plasmacytosis in North Jutland* (2005)**

The case concerned mink producers in the northern part of Jutland. Producers of feedstock for minks had made a set of agreements and amendments to their regulations to expand the fight against plasmacytosis (infectious disease that can hit mink). The producers are organized as cooperative societies owned by the mink farmers. The Danish Competition Authority considered that the notified agreements imply elements that are restrictive to competition for farmers as well as for feedstock producers. On the other hand, The Danish Competition Authority considered that a possible refusal to supply to farmers who refuse to follow the rules for expanded fight against plasmacytosis will not be contrary to the provisions of section 11; subsection 1, as the reasoning for the refusal to supply is considered objective, impartial and reasonable, inter alia because mink farmers who did not want to participate in the eradication inflicts an increased danger of infection on other farmers.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2005/konkurrenceraadets-moede-den-31-august-2005/the-expanded-fight-against-plasmacytosis-in-north-jutland/

***Clearing of taxi fare tickets* (2006)**

The Competition Council found that four out of five large players in the market for taxi rides had abused their joint dominant position as they by very short notice stopped collaborating with the taxi-company Taxamotor concerning common acceptance of taxi fare tickets from the parties. The four other companies were told to resume the clearance co-operation with the fifth company Taxa Motor.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2006/konkurrenceraadets-moede-den-31-maj-2006/5-taxi-companies-in-greater-copenhagen-have-abused-their-collective-dominant-position/

EUROPEAN COMMISSION

Commission Decision of 3 July 2001, Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures – Official Journal L 59, 28.2.2002, p. 18 (refusal to licence IP rights concerning the structure used to divide Germany into geographic areas ("brick structure") in order to present pharmaceuticals sales data to customers).

***Commission Decision of 25 July 2001, Case COMP/C-1/36.915 — Deutsche Post AG*: ** Official Journal L 331, 15/12/2001, p. 40 (intercepting, surcharging and delaying incoming international mail, amounting to a constructive refusal to supply)

***Commission Decision 2003/707/EC*: ** relating to a proceeding under Article 82 EC, 21 May 2003, (Case COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom AG*) - OJ 2003 L 263, p. 9 (margin squeeze)

***Commission Decision of 27 August 2003, Case COMP/37.685 GVG/FS*: ** OJ L 6, 10.1.2003, p. 1 (refusal to provide access to the Italian railway infrastructure)

***Commission Decision of 24 May 2004, Case COMP/37.792 Microsoft*: ** OJ L 32, 6.2.2007, p. 23 (refusal to disclose information needed for interoperability with the Microsoft PC operating system and servers).

Commission Decision of 2 June 2004, Case COMP/38.096 — Clearstream: (Clearing and Settlement) - OJ C 165, 17.7.2009, p. 7 (refusal to supply primary clearing and settlement services, and delays in service provision amounting to an abusive refusal to supply)

Commission Decision of 4 July 2007, Case COMP/38.784 Wanadoo España/Telefónica: OJ C 83, 2.4.2008 (margin squeeze)

***Commission Decision of 18 March 2009, Case COMP/B-1/39.402 RWE Gas Foreclosure*: ** OJ C 133, 12.6.2009, p. 10. (refusal to supply gas transmission services to third parties, and margin squeeze).

Number of Decisions Upheld on Appeal(s): 2 (*Microsoft* - T-201/04; *Clearstream* T-301/04).

Number of appeals pending: 2 (*Deutsche Telekom* - up-held by the Court of First Instance (see Case T-271/03 [2008] ECR II-477), currently on appeal before the European Court of Justice in Case C-280 P; and *Telefónica* (see case T-336/07).

NDC Health/IMS Health

Additionally, in *NDC Health/IMS Health*, the Commission subsequently withdrew its interim measures decision following a judgment from the Frankfurter Higher Regional Court which, while recognising that IMS' brick structure was protected by national copyright, held that third parties could not be barred from developing another brick structure […] "*even if the resulting structure may have a similar number of brick segments to the 1860 structure [of IMS Health] and might be deemed to derive from that structure*". (Commission Decision of 13 August 2003 - Official Journal L 268, 18/10/2003 p. 69)

Refusal to supply cases

See the following links to these judgments or decisions, which include a part called "summary":

Commercial Solvents: Joined Cases 6/73 and 7/73, *Institutio Chemioterapico Italiano SPA and Commercial Solvents Corporation v. Commission* [1974] ECR 223n.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973J0006:EN:HTML

Sea Containers**:** Case COMP IV/34.689 *Sea Containers v. Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994).

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0019:EN:HTML

Magill**:** Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* ('*Magill*') [1995] ECR I-743

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0241:EN:HTML

Bronner**:** Case C-7/97, *Oscar Bronner GmbH & KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbG & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0007:EN:HTML

IMS Health**:** Case C-481/01 P(R), *NDC Health GmbH & Co KG and NDC Health Corporation v. Commission and IMS Health Inc* [2002] ECR I-3401.

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-481/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

***Microsoft* (24/03/2004),** see press release describing the main facts in this Decision in:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en

and the relevant CFI judgment (17/09/2007) at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0201:EN:HTML

FINLAND

***Finnish Meteorological Institute* (FMI)**

One of the cases concerned the conduct of the Finnish Meteorological Institute (FMI). The Institute held a monopoly in the Finnish weather service market until 1996. After that, it was made possible for private weather service providers to obtain weather data from national meteorological institutes. It was found that the FMI lowered the quality level of the radar images it delivered to the Swedish Meteorological Institute between June and December 1999. The FMI's competitor Foreca Oy bought its meteorological data from the Swedish Institute. At the same time, the FMI was using first grade radar images in its own commercial weather service operations. The Competition Council found that the FMI had abused its dominant position in the market of weather data. The conduct did not have acceptable financial or technical grounds and was harmful for the operations of the Institute's competitors.

Salon Seudun Puhelin Oy, Turun Puhelin Oy and Elisa Communications Oyj

Three of the cases involved a margin squeeze in the supply of unbundled local loop. The companies involved were local incumbent telecom operators, namely Salon Seudun Puhelin Oy, Turun Puhelin Oy and Elisa Communications Oyj. The rental fees charged by the incumbent operators from their competitors were higher than those charged from the end-users of the incumbents. Therefore, the conduct de facto blocked entry and hindered effective competition in a situation where the telecommunications sector was recently opened for competition. In 2001 the Competition Council found that the companies had abused their dominant positions respectively and the Supreme Administrative Court rejected the appeals of Turun Puhelin Oy and Salon Seudun Puhelin Oy in 2002. Elisa Communications Oyj did not appeal.

Alfons Håkans Oy and Finntugs Oy

In the case concerning the market of port tugging the FCA found that Alfons Håkans Oy and Finntugs Oy had together abused their dominant position in the port tugging markets in some areas during 1992 - 1997. The case included several forms of abuse including refusal to deal aspect. In some special circumstances an urgent need for co-operation may arise between tugging companies for example because of exceptional weather conditions. Alfons Håkans and Finntugs refused to offer their assistance for competitors and so artificially hindered their ability to be active in the market. The Competition Council stated that there was no acceptable grounds for refusal to deal. The Supreme Administrative Court confirmed the Competition Council's decisions in January 2002.

FRANCE

Dyneff

In the Dyneff case, Dyneff (a company established in southern France and active in the sector of oil distribution) claimed that Total had abused its dominant position, through dilatory tactics that eventually caused negotiations between the plaintiff and the defendant to fail. The purpose of these negotiations was for the two firms to form a joint-venture capable of operating a sea-line on the Mediterranean coast, which was a condition imposed by the local administration to authorize access and operations on that sea-line. On April 24, 2007, the Court of Appeal of Montpellier ruled that Total had adopted a fair and legitimate attitude towards Dyneff during the course of the negotiations, and that the local authorities were solely responsible for the temporary closing of the sea-line. Consequently, Dyneff's claim was rejected.

Dyneff also filed a complaint with the French Competition Authority, who also investigated the case., Decision n°08-D-27, Dyneff vs Total. Besides the allegation of dilatory conducts, Dyneff claimed that the refusal by Total to grant access to the sea-line on several occasions constituted a refusal to access an essential facility. The Authority however concluded that the sea-line was not an essential facility, since there existed alternative means for Dyneff to unload its ships.

GERMANY

***Scandlines Deutschland GmbH*, BKartA case no. B9-16/98 – Scandlines Deutschland GmbH**

Decision in German available at
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9_199_97_16_98.pdf?navid=41.

In December 1999, the Bundeskartellamt prohibited Scandlines Deutschland GmbH – in which Deutsche Bahn AG and the Kingdom of Denmark each held an indirect share of 50% - from refusing competing ferry companies access to the Puttgarden terminal upon payment of an adequate fee. The proceedings were based upon two complaints from competitors who wanted to start ferry service along the Puttgarden-Rödby (Denmark) route, but whose application for shared use of the Puttgarden terminal had been rejected by Scandlines, the terminal owner. The Bundeskartellamt determined that Scandlines held a dominant position both with respect to its control of the terminal facilities, and the downstream market of providing ferry services from Puttgarden and Rödby. The alternative transportation routes were not interchangeable with the Puttgarden-Rödby route, while legal and physical obstacles prevented the competitors from constructing their own terminal at Puttgarden. The Bundeskartellamt found that the public's interest in opening up the market to competition outweighed Scandlines' interest in having the exclusive and unlimited use of its terminal.

The Düsseldorf Regional High Court (OLG Düsseldorf) overturned the decision of the Bundeskartellamt in August 2000. See OLG Düsseldorf WuW/E DE-R 569 – Puttgarden II (2000). The Federal Court of Justice (Bundesgerichtshof), however, rejected the arguments of the Düsseldorf Regional High Court overturning the decision of the Bundeskartellamt in September 2002, and sent the case back for further review. See BGH WuW/E DE-R 977 – Fährhafen Puttgarden (2002). The Düsseldorf Regional High Court, however, did not issue a further opinion because the two entities seeking access to the Puttgarden terminal no longer existed. In 2003, Eidsiva Reederi SA – the Norwegian owner of one of the original complainants – reasserted its complaint before the European Commission. The Commission referred the case back to the Bundeskartellamt in 2006, which then instituted a study to determine whether the Puttgarden port basin could accommodate another ferry service. The Bundeskartellamt is currently (November 2009) in the process of investigating the matter.

***Freie Tankstellen*, BKartA case no. B8 -77/00 – Freie Tankstellen**

Decision in German available at
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B8_77_00.pdf?navid=41.

In August 2000, the Bundeskartellamt prohibited several gas companies from charging wholesale prices to independent gas stations (so-called "*Freie Tankstellen*") that exceed the retail prices they charge to end customers. The proceedings were based upon several complaints by independent gas stations and their associations.

The Düsseldorf Regional High Court (OLG Düsseldorf) overturned the decision of the Bundeskartellamt in February 2002. See OLG Düsseldorf WuW/E DE-R 829 - Freie Tankstellen (2002); see also OLG Düsseldorf WuW/E DE-R 589 – Freie Tankstellen (2001). It found that the Bundeskartellamt had not sufficiently demonstrated that the prerequisites of Section 20 ARC were met.

***Mainova AG*, BKartA case no. B11-12/03 – Mainova AG**

Decision in German available at
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B11_12_03.pdf?navid=41.

In October 2003, the Bundeskartellamt prohibited the energy supplier Mainova AG from denying GETEC net GmbH and Energieversorgung Offenbach AG (EVO) connection to its medium-voltage network. Mainova AG supplied the city of Frankfurt with electricity. Its shareholders included the city of Frankfurt am Main and the E.ON group. GETEC net and EVO depended on this network connection in order to be able to operate site network facilities on premises used for business or housing purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. The establishment and operation of site networks represented a newly emerging market in which Mainova AG attempted to eliminate competition from the outset. According to the Bundeskartellamt's decision, both site network operators were entitled to have access to Mainova AG's medium-voltage network pursuant to Section 19 (4) no. 4 ARC in exchange for an adequate fee, because without such access they would have been unable to compete in the market of supplying end customers with electricity.

The Düsseldorf Regional High Court affirmed the decision of the Bundeskartellamt in 2004, see OLG Düsseldorf WuW/E DE-R 1307 – GETECnet (2004) and the Federal Court of Justice did so as well upon further appeal in 2005, see BGH WuW/E DE-R 1520 – Arealnetz (2005). Mainova AG then appealed to the Federal Constitutional Court (Bundesverfassungsgericht) in Karlsruhe, which in May 2009 declined to hear the case, see BVerfG WuW/E DE-R 2667 – Arealnetz (2009). With that the judgment of the Bundeskartellamt became final.

***Deutsche Post AG*, BKartA case no. B9-55/03 – Deutsche Post AG**

Decision in German available at
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf?navid=41.

In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against certain providers of postal services called "mail consolidators". These mail consolidators collected and sorted mail items weighing under 100 grams and fed them into Deutsche Post's sorting centers. Deutsche Post awarded discounts of 3-21% on the regular postage for these services only to its own major customers and not to the mail consolidators. Small and mediumsized senders generally do not reach the minimum volumes of letters required by Deutsche Post to qualify for the higher levels of the discount echelon. They could thus only reduce their postage costs by utilizing the services of the mail consolidators, who would pool the mail volumes of various senders, allowing each of them to achieve higher discounts.

The Bundeskartellamt found that Deutsche Post, as a dominant company, could not treat providers of mail services feeding in items collected from one large customer and the mail consolidators feeding in items collected from various customers differently without any objective justification. Deutsche Post was also prohibited from hindering the activities of the mail consolidators by refusing them access to the service of mail delivery (without the services of collection, pre-sorting and feeding into the delivery system) without any objective justification. The Bundeskartellamt determined that Deutsche Post must abstain from its discriminating behavior, and grant the mail consolidator the same discounts as those it granted to large customers.

The Düsseldorf Regional High Court affirmed the decision of the Bundeskartellamt in April 2005. See OLG Düsseldorf WuW-E DE-R 1473 – Konsolidierer (2005). Following a decision from the European Court of Justice in March 2008 that EC law did not permit Deutsche Post to discriminate against the mail consolidators, Deutsche Post withdrew its appeal. With that the judgment of the Bundeskartellamt became final.

***Deutsche Telekom AG – MABEZ services*, BKartA case no. B 7 - 11/09 (non-infringement decision)**

Decision in German available at WuW/E DE-V 1769-1774.

The alleged margin squeeze concerned the pricing of connection services on the wholesale level and certain mass call services (hereinafter: MABEZ services) on the retail level. The mass call services are characterized by large traffic volumes within short intervals. MABEZ services are often used for the active participation of large numbers of readers or viewers, e.g. for TV-prize draws and opinion polls.

Due to the large number of incoming calls, MABEZ services require a technical platform to operate the incoming calls. Further, connection services are required that connect the incoming calls with the technical platform operated by the provider.

Any provider of MABEZ services will regularly have to purchase connection services from DTAG. Prices for these services are subject to regulation by the Federal Network Agency (Bundesnetzagentur). The connection services purchased by DTAG will usually also include certain services needed for MABEZ services (e.g., invoicing, billing, assumption of the default risk (Ausfallrisiko)).

In 2008 9Live, a national German TV station, had invited tenders for MABEZ services for its TV-prize games; the final contract had been awarded to DTAG. NextID, a value-added service provider and competitor of DTAG on the market for MABEZ services, thereafter lodged a complaint with the Bundeskartellamt because of an alleged infringement by DTAG of Art. 82 EC and Sections 19, 20 ARC in the form of a margin squeeze and substantiated this with a detailed statement of costs.

The Bundeskartellamt initiated proceedings to examine possible infringements of Art. 82 EC and Sections 19, 20 ARC, but ultimately saw no grounds to take further enforcement action due to the lack of probability of an infringement.

Reisestellenkarte (private case)

BGH WM 2009 1863 (cited according to legal database juris).

In March 2009, the Federal Court of Justice held that the defendant (an airline) had violated Art. 82 EG when it withdrew its permission to allow the plaintiff, a credit card company, to separate out the amount of sales tax included in the cost of the flights offered by the defendant in the credit card statements that the plaintiff provided to its customers.

The plaintiff had offered to businesses a type of credit card called a "Lodge Card," which unlike a regular credit card included in its bill the amount of sales tax included in the cost of certain travel expenses. This significantly relieved the administrative burden of the companies who used these cards, because in reporting and verifying their taxes to the tax authorities they could simply submit their lodge card statements rather than the individual receipts from every business trip.

To separate out the sales tax in this manner, however, the entity issuing the card needs the permission of the individual service providers under German tax law. A fully owned subsidiary of the defendant was also active in the Lodge Card business, and had a market share of 90-95%. In the upstream market of domestic flights within Germany, the defendant held a market share of roughly 73% of the market.

The Federal Court of Justice held that by withdrawing its permission to the plaintiff, the defendant was attempting to use its power in the upstream market to hinder the plaintiff from competing against its own subsidiary in the Lodge Card market.

As the case affected the trade between EC Member States, the Federal Court of Justice applied Article 82 EC and used the relevant criteria as applied by the Commission and the European courts, see paras 10, 35 of the decision.

Orange-Book-Standard (private case)

BGH WuW/E DE-R 2613 – Orange-Book-Standard (2009).

In May 2009, the Federal Court of Justice held that a party accused of patent violation can raise as a defense that the patent holder has abused a dominant market position by refusing to grant a patent license to the accused on nondiscriminatory and fair terms (nicht diskriminierende und nicht behindernde Bedingungen).

The patent holder only abuses his position, however, when the accused has made the patent holder an unconditional offer for a patent license which the patent holder may not reject without violating the prohibition on unfair abuse of a dominant position (Behinderungsverbot) or discriminatory treatment. In the event that the accused has been using the invention or ideas covered by the patent, s/he must have honored the terms of the unconditional patent license in order to raise the defense.

If the accused regards the license fee demanded by the patent holder to be so high as to constitute an abuse of its dominant position, or if the patent holder refuses to calculate a license fee, then the accused satisfies the prerequisite of making an unconditional offer for a patent license where the license specifies that the patent holder will set the fee at a level constituting a reasonable compensation (die Höhe der Lizenzgebühr nach billigem Ermessen bestimmen).

The patent holder in Orange-Book-Standard owned various patents related to data drive devices and had licensed them to certain businesses. The accused sought a license for the patents, offering a 3% licensing fee, which the patent holder rejected. The accused proceeded to use the patents, and the patent holder subsequently sued. In defense, the accused asserted that the patent holder's refusal of its licensing terms amounted to an abuse of a dominant position, insofar as the patent holder had issued other licenses and was discriminating against the accused. This defense failed, however, because the accused could advance no evidence indicating that the patent holder had granted the other licenses at a 3% fee.

Other relevant private cases include for example:

Standard-Spundfass II

BGH WuW/E DE-R 1329 – Standard-Spundfass II (2004).

In July 2004, the Federal Court of Justice held that a patent holder violates the prohibition against discrimination contained in Section 20 (1) ARC, when it uses the circumstance that entry into a downstream market – because of an industry norm or similar conditions – is dependent on the use of its patent, and then limits entry into the downstream market in a way that violates the principles of free competition.

In Standard-Spundfass II, the German subsidiary of an Italian company began producing a type of barrel that represented the standard in the chemical industry, and was subsequently sued for patent infringement. The genesis of the barrel's design dated back to 1990, when leading firms in the German chemical industry requested the production of a plastic barrel from which waste material could more easily be removed. The patent holder and three other companies formed a working group and discussed designs; ultimately the design of the patent holder was accepted and became the industry norm. The patent holder granted the three German companies of the working group a free license to produce the new barrel, but sold licenses to companies located in other EU member states. The patent holder refused, however, to grant the accused a free license.

The Federal Court of Justice held that the patent holder would only be entitled to damages for the infringement if his refusal to grant the accused a free license did not run afoul of the prohibition against discrimination found in Section 20 (1) ARC. The Court indicated that the question would turn on whether the distinction between the free and purchased licenses was economically justified, or whether it amounted to arbitrary discrimination and sent the case back for further review.

Sparberaterin

BGH WuW/E DE-R 1377 – Sparberaterin (2004).

In July 2004, the Federal Court of Justice held that a different treatment of downstream customers by a dominant company was not justified, when it was aimed at inducing the customers to violate their contractual relations with respect to their own customers.

HUNGARY

MÁV

In case Vj-22/2005 Magyar Államvasutak ZRt. (Hungarian State Railways, hereinafter MÁV) the GVH investigated the conduct of earlier railway monopolist in the period just before and after market liberalization. The Competition Council established in its decision, issued on 10 July 2006, that MÁV, the dominant undertaking on the railway market, infringed the provisions on abuse of both the Hungarian Competition Act and the EC Treaty.

The Competition Council found that MÁV, which had a dominant position both on the upstream market of access to rail tracks and also on the downstream market of transporting bulk goods (freight transport market), had abused its dominant position:

1) by causing unreasonable additional costs to its competitors on the freight transport market, when it required bank guarantee as a prequisite for the conclusion of the 2005 network access agreements;

2) by hindering, impeding and delaying access to non public industrial sidetracks; and

3) by concluding long term transport agreements, containing exclusivity clauses, with the most significant bulk-shippers, thereby foreclosing access of new entrants to a significant part of the freight transport market.

The Competition Council fined MÁV HUF 1 billion (approx. EUR 4 million) (reduced by the court).

MÁV is the successor of the earlier state undertaking (state undertaking as not a commercial entity) Magyar Államvasutak. The main activity of the undertaking is railway transport and in addition it pursues numerous other activities closely related to its core business. As of 1 January 2003, the organizational structure of MÁV has been transformed with regard to the provisions of relevant community law. The particular core activities have been organized in separate business units (branches). MÁV Pályavasút Üzletág (hereinafter MÁV PV) has been created for the management of the railway network and its accessories and for managing traffic on the track. MÁV Árufuvarozás Üzletág (hereinafter MÁV ÁFU) has been created to pursue the freight transport activities of the undertaking. Additional business units were established for passenger transport, engineering (traction) and real estate management.

As one of the infringements mentioned above, MÁV ÁFU refused to grant access to certain of its industrial sidetrack when requested by competing railway undertakings. Industrial sidetracks are the so-called 'last mile' of a railway network, i.e. tracks that connect the national public railway network with the premises of shippers (factories, power plants, mines, etc.). Without access to the 'last mile' track, competitors are unable to offer shippers railway transport services in competition with MÁV ÁFU.

MÁV ÁFU refused to grant access to its industrial sidetrack at Bükkábrány when requested by MMV. It referred to the fact that the usage and service of these tracks are governed by the framework agreement in force at that time, and concluded between MERT and MÁV. According to these rules the industrial sidetrack is serviced exclusively by MÁV ÁFU. The conduct of MÁV ÁFU is the consequence of the above mentioned framework agreement.

MÁV ÁFU had no acceptable reasons under competition law for the refusal. Access cannot be denied simply by the fact that this would be detrimental for the undertaking in economic terms. It is also not acceptable to refer to property rights over the industrial sidetracks, since competition law should prevail against ownership rights in the case of essential facilities. See the decision of the Competition Council in case Vj-10/2002, or the judgement of the CFI in case T-63/98. Of course the owner, manager or main user of the essential facility can claim the economically reasonable and under the relevant regulation acceptable costs of granting the access. Should regulation fail to determine this amount, then the parties have to come to an agreement on it. If the parties cannot agree, then it can be investigated from a competition law point of view whether the dominant undertaking has any responsibility for this outcome. In the case of the Bükkábrány industrial sidetracks it is not necessary to make this exercise, since MÁV ÁFU refused to grant access without giving any prior conditions, consequently MÁV ÁFU obviously has a responsibility under the competition rules.

With regard to the request for access to sidetracks at Eperjeske-átrakó and Berente stations, including the servicing of the trains, MÁV already did not refuse to cooperate but "asked for patience" to make an appropriate decision. It referred to the unclear internal decision-making competences concerning Eperjeske. MÁV cannot use as a defence with relation to third parties its unclarity of the internal competences. Thereby MÁV unduly delayed the performance of MMV's transport services. MMV was not granted access to the sidetracks for loading, only to the servicing services, which meant that it was MÁV who shunt the wagons to and from the siding although MMV had its on locomotive.

MÁV ÁFU explained its behaviour with similar reasons as in the case of Bükkábrány, therefore those are unreasonable under the same argumentation as applied there. The circumstances are aggravated by the fact that MMV practically did not objected to the fees MÁV offered for the services, consequently it was solely MÁV ÁFU's attitude, which hindered the agreement. Refusing access to the sidetracks for loading qualifies as a competition law infringement, even if MMV's transport contract was finally not terminated by the shipper because of the delay. In the absence of any regulation to the contrary, MÁV ÁFU cannot pick certain services to provide, from the package of access to industrial sidetracks and the ancillary services. The obligation to grant access under competition law encompasses the whole service package related to industrial sidetracks.

With regard to its request for access at BILK terminal and connected services (including towing), Floyd found the one-time offer from MÁV ÁFU too high, therefore initiated negotiations in order to arrange that it can use the own locomotive for shunting the train on the terminal, while using only the crew of MÁV ÁFU. MÁV PV did not refuse this possibility by saying that servicing trains is possible without the involvement of MÁV ÁFU. Although MÁV PV promised, it did not make an offer. Negotiations between MÁV ÁFU and Floyd had been remained unsuccessful. Based on the above mentioned facts it can be established that a solution for the access held possible by one of the business units of MÁV (MÁV PV) was hindered by the behaviour of another business unit, MÁV ÁFU. Floyd concluded the agreement with WLB for continuous transports, therefore the conduct of MÁV ÁFU could not impede the transaction however it made the performance of it more difficult. There is no acceptable reason for this behaviour under competition law, therefore it qualifies as an infringement.

It can be established that the access to the industrial sidetrack at Uzsabánya station was partly delayed by the inaccurate registry of VPE, since the station has no public tracks for loading, consequently the available sidetracks are all industrial sidetracks. Following the modification of VPE's decision, MÁV ÁFU informed Floyd that only they have a valid servicing agreement with Basalt-Középkő for the sidetracks for loading, therefore anybody else intending to use these facilities have to agree with MÁV ÁFU concerning the joint usage. According to the findings of the investigation, although the transports began on 1 June 2005, due to the loading difficulties at Adony station, problems were solved only after the intervention of MÁV PV. Practically MÁV ÁFU's conduct aimed and served here as well the delay of the access of a competitor, therefore qualifies as an abuse of dominant position.

With the refusal to deal or constructive refusal to deal MÁV ÁFU intended to use its controlling position over certain railway infrastructure to foreclose competitors and deter entry on the downstream market thereby strengthening its position on that same market. The dominant position on the upstream market was leveraged to the connected downstream market.

When evaluating refusal to deal cases, one has to find the balance between two legally protected interests. On the one hand dominant undertakings have the right of disposal concerning the own property, while on the other hand competition law provisions prescribe a special additional responsibility to dominant undertakings in order to protect the public interest connected to the maintenance of effective competition. A dominant undertaking can be condemned for the refusal to create or maintain business relations provided it cannot come up with an objective and reasonable explanation and the conduct has an appreciable negative effect on competition in the market.

MÁV did not explain its refusal with any such objective and, from a business point of view, reasonable justifications. In fact in the case of Bükkábrány, it expressly highlighted the fact that it considers the access detrimental to its business interests and sees no legal constraints, which would induce MÁV to enter into business relations with the competitors. The intent to maintain a dominant position cannot be accepted as a reasonable justification.

Telecom margin squeeze cases

Telecom margin squeeze cases illustrate the GVH's approach to margin squeeze best, since the decisions on them resulted in quite general conclusions on certain issues. The GVH's approach and tests used are basically in accord with that of the European Commission's Deutsche Telekom (2003/707/EC) case (even before Hungary joined the European Union in May 2004). Right after the first steps of market opening in the telecom sector (2002-2004), the GVH launched several cases concerning the telecom markets (broadband internet access (ADSL) and fixed line telephone services markets) in which the GVH introduced the concept of margin squeeze into the Hungarian case law. The GVH found abuse in only one of these cases.

Regarding margin squeeze proceedings concerning regulated sectors (such as telecoms), in order to evaluate the applicability of competition law, it is essential to analyse sector-related regulation from the point of view of whether and to what extent it gives a room to manoeuvre (freedom for action) for the incumbent to freely develop its market practice and make its pricing decisions. In certain cases, the competition authority may come to the conclusion that the restrictive market practice may be derived from regulation, as it restricted the freedom for action of the incumbent to an extent, which did not allow it to avoid margin squeeze within the framework of the regulation. For instance one of the interconnection margin squeeze cases was ceased because the GVH found that squeezing was caused by the regulation itself: both wholesale and retail prices were regulated, but retail prices by price caps, which ensured some elbow-room, thus competition law was applicable in theory. The GVH however found that the dominant firm exhausted almost all its possibilities within the price cap to increase prices, even if this was not sufficient to avoid squeezing.

The way in which the wholesale level of the ADSL service works (due to the single-point access), ensures little choice for the Internet service providers to make their pricing decisions, therefore the suspicion of margin squeeze arose in several occasions. That time the prices of ADSL services were not regulated, so the competition law was applicable. The GVH pursued two formal procedures against vertically integrated incumbent telecom operators in 2002 and 2003. One of the DSL cases (Vj-124/2003) was closed because the squeezing could not be proved. In the other case (Vj-101/2002) the squeezing itself could be established, but the GVH taking into account the contestability of the market and the long-term effects of the conduct terminated the procedure, finding that the undertaking could not in the future be capable of raising and permanently maintaining its retail prices above the competitive price level (so the recoupment stage was unlikely).

In 2002 and 2003 the GVH had two interconnection margin squeeze cases: first, (Vj-100/2002) related to the business (hereinafter: Matáv business case), second, (Vj-73/2003) to the residential market (hereinafter: Matáv residential case) against the largest fixed line operator, Matáv (which owns 39 primary areas in Hungary out of the 54 and provides all retail and wholesale voice services, and mobile, Internet and cable TV services as well). The alleged infringement was – inter alia – that the interconnection fees were higher than some retail tariffs of fixed line telephone services.

As to the regulatory environment of this interconnection margin squeeze cases: the first stage of market opening (liberalization) took place from the end of 2001 (with a telecom regulation based on the "old regulatory framework" of the EU). Wholesale interconnection prices became regulated from July 2002 (from the regulatory approval of reference interconnection offer – RIO, and reference unbundling offer – RUO), actually there was a duty to deal, and from July 2002 the conditions and prices of this wholesale deal were also regulated. As it was mentioned the retail prices were under a price cap, which provided a certain amount of freedom for action, which is a prerequisite for the applicability of competition law.

In these cases excessive pricing was excluded because it was very difficult in the telecommunication sector to properly determine costs of individual services. Moreover, under national competition law the GVH had no legal possibility to examine RIO and RUO charges as they were approved by the Communications Authority and therefore had to be considered as cost based prices.

Predatory pricing also was rejected by the GVH. In the business segment, based on the testimony procured from rivals predation was not presumed. Moreover, Matáv's operating revenues were too high to assume that its retail prices were below costs, and actually most of the revenues came from the residential market, so in spite of the delays in tariff rebalancing predatory pricing applied by Matáv was not probable. On the other hand, future recoupment of a presumed sacrificed profit was not likely, either.

Recoupment in the form of price increase was unlikely in the margin squeeze framework too, but the potential harmful effect of squeezing could also be that it would maintain higher prices and postpone entries (and at the same time the pressure to decrease prices). So the margin squeeze between wholesale and retail tariffs proved to be the only proper approach.

The GVH followed a market-oriented approach in its price-squeeze tests in these telecom margin squeeze cases. This means that when facing with various retail and/or wholesale offers, or multi-component fee structures, it did not performed its analysis by types of services or by fee components, but it analysed the overall relationship between the services and/or fee components belonging to - from a competition law perspective - the same downstream market and their counterparts on the upstream market.

At retail level the GVH defined the relevant market as the one for fixed line telephone services offered to business customers comprising access, local and national long distance call services and another one for fixed line telephone services offered to residential customers. Although the GVH admitted that theoretically the different call services and access services created distinct markets, it found that in practice there was no individual demand for these services, costumers took them together in one package.

The GVH first had to identify the wholesale contents of the retail packages' service components, in order to make prices of retail packages comparable with proper bundle of wholesale prices, doing so the GVH created a model in which wholesale (infrastructure-related) costs of the concerned services were built up from RIO and RUO price-elements. The call origination, call termination (and call transit) services (as the wholesale counterparts of retail calls), and LLU (local loop unbundling as the wholesale counterpart of retail access) were the relevant services at upstream (wholesale) level, which were taken into account in the calculation of the costs incurred by Matáv due to providing these retail packages. Matáv's dominant position could be established regarding call origination, call termination and local access services.

Other tariffs and fees, for example prices charged for collocation or for the interconnection link between the incumbent and the downstream rivals, determined in the commercial contracts or in the RIO were omitted from the calculation because they do not occur if Matáv as a vertically integrated operator provides the retail services itself. So the GVH applied in its margin squeeze cases the so called 'as efficient competitor test'. According to the GVH in a margin squeeze test created for competition policy purposes the synergies and cost savings deriving from vertical integration must be taken into account (which is favourable for the incumbent). Regulation can apply more easily tests that reflect the intention to encourage the creation of, and establish the conditions for competition, as opposed to maintain the competitive status quo.

In the margin squeeze test the GVH first compared Matáv's monthly total income stemming from providing retail voice services to business or residential customers (including monthly rental and revenues of local and national long distance call services) to the estimated monthly wholesale costs of these services (including the monthly fee of local loop unbundling and the sum of the various interconnection services, i.e. origination and termination). The notions total income and total cost mean that GVH did not compare the prices and costs of individual services or of an individual customer to each other but it calculated total revenues as the product of call charges and monthly call minutes plus the product of monthly rental and the number of subscribers, while total costs were calculated as the product of estimated wholesale costs of the different call types and monthly call minutes plus the product of monthly LLU fee and the number of subscribers. This difference was named as Spread I.

In Step 2 the GVH calculated the downstream costs of providing retail voice services, which included the costs of marketing, product, sales and active debts managements, billing and customer service. The retail cost data came from the firm's ABC (Activity-Based Costing) accounting system. The difference of Spread I. and these downstream costs resulted in the determination of Spread II. The GVH in the Matáv residential case used the direct costs allocated to the downstream service submitted by Matáv.

Results of the tests in the interconnection margin squeeze cases (return on revenues):

SEGMENT	PERIOD	SPREAD I.	SPREAD II.
Business market	February – July 2002	Negative	not applicable
	July 2002 – April 2003	about 10%	not applicable
Residential market	2002	3-7%	less than 1%
	January – September 2003	less than 10%	5-10%

The margin squeeze test showed that revenues from the provision of the retail business packages and offers had not covered the wholesale, infrastructure-related costs occurring due to these services from February 2002 to July 2002. In this period the margin proved to be negative, but afterwards, following the approval of the cost-based RIO tariffs this margin turned slightly positive, for lack of information on product specific or retail costs (in connection with the business segment) the GVH could not assess whether this positive margin had been sufficient in the sense that it could have covered all Matáv's relevant costs and expenditures and profit expectations. This calculation however revealed that the former negative margins had been caused by the unduly high wholesale prices in the commercially negotiated contracts which problem was solved by the intervention of the Communications Authority, i.e. by the approval of the RIO and the cost-based prices therein.

In the Matáv business case in spite of the above-mentioned relatively short time period and the efficient intervention of the Communications Authority the GVH established that Matáv applied abusive margin squeeze from February to July 2002 and thus infringed competition law, because its behaviour was capable of excluding competitors or hindering them in entering the market (actual exit or harm was not proved). The above mentioned Vivendi DSL case was terminated since the recoupment was not probable, in this interconnection case the GVH held that the consequence of margin squeeze is not necessarily the increase in retail prices, but the exclusion of competition may result in the hindrance of a latter price decrease (that would be forced by the pressure of rivals) as a potential harm.

By deciding so the GVH admitted that under its effects based approach, as a rule of thumb to find margin squeeze as an abusive behaviour under competition law it should be exercised over a longer period of time (or a perspective of that should be realistic). At the same time, the GVH held that right after liberalisation even a shorter time period could be crucial for the evolvement of the competition (and could contribute to maintain the positions of the incumbent), so in the market-opening context this strategy of Matáv had to be judged more severely.

In this case the GVH established the infringement, and imposed a fine (HUF 70 million – approx. EUR 265 thousand), but did not apply any other remedy (since the changes in the regulation from July 2002 solved the problems).

As regards the Matáv residential case it was established without further or deeper investigation that in 2002 Spread II. was not sufficient to cover the cost of capital (profit) relating to these services and thus hindered new entry. It is clearly understandable that if return on revenues is less than 1% it could no way come up to the company's profit expectations. However, the GVH established no infringement because this situation was mainly caused by regulation (fixed wholesale charges and price caps for retail services). Though price cap regulation does not in itself preclude the applicability of competition law but in this particular case the freedom for action granted by the price cap was(had been) insufficient for the incumbent to put an end to this margin squeeze.

IRELAND

ILCU

In July 2003, the Competition Authority initiated proceedings against the Irish League of Credit Unions ("ILCU"). During High Court proceedings in 2004, the Competition Authority alleged that ILCU occupied a dominant position in the market for Savings Protection Scheme ("SPS") services (SPS is a stabilization scheme established to protect the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union) and that ILCU was abusing its dominant position in the SPS market by tying the provision of SPS to the provision of credit union representation. The Competition Authority also suggested, but very much as a subsidiary argument, that this conduct was anti-competitive by reason of abusive refusal to supply SPS by a dominant firm.

The High Court found in favour of the Competition Authority. However, the High Court judgment was overturned on appeal to the Supreme Court, which concluded, in May 2007, that there were not two separate markets for representation and SPS services and, therefore, no question of abusive tying could arise. After having dealt with the issue of the market definition, the Supreme Court considered that there was no need to analyse the ssue of dominant position, its abuse or any objective justification. The judgment also indicated that there cannot be an abusive refusal to supply, although it did not go into further detail on this point given that it was presented as a subsidiary argument.

The Supreme Court judgment is available at: http://www.bailii.org/ie/cases/IESC/2007/S22.html

Galileo

The Competition Authority received a complaint from a travel technology developer, in March 2003, alleging that Timas Ireland, trading as Galileo Ireland, had unjustifiably refused access to its computerised reservation system. Galileo Ireland operates the computerised reservation system used by most travel agents in Ireland. It was alleged that the refusal to allow the complainant access to Galileo Ireland's computerised reservation system was preventing the development of new technology for the travel industry that would enable travel agents to search more effectively and efficiently for information, such as airfares, on behalf of their customers.

The Competition Authority investigated this complaint primarily as a possible abuse of a dominant position, in breach of Section 5 of the Competition Act, 2002, and Article 82 of the Treaty establishing the European Union. The Competition Authority agreed to conclude its investigation without recourse to legal proceedings having received legally binding commitments from Galileo Ireland to deal with future requests for access to its computerised reservation system in an open, transparent, proportionate and nondiscriminatory manner. Galileo Ireland asserted that its behaviour was not in breach of the Competition Act and denied that the facts alleged in the complaint were true. Nevertheless, in the interest of resolving the investigation, Galileo Ireland offered to give undertakings to the Competition Authority.

JNRS

In May 2006 the Competition Authority initiated an investigation following a complaint which was submitted on behalf of Metro, the free Dublin newspaper, with regard to the refusal of the Joint National Readership Survey (JNRS) to admit it to its readership survey. JNRS conducts a readership survey to measure the readership of newspapers and magazines that offer an advertising platform in Ireland. The JNRS survey is used by publications to sell advertising space to advertisers and advertising agencies acting on behalf of clients. All major daily newspapers, Sunday newspapers, evening newspapers and over 50 regional newspapers are included in the JNRS survey.

Metro's complaint was that the JNRS refusal makes it impossible for Metro to compete for advertising revenues in Ireland due to the fact that independently verifiable statistics on readership are essential before advertising agencies can justify spending significant amounts of money to place advertising in a publication on behalf of their clients.

As part of its investigation the Competition Authority obtained information from JNRS, publishers of newspapers and magazines, advertising agencies, media buying agencies as well as others. Subsequently, the Competition Authority advised JNRS of the following preliminary findings:

Free newspapers such as Metro would not be able to compete effectively for national brand advertising against major daily newspapers unless they are able to provide independent verifiable readership statistics such as provided by the JNRS survey;

The ability to attract national brand advertising was important to the financial viability of Metro and other newspapers;

There was no reasonable alternative to the JNRS survey in Ireland.

The Competition Authority was of the preliminary view that the refusal to include Metro and other free newspapers in the JNRS survey would distort competition in the market for the supply of national brand advertising in print media and thereby would be a breach of Section 4 and Section 5 of the Competition Act 2002. On foot of the Competition Authority investigation, the JNRS amended its admission criteria to provide for participation in its survey by free newspapers such as Metro without admitting any liability and in January 2008 the Competition Authority closed the investigation.

Meridian – Eircell

Meridian Communications Ltd, owner of the mobile services provider Cellular 3 Ltd, took a case under the statutory right of private action against the Eircom group subsidiary Eircell Ltd. Concerning wholesale access to the mobile phones market in 2000. Meridian's argument was that Eircell, by terminating its volume discount agreement with Meridian, was abusing its dominant position by refusing to supply Meridian at the corporate rate. In 2001 the High Court ruled that, despite having a 60 percent share of the market, Eircell did not have a dominant position because, inter alia, Eircell's market share was declining rapidly (Eircell's only competitor, Esat Digifone, had won around 40 percent of the market in just two years), and the significance of the high barriers to market entry was "vastly reduced" by the low barriers to expansion. The Court also ruled that Eircell's mobile network was not an essential facility which had to be made available to other market operators.

Heatons – O'Neills

In April 2009 Heatons, a retailer of Gaelic sport replica kits, initiated competition proceedings against O'Neills, a manufacturer of replica kits. Heatons are seeking a declaration that the actions of O'Neills in refusing to supply and/or constructively refusing to supply and or/or applying dissimilar conditions to equivalent transactions in respect of the sale of GAA replica kits to Heatons are contrary to section 5 of the Act 2002 and/or Article 82.The matter is still before the courts.

ISRAEL

Criminal Indictment

Ofek-Aeropan

In the *Ofek-Aeropan* (Air Photography) case (CrimC 1268/01 *State of Israel v. Friedlander et. Al*. Decision of 9/5/2004), the air photography companies Ofek and Aeropan were accused of consummating an illegal merger to monopoly. Having achieved monopoly through an illegal merger, the merging parties were also accused of having unreasonably refused to deal with their competitors in the downstream market for air photography products, such as certain types of air photography based maps. The defendants reached a plea bargain, and managers of the companies were sentenced to up to 5 months imprisonments to be served in community works.

Administrative Determination

Egged-Nitzba

In the *Egged-Nitzba* case (*Re: Nitzba Holdings 1995 Ltd. - Egged, Israel Transp. Coop*. (Determination of Restrictive Arrangement and Monopoly) 1999 IAA Website 3003820E), Egged, the Israeli bus-service monopoly, held 25 out of 36 central bus terminals through partially owned subsidiaries. Egged refused to allow other public transportation operators to access those terminals. In 1999, the General Director declared that Egged and its subsidiaries held a monopoly in the relevant geographic market for each central bus terminal. The General Director also determined that Egged and its subsidiaries were bound by an illegal restrictive arrangement, which did not allow the subsidiaries to deal with other public transportation operators.

Bezeq-Hot

In the *Bezeq-Hot* case (*Re: Bezeq the Israeli Telecomm Corp. (Determination of Abuse of Position*) 2007 IAA Website 5000727E), Bezeq, the Israeli telecommunication monopoly was found to have abused its position against another and newer Israeli telecommunication operator, HOT. Bezeq subscribers constituted the vast majority of the market. Due to a technical problem in one of Bezeq's sites, HOT subscribers were disconnected from Bezeq subscribers for 34 hours. A labor dispute and Bezeq's management initial decision not to invoke an injunction against the workers, as well as the management's failure to anticipate the events, prevented the prompt repair of the connection. Bezeq's management could have taken the necessary procedures promptly, since the technicians' work stoppages were not classified as a warranted strike by Israeli labor law. The General Director determined, according to the authority granted to her in Article 43 of the Law, that Bezeq abused its monopoly position.

Bezeq argued the case was in essence an RTD case, which should have been dealt solely under Article 29 of the Law. Had it been accepted, this argument would grant Bezeq a formal-technical defense against the determination under Article 43 of the Law. The General Director explained in her decision that Article 29A is not ruled out even if the case was an RTD case, since Article 29A establishes a wide and general behavioral norm that monopolies must abide by. The case is currently under appeal.

Consent Decrees

Elite-Cadbury

The *Elite-Cadbury* case (AT 612/06 *IAA General Director v. Strauss-Elite*, 2007 IAA Website 5000477) concerned Strauss-Elite, a food manufacturer that was declared a monopoly in chocolate bars. Strauss-Elite exercised illicit practices to hinder entry to the market of the UK imported Cadbury brand of chocolate. Among other measures, Strauss-Elite decided to withdraw all discounts from wholesalers who distributed Cadbury products. The case was closed with a consent decree, instructing Strauss Elite to pay the sum of 5 millions NIS to the State's treasury.

Coca-Cola

The Coca-Cola case, (AT 612/05 *IAA General Director v. Central Bottling Co. Ltd.* 2005 IAA Website 5000148) concerned the Central Bottling Company LTD (hereinafter: "the CBC"). CBC is the Israeli licensee of the Coca Cola brand and a declared monopoly in cola flavored carbonated drinks. In 1998, the General Director imposed monopoly instructions on the company. Two years later the CBC purchased a mineral water company named "Neviot". After the merger, the CBC conditioned the supply of its cola products and the commercial terms of the contract, including discounts, to the retailers' consent to purchase mineral water from Neviot brand and avoid the purchase of the rival Mey Eden brand. The case was closed after investigation with a consent decree, instructing the Company to pay the sum of 500,000 NIS to the State's treasury. The evidence in this case did not implicate the higher managers and was not as clear as in the Elite case, and hence the smaller payment.

Gibor-Sabrina

In that case, a stockings producer (hereinafter: "the Producer") was convicted of an illegal refusal to deal. The Producer had a monopoly over the production and distribution of stockings in Israel and refused to supply a certain brand of stockings to one of the retailers, on the grounds that the retailer was using them as a loss leader. The Producer was convicted of an illegal refusal to deal, despite the fact that it was willing to sell the retailer another brand of stockings. "A reasonable refusal", the court explained, is a refusal "that is compatible with the principles of antitrust laws and free competition". An RTD which allowed a monopoly to control the resale prices of its products was not, in the courts opinion, compatible with those principles.

The practice in question does not necessarily have to exclude or threaten to exclude a rival from the market, although these circumstances could be taken into account when considering the reasonability of RTD.

Bikur Holim Hospital v. Clalit Health Services

The *Bikur Holim Hospital v. Clalit Health Service*s (hereinafter: "Clalit") medical insurance case (Misc.M(JER) 4300/07 *Bikur Holim Hospital v. Clalit*, 4/22/2007) concerned the liquidation of a non-profit hospital in Jerusalem (Hereinafter "the Hospital"). The relevant market was defined as government-financed hospital services in Jerusalem. Clalit was a monopsony purchasing almost 60% of government financed hospital services in Jerusalem – more than all its three competitors combined. Clalit demanded a 10 million NIS discount on services from the Hospital. The Hospital could not financially accommodate the request, and the Hospital's liquidator therefore refused the request. Subsequently, Clalit informed its cardiologists to stop referring patients to the Hospital. The Jerusalem District Court concluded that Clalit's refusal to deal with the Hospital was illegal on the basis that Clalit discriminated against the Hospital relative to other hospitals in Jerusalem. Another material fact considered by the Court was that, Clalit had already been given the largest discount among all insurers. The Court therefore instructed Clalit to deal with the hospital on the same terms preceding the liquidation process.

Bazan – Paz

The *Bazan – Paz* case (M(JER) 590/96 *Paz v. Bazan*, 7/25/1999) concerned Bazan, at the time the only oil refinery in Israel and the sole supplier of fuel oil. In 1996, the State of Israel ceased to subsidize the emergency inventories, which the fuel marketing firms held as operating inventories on Bazan's premises. Bazan tried to force the fuel marketing companies to continue to hold operating inventories of fuel on its premises. The Court viewed this demand as a constructive refusal to deal. A declaratory remedy was issued, according to which Bazan could not condition dealing with the marketing companies on their holding inventories of fuel oil on Bazan's premises. It is important to note that an extensive reform was later enacted in the refinery sector which divided the company into two separate competing companies, each operating a different refinery.

ITALY

***Glaxo - Active ingredients* (IP rights)**

Italian Competition Authority’s case A363 Glaxo-Principi attivi, decision n. 15175 of 8 February 2006, published in Bulletin n. 6/2006.

In February 2006 an investigation into the pharmaceutical group Glaxo concluded with the finding of abusive practices in violation of Article 82 of the EC Treaty. Glaxo refused to grant Fabbrica Sintetici Italiana (FIS), a chemical-pharmaceutical undertaking, a licence to produce an active drug ingredient known as Sumatriptan Succinato, covered in Italy by a supplementary protection certificate, for use in other Member States (in which Glaxo no longer held any patent-rights) in the production of generic drugs known as triptans for the treatment of migraines. The Authority found that Glaxo, in addition to holding a quasi-monopoly on the production of Sumatriptan Succinato worldwide, occupied a dominant position in the Spanish and Italian markets for the production and marketing of triptans sold through hospitals. In these markets Glaxo held a particularly high market-share, equal to about 96% in Italy and 58% in Spain. As for the possibility of access for potential competitors, all the products sold in the markets concerned were found to be covered by industrial patent-rights, which were due to lapse between 2008 and 2012, with the exception of Sumatriptan Succinato which was not covered by any patent in the Spanish market. Based on the investigation’s findings, the Authority deemed that Glaxo’s refusal to grant the requested licence constituted an abuse of dominant position in violation of Article 82 of the EC Treaty, since its refusal hindered the production of an active ingredient needed by producers of generic drugs, potential competitors of Glaxo, to access national markets where Glaxo did not have any exclusive rights. The Authority considered this conduct had no objective justification.

***A351 Telecom Italia* (margin squeeze)**

Italian Competition Authority, case A351 Comportamenti abusivi di Telecom Italia, decision n. 13752 published in Bulletin n. 47/2004.

In November 2004 the Italian Competition Authority concluded an investigation into abusive practices by Telecom Italia. The Authority found that in the period 2001-2003, Telecom Italia had adopted an exclusionary strategy against its competitors offering financial and technical conditions to customers which the competitors could replicate only at a loss. In particular, one of the allegations concerned the provision of telecom services to the Public Administration through a procurement organized by Consip, an institution that organizes all the procurements for the purchases of the Italian Public Administration’s bodies. At the time of the procurement wholesale telecom services where regulated and part of the inputs that Telecom Italia’s rivals required to offer the bundle of services had to be made available by Telecom Italia at charges set by the national telecommunications regulator.

The Authority concluded that Telecom Italia abused its dominant position by making a bid that could not be replicated by its competitors. This was not due to Telecom Italia’s superior technology or efficiency, but because it had charged its internal divisions less than it did to its competitors for the relevant inputs. While the price paid by rivals to Telecom Italia was regulated, Telecom Italia's internal transfer price was not. The Authority used regulated charges as the benchmark to assess whether competitors could place equivalent bids. To the extent that regulated charges exceeded Telecom Italia's actual costs for the input in question, Telecom Italia's offer was not replicable by competitors. The incumbent operator should have applied the same cost base (in this case the long run incremental costs, rather than historical costs on which the regulatory accounting was based) not only to services provided to its own final customers, but also to wholesale services provided to competitors in order to avoid the price squeeze effect.

The application of the test showed that Telecom Italia's offer was not replicable, both at the disaggregate and at the aggregate level. This implied, in the view of the Authority, that Telecom Italia had performed a price squeeze abuse with the effect of excluding as efficient competitors from an important provision and that this would have seriously limited the ability of new entrants to compete with the incumbent, with un ultimate detrimental effect to consumers. The Competition Authority imposed on Telecom Italia a sanction of 152 million Euros, taking into account, among other things, the long duration of the infringement (3 years). The decision of the Authority was appealed and confirmed by the upper level Appeal.

***A358 ENI/TTPC* (essential facility)**

Italian Competition Authority, case A358 - ENI-TRANS TUNISIAN PIPELINE, decision n. 15174, published in Bulletin n. 5/2006.

In Eni – Trans Tunisian Pipeline the Authority conducted an investigation into an alleged abuse of dominant position by ENI concerning access to the pipeline transporting Algerian natural gas into Italy. ENI is the most important national producer and the main importer of natural gas in the Italian market, with a market share of 68%. It has a dominant position and/or control of all the international gas pipelines into Italy. ENI is vertically integrated in transmission, where, through its controlled company SNAM, it owns almost all existing nationwide high pressure transmission capacity and also operates, through Italgas, at the distribution level. The Algerian gas is carried to Italy through a pipeline crossing Algeria (TTPC) and then through a submarine pipeline from Algeria to Sicily (TMPC). ENI owns 100% of TTPC and holds exclusive rights of transportation on the pipeline. In 2002 TTPC announced its intention to expand the capacity of the TTPC pipeline. Following this announcement TTPC received several requests and allocated the "new" capacity. In March 2003, following the allocation of new capacity, TTPC concluded take or pay agreements with seven shippers. The agreements were subject to the fulfilment, by June 2003, of several conditions (administrative authorizations, bank guarantees, etc.). In June 2003, TTPC wrote to the shippers that it wished to postpone the effect of the agreements. Finally, in November 2003, TTPC announced its intention to rescind the agreements since the conditions provided in the take or pay contracts had not been fulfilled, even though the shippers had all signed binding agreements with the Algerian supplying company Sonatrach.

The problem was that the fulfilment of the conditions was partially in the power of ENI and TTPC themselves. The legal disputes on the responsibilities in the fulfilment of the conditions contained in the agreements went on throughout the whole year 2004, when, in November TTPC offered a new allocation of the additional capacity. The new allocation, contained the provision that the expansion of the pipeline would have been postponed from 2007 to 2012.

The case is, in a way, peculiar considering that access has not been denied to existing capacity, but on the capacity resulting from an investment that ENI had no obligation to undertake. However, the Authority considered the fact that, once the decision to expand the pipeline had been taken and the shippers had defined their commercial strategies, the behaviour of TTPC, first wasting time in legal disputes and finally rescinding the contracts, resulted in delaying the entry of competitors into the Italian natural gas market where ENI has a dominant position. The lack of objective justification for the refusal was also stressed. In fact, the investments required for the expansion of the pipeline would be entirely recouped with the contracts subscribed by the shippers that would account for all the additional capacity planned from 2007 to 2019.

JAPAN

Nipro Corporation

To Naigai Glass Industry Co., Ltd. and its subsidiary company (Naigai group) dealing competitive imported products, Nipro Corporation (Nipro) refused to supply the same type of material glass tubes for ampoules made by Nippon Electric Glass Co., Ltd. as those imported by Naigai group and changed trade conditions for such products. Nipro, already having power to control the market as an exclusive supplier of material glass tubes for ampoules made by Nippon Electric Glass in the material tube supply market in the western part of Japan, took such act against Naigai group to restrain continued or expanded dealing of imported material tubes and to impose a sort of sanction to Naigai group. Nipro intended to restrict or suppress import of material tubes by influential competitors, and thereby, to avoid situations where quality and price competitions are caused or possibly caused. This substantially restrained competition in the field of supplying material tubes in the western part of Japan (Hearing decision on June 5, 2006). Since the JFTC found these violation acts were already ceased and considered it not particularly necessary to take any measures, the hearing decision did not order a particular measure to Nipro.

NTT East

Nippon Telegraph and Telephone East Corporation (NTT East) set the user charge of a particular broadband service via optical fiber for detached houses at 5,800 yen per month at first and at 4,500 yen per month from April 1, 2003. These prices were lower than the connection charge required to other telecommunications entrepreneurs for providing the broadband services with connection to the optical fiber facilities of NTT East.

Considering that an entrepreneur that intends to newly start the business of broadband service with making connection with the subscriber optical fiber facilities held by NTT East needs to set a user charge higher than the connection charge payable to NTT East to expect continued and rational operation of business, it could be decided that the act by NTT East made it difficult for other telecommunications entrepreneurs, which did not hold any subscriber optical fiber facilities, to start the broadband service business for detached houses with making connection to NTT East's subscriber optical fiber facilities and thereby excluded such business by other entrepreneurs.

Thus, the JFTC decided that the above act by NTT East fell under the private monopolization, which was in violation of the provision under Article 3 of the Antimonopoly Act (Hearing Decision on March 26, 2007). NTT East raised litigation at the Tokyo High Court, rescinding the decision of the JFTC. This case was dismissed by Tokyo High Court on May 29, 2009. It is being appealed to the Supreme Court.

JERSEY

TTS

This Decision arose from the refusal of a Government undertaking, Transport and Technical Services ("TTS") to provide access to Jersey's only sewage treatment facility at Bellozanne to private waste disposal companies for the disposal of waste collected from tight and septic tanks in Jersey. TTS affected this foreclosure through a series of restrictive licences issued to private waste disposal companies in the 1990s and in 2005, prior to Jersey's Competition Law coming into effect. These licences specifically prohibited the private companies from disposing of waste from tight and septic tanks at the Bellozane facility, which is the only location in Jersey where such waste can be disposed of properly. TTS both operates the Bellozanne facility and collects and disposes of waste from tight and septic tanks.

To analyse the alleged abuse in this matter, the JCRA followed a 3-step analysis: (1) defining the relevant product and geographic markets, (2) determining whether the undertaking in question is dominant in the relevant markets, and (3) determining if the undertaking's conduct constitutes an abuse. In addition, the JCRA examined if the there existed an objective justification for the conduct in question, or if it was efficient.

Here, the JCRA found that TTS is dominant in a relevant market defined as the provision of sewerage services – defined as the emptying of waste from septic and tight tanks, the transportation of the waste to the disposal facilities at Bellozanne, and the discharge of the waste at those facilities – in Jersey. The JCRA also determined that the issuance of the restrictive licences, as described above, constituted an abuse of dominance. Specifically, the JCRA found that the issuance of the restrictive licences had an actual anticompetitive foreclosure effect, by prohibiting new entry into the relevant market. Several potential competitors had told the JCRA of their willingness and ability to enter the relevant market, but for the licences issued by TTS. The restrictive licences therefore created and maintained a monopoly for TTS in the provision of sewerage services in Jersey, placing it in a position to profitably increase prices to the detriment of consumers. The JCRA had received complaints from consumers of high prices for certain sewerage services and a lack of choice of providers in this market.

The Decision imposed a £15,000.00 financial penalty on TTS. As a result of the JCRA's investigation into this matter, TTS voluntary ended the abusive practice by revoking the restrictive licences. TTS did not appeal the Decision.

A copy of the JCRA's TTS Decision may be obtained via the following link: http://www.jcra.je/pdf/090520%20TTS%20Decision%20public%20version.pdf

A copy of the JCRA's Press Release concerning this Decision may be obtained via the following link: http://www.jcra.je/pdf/090519%20TTS%20Press%20Release.pdf.

REPUBLIC OF KOREA

POSCO

POSCO accounted for 79.8% of the hot coil market of Korea and at the same time, took up 58.4% of the domestic market of cold rolled steel sheet, for which hot coil is main ingredient. Given this market situation, Hyundai HYSCO, a new entrant of the cold rolled steel sheet market, requested POSCO to supply its hot coil over several times, but POSCO refused the requests without any clear reasons. As a result, Hyundai HYSCO had no choice but to import hot coil from overseas including Japan to enter the downstream market, and during the process, far more cost was incurred, putting the firm in a very difficult situation. The KFTC saw that POSCO's act of refusal to deal is abusing its market dominance in the upstream market to obstruct its rival's business activities in the downstream market, thereby restraining competition. Therefore, the KFTC imposed a corrective order and a surcharge on POSCO.

However, the Supreme Court sided with POSCO, citing that KFTC's argument that POSCO's refusal to deal has restrained competition has not been fully backed by evidence. With regard to this ruling, the Supreme Court stated that to prove any anti-competitive effects of the refusal to deal, the possibility of price raise, output reduction, undermined innovation, reduction in the number of effective competitors and diversity reduction, etc. should be proved to be substantially high. In particular, the Supreme Court decided that as the regulation on abuse of market dominance is to protect not competing enterprises but competition itself, it is hard to recognize POSCO's refusal to deal as illegal just because it caused Hyundai HYSCO some loss, and so, to prove POSCO's act illegal requires sufficient proof of the firm's intent to restrain competition and anti-competitive effects of the act.

Royal Industrial Tech Corp

Royal Industrial Tech Corp and Shinhwa Electronics are both engaged in the industry of production and installation of fire detection system. Especially, Royal Industrial Tech Corp owns a patent to exclusively use major technologies related to fire detection system. Meanwhile, Construction company A invited open bids for a fire detection system installation project for which Royal's patented technology is required. In the concerned bidding, Shinhwa Electronics was selected as a successful bidder under the system where award is given to the lowest bidder (followed by Woo Seok Electronics, and Royal Industrial Tech Corp in order). Once determined as the successful bidder, Shinwha over several times requested Royal to provide estimates of the concerned fire detection system. However, Royal refused such requests. In response, Shinhwa informed Construction A that it would give up its right to the contract. Meanwhile, Company A let the second lowest bidder Woo Seok Electronics participate in the project and Woo Seok Electronics requested Royal for estimates of the system. The estimated price provided by Royal was quite high, hovering over 48% of the average transaction price. Then, Woo Seok Electronics concluded that it might not be able to make profits based on the estimate, and informed Company A of its intent to withdraw from the contract. Eventually, the 3rd lowest bidder Royal was awarded the project.

The KFTC saw that Royal's refusal to license its IP constituted an abuse of market dominance to exclude its rival. In particular, the KFTC concluded that besides its refusal to deal with Shinwha, Royal called for a price that Woo Seok couldn't afford to pay, which also virtually amounted to a refusal to deal. Through this refusal to deal, Royal's rivals actually couldn't participate in major open bids, which was tantamount to anti-competitive effects. Also intent to restrain competition was verified as Royal argued that it couldn't help refusing to deal in order to prevent its rivals from entering the relevant market. Recognizing this, the KFTC imposed a corrective order on Royal for its refusal to deal.

LITHUANIA

Essential facilities

AB Lietuvos telekomas

AB Lietuvos telekomas accused the company UAB Interprova (the claimant) of the infringement of the exclusive rights granted to AB Lietuvos telekomas in accordance with the Law on Telecommunications and blocked the ISDN flows and telephone lines operated by UAB Interprova. As a result, UAB Interprova was prevented from the provision of the internet telephony services and suffered a loss of about LTL 1 million (EUR 289 620), since the blocking of the telephone lines made it impossible for the company to operate in the market and compete with other companies rendering the data transmission services. In order to be able to render services to the consumers the telecommunications service provider must have an access to the terminal points of the telecommunications network to which the users are connected. Such connection is possible only using the existing local infrastructure. For the purpose of providing the data transmission services UAB Interprova had concluded the agreement on the lease of dedicated lines with AB Lietuvos telekomas.

Enjoying the dominant position in the fixed public telecommunications network market and the market for the lease of the telecommunications networks AB Lietuvos telekomas passed a decision to block the lines leased by UAB Interprova and about 30 more undertakings providing the internet telephony services, as a result eliminating competition and consolidating its dominant position in the internet telephony services market. Such actions by AB Lietuvos Telekomas were qualified as the restriction of the internet telephony services and market monopolization in breach of the Law on Competition. Besides, by such actions AB Lietuvos telekomas injured a public interest, restricted potential competition, and caused damage for consumers.

The Competition Council decided to obligate AB Lietuvos telekomas to resume the provision of the services concerned to UAB Interprova and fined it LTL 2 077 000 (EUR 601 540.77).

AB Lietuvos Telekomas appealed the decision to the court. By the ruling of 11/06/2003 the Court of appellate instance upheld the CC's decision.

Margin squeeze

TEO AB, LT

TEO AB, LT (previously AB Lietuvos telekomas) abused its dominant position in internet services market by imposing unfair prices referred to as "price squeezing". The investigation was started upon the request of 6 undertakings. One of the major objects of the investigation was the provision of the ADSL (the digital subscribe line that allows more bandwidth downstream, - from the network to the customer site – than upstream) internet access services to the final users.

The services were provided on the basis of the wholesale TEO AB, LT ADSL internet access framework. The comparison of the prices for services provided by undertakings operating in the market revealed that in the retail market TEO AB, LT was rendering certain ADSL internet access services to its final users (households and business customers) at the price that was lower than the prices offered to other customers in the wholesale market. Such actions restricted the possibilities for other companies to compete over prices when providing services in the retail market to the final consumers.

The CC's decision was to obligate TEO AB, LT to terminate the actions constituting an infringement of the Law on Competition and adjust the terms for the provision of the ADSL access so that the direct or indirect imposition of unfair prices or other terms for the purchase of the services would be eliminated. For this infringement TEO AB, LT was fined LTL 3 011 000 (EUR 872 045.87). For more information see at www.konkuren.lt/en/anual/2006_eng.pdf.

MEXICO

Essential facilities in telecommunications markets

Telmex & Telcel

Four out of the five cases in telecommunication markets involved access to essential facilities and services for fixed telephony markets. In those cases Telmex (Teléfonos de México, S.A.B. de C.V. is the incumbent carrier in fixed telecommunication industry) was found responsible of illegal RTD practices against three downstream competitors in three cases and in one case, the affected party was a non downstream competitor. One case dealt with the refusal of Telcel (Radiomóvil Dipsa, S.A. de C.V., which operates under the name "Telcel," we provide mobile telecommunications service in all nine regions in Mexico) to provide interconnection services to Nextel essential for mobile Short Message Service (SMS).

Refusal to contract origination services for long distance services in public telephones

Files DE-07-1998 and RA-33-2000. English summaries are available in the CFC's 2000 Annual Report available at http://www.oecd.org/dataoecd/52/32/39554154.pdf; and enclosed in the document

"Competition and Regulation Issues in Telecommunications" available at: http://www.oecd.org/dataoecd/48/39/1834399.pdf.

Telmex

One case was about the refusal to deal by Telmex that prevented Avantel to enter into a contract which would enable it to absorb the $0.50 charge for 1-800 number calls originated from public telephones, in order to free its users from this payment. Telmex refused the contract without justification, although it had already subscribed such agreements with foreign providers of 1-800 numbers. The investigation also included tying, rising rival's cost (by reducing its demand) and price discrimination. It was concluded on May 25th 2000.

Refusal to provide access to essential facilities and services for long distance services

Case files DE-03-99 y RA-18-2001. English summary enclosed in the document "Competition and Regulation Issues in Telecommunications" available at:
http://www.oecd.org/dataoecd/48/39/1834399.pdf. Also available in Spanish at:
http://201.161.46.75/index.php?option=com_content&task=view&id=1847&Itemid=120.

Avantel, Marcatel and Alestra v. Telmex

In 1999, Avantel, Marcatel and Alestra, all of them long-distance services providers, filed a complaint against Telmex related to: (i) the payment of tariffs for interurban transportation higher than the tariffs offered to final commercial users of long distance services (i.e. margin squeeze); (ii) restrictions in the supply of resale ports and leased lines for interurban transportation; (iii) delaying the supply of interurban services; and (vi) the imposition to use 2 Mbps leased lines, thus impeding the acquisition of lower capacities and co-sharing among carriers.

The CFC determined that such practices had the object and effect to impede or delay competitor's access to services and facilities in the relevant market of interurban transport services (i.e. resale), an essential input to provide long distance services to final users. In July 2002, the CFC sanctioned and fined Telmex as responsible for illegal price discrimination and was ordered to immediately eliminate the practices.

Refusal to provide circuits and leased lines for long distance services

Files DE-33-1999 and RA-78-2002. No English summary available. A summary of the final resolution is available in Spanish at:
http://201.161.46.75/index.php?option=com_content&task=view&id=1854&Itemid=120.

Avantel and Alestra v. Telmex

In August 1999, Avantel and Alestra filed a complaint against Telmex because its refusal to accept their requests for service involving the installation of circuits and leased lines, which the plaintiffs needed to provide long distance services.

In February 2002, the CFC ruled that Telmex had engaged in relative monopolistic practice consisting on the refusal to receive requests to process more quickly priority services and payment for contracting access or interconnection services. This refusal reduced the demand that the plaintiffs had at hand, and also caused undue displacement of said companies from the markets for access or interconnection, which require these lines, and interurban transport, which includes circuits, and directly affects national and international long distance markets. The CFC therefore ordered Telmex to cease the above mentioned practices and imposed it a fine.

Refusal to provide access for telephone emergency services

A public version of the final resolution is available in Spanish at: http://201.161.46.75/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-22-2003.pdf.

SCE v. Telmex

In May 2003, Sistema Computarizado de Emergencia, S.A. de C.V. (SCE) filed a complaint against Telmex alleging its refusal to bill and collect through its system the services provided by SCE, which consist of installing phone emergency systems in one urban area in Mexico.

SCE provided a telephone number to communicate residents of an urban area with providers of public emergency services. It required Telmex's telephone billing system to bill and collect for its services, since it could not do so by other means without losing its economic viability.

The CFC found that Telmex billed those services to other companies (i.e. it was available to other firms). Telmex claimed that it refused to provide the services to SCE due to the end of its contractual relationship, the denial of some final users to pay for SCE's services, and the filling of complaints against Telmex owing to the poor quality of SCE's services. The CFC determined that Telmex's arguments did not justify the RTD against SCE, and ordered it to the practice and imposed a fine.

Refusal to provide interconnection services for mobile short message services (SMS)

Case files DE-11-2005. No English summary available. Final decision available only in Spanish at: http://201.161.46.75/index.php?option=com_content&task=view&id=5908&Itemid=122.

Telcel

In 2007, Telcel was found responsible of a illegal refusal to provide access to interconnection services essential for Nextel to provide to its subscribers the short messages service (SMS) from and to Telcel's subscribers. The interconnection services between networks are essential for any mobile carrier to offer to its customers the ability to send and receive SMS to and from users of networks of other carriers throughout Mexico. The CFC imposed to Telcel an order to suspend the RTD to Nextel and a fine.

Refusal to provide distribution licenses for pay TV channels (i.e. IP licensing)

PCTV

In 2007 (Case file DE-01-2006. Final decision available only in Spanish at: http://201.161.46.75/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-001-2006.pdf), the CFC found PCTV responsible for performing illegal refusals to provide distribution licenses and wholesale supply agreements to competing pay TV carriers. PCTV vertically integrates the production of TV channels; the acquisition of broadcasting rights over foreign TV channels; and the wholesale distribution of TV channels to cable TV carriers. Additionally, PCTV's shareholders participate in the downstream markets of retail distribution and commercialization of pay TV services in Mexico.

The complainant was a cable TV carrier, downstream client but not shareholder of PCTV. This cable TV carrier alleged that by refusing to provide wholesale licenses and contracts for specific and most demanded TV channels, PCTV has hindering its possibilities to conform competitive pay TV retail services to acquire and maintain its final subscribers; and by providing those TV channels to its shareholders, PCTV was creating unfair competitive conditions in the downstream market.

The definition of the relevant markets was critical to determine when TV channels distributed by PCTV constitute essential for pay TV carriers in order to reach final subscribers. The CFC concluded that each category of content constituted a separated relevant market, thus determining the existence of at least six relevant markets in the wholesale distribution and commercialization of TV channels. Namely, the relevant markets defined were the wholesale commercialization of TV channels in the following content categories: cultural, sports, entertainment, children's, music and movies programming.

The CFC found that each of those programming content categories is essential for pay TV carriers in order to compete in the retail market (i.e. to reach the subscribers); and that PCTV wield substantial market power in four out of the six wholesale relevant markets it participates. Thus, by applying a selective refusal to deal over the most valuable TV channels in each relevant market, PCTV was found possible responsible to foreclosing specific pay TV carriers in the downstream markets and unduly favoring its shareholders.

Prior the issuance of a final resolution and pursuant Article 41 of the Rulings of the FLEC, Article 41 of the Rulings of the FLEC is the implementing regulation governing early termination of the investigations when parties under investigation present sufficient and viable binding commitments. In 2007 the Rulings of the FLEC was amended and such provision was incorporated as article 32 bis 2 of the FLEC. PCTV offered binding commitments to the CFC that included:

(i) To brought to an end the acts under investigation.

(ii) To provide access in non-discriminatory terms to all pay TV carriers that request PCTV's services.

(iii) To exhibit in its internet webpage and national newspapers: the terms to be shareholder-user and non-share holder-user, membership fees, and TV channels' tariffs.

(iv) To provide enough evidence and information about the compliance of all the assumed commitments.

On March 31, 2009 the CFC issue a final administrative resolution declaring PCTV responsible of an illegal RTD, accepting its commitments, and imposing a fine.

RTD with stores of the traditional distribution channel for carbonated soft drinks

Case files DE-21-2003, RA-12-2005, RA-13-2005 and RA-18-2005. No English summary available.

Coca-Cola

In 2003, the CFC sanctioned and fined firms The Coca-Cola Export Company and fourteen of its bottlers (all together 'Coca-Cola') for illegal RTD and exclusivity agreements against traditional grocery stores that did not accepted to enter into exclusivity distribution (verbal) agreement that forbids them to sale products of Big Cola, a competing producer of carbonated soft drinks. In return for the exclusivity agreements, Coca Cola offered discounts, rebates, and financing. In particular, Coca Cola provided resources for stores maintenance and supplied (in gratuitous loan) refrigerators and coolers.

The relevant market was defined as the commercialization and distribution of bottled carbonated soft drinks over the localities were the fourteen bottlers participated. The market definition was based on the fact that, as far as product characteristics and intended use are concerned, carbonated soft drinks could be distinguished from other beverages such as bottled juices, water, coffee, tea, isotonic and energy drinks. TCCEC and its fourteen bottlers were considered one «economic agent» due to its power to adopt a common market policy, to act as a collective entity in the relevant markets due to economic links between them, the unique and coordinated policy making, and marketing and distribution processes they have established.

The CFC concluded that by imposing exclusivity contracts and RTD as retaliation to grocery stores that did not accept them, Coca Cola were foreclosing competing soft drinks producers from the distribution channel. The CFC also determined that Coca Cola's competitors did not had the economic capacity to countervail Coca Cola's practices; and that stores did not either countervailing buying power to negotiate for the supply of Coca Cola branded products.

Refusal to deal in tortilla markets

Files IO-11-2000 and RA-23-2001. An English summary of the case is available in the CFC's 2001 Annual Report, at: http://www.oecd.org/dataoecd/34/43/2488754.pdf.

Harinera de Yucatán

In 2001, the CFC sanctioned an illegal RTD in the market for production, distribution and commercialisation of corn flour for human consumption. The activity involved in this case had great economic relevance because corn flour is a basic input for tortillas, which are the main staple of the Mexican diet. The investigation revealed Harinera de Yucatán, a subsidiary of a major conr flour producer at that time, had celebrated agreements with mill and tortilla associations in two municipal districts in Yucatán by means of which the former refused to sell flour and machinery to businesses located within a given distance from already established ones. As a related matter, is worth to mention that many local regulations set minimum distance requirements as a condition for mill and/or tortillería licenses issued by the municipal government. In this matter, the Supreme Court of Justice of the Nation has established that any regulation setting distance requirements between similar businesses is unconstitutional, since it is contrary to the individual right of freedom of work, contained in article 28, and interferes with free market access. Pursuant that SCJN's sentence, the CFC has issued several decisions and opinions advocating before local authorities for avoiding or eliminating the setting of minimum distances between tortilla-makers and other food sellers. For further information, see the CFC's 2004 Annual Report available at: http://www.oecd.org/dataoecd/51/46/35111139.pdf. The CFC santioned and fined Harinera de Yucatán that in turn committed to suspend the those agreements and not to refuse dealing.

Local authorities refusing to grant permits for public transportation (i.e. taxis)

Case files IO-17-99, RA-44-2000 and RA-45-2000 and Constitutional Controversy Suit 11/2001. A summary in Spanish of the final administrative decision is available at: http://201.161.46.75/index.php?option=com_content&task=view&id=1946&Itemid=120. And the Sentence in Spanish of the SCJN is available at: http://201.161.46.75/images/stories/Poder%20judicial%20y%20CFC/CC_11-2001.pdf.

Campeche

In 2001, the CFC declared that Campeche State Government, by enforcing the existent transportation state law, was committing an anticompetitive RTD in the granting of taxi permits to the members of a new association of drivers.

The CFC initiated an *ex officio* investigation after receiving a complaint by the a new association of drivers alleging the denial of the Campeche State Government to grant them permits to provide taxi services in one city, whilst it granted all the available permits only to only established association. The CFC's investigation into the alleged refusal to grant permits to provide taxi services indicated that the transportation state law of the State of Campeche contained unjustified barriers to entry and by enforcing them, the State Executive was incurring in illegal discriminatory and RTD practices.

The State Transportation Law granted discretional powers to the State Executive to limit the supply in the relevant market because, among other things, the declaration of public needs was not subject to objective and non discriminatory criteria; and favored the established association in the granting of new permits, causing the increase in market concentration and impeding the entrance of new participants.

In 2001, final CFC’s administrative resolution: (i) notified to the Executive of the State of Campeche that the enforcement of the State Transportation Law, in the matter of granting permits for taxi services, was in violation of the FLEC; (ii) recommended to Campeche Governor to elaborate a Draft Amendment to the State Transportation Law and present it to the CFC to issue an opinion prior its submission to the Congress of the State; and (ii) ordered the granting taxi permits subject to non discriminatory and competitive criteria enclosed in the FLEC, until the entry into force of the new law.

Campeche Governor promoted a constitutional controversy against CFC’s final decision, alleging that it had exceeded its enforcement powers and invaded or limited the sovereign rights of the States to issue its regulations in transportation matters. In January, 2004 the Supreme Court of Justice of the Nation resolved that authorities in exercise of the powers granted by legislations shall not be considered economic agents subject to the FLEC. In consequence, the CFC declared void its 2001 administrative decision in compliance of the court’s sentence.

Oaxaca

In March 1995, a group of people from the State of Oaxaca informed the CFC about the existence of regulatory and administrative barriers that unduly restricted their access to the market for the local public taxi service. They stated that, in spite of having met the requirements for obtaining concessions as taxi service providers, the state authorities had only given them temporary permits. They also stated that their problems in obtaining concessions were on account of their having left the Unión de Organizaciones de Taxistas de Oaxaca, A.C. and the consequent lack of support from the Union in their requirements. Subsequently, the temporary permits notwithstanding, the same authorities prevented them from going about their business.

After these facts had been presented to the CFC by the affected parties, the state government issued a decree suspending the issue of new concessions for a period of two years. Excluded from this provision were requests dated prior to that date, which were to be resolved within one year. Shortly afterwards, a resolution revoking the temporary permits was issued. The reasons given for this measure included, notably, the following: the permit bearers' lack of a corresponding concession document, and the fact that the permits had been issued by an authority without competence in that matter.

The Commission's investigation also revealed that one of the Union's functions is to coordinate the issuing of concessions between its members and the local authorities. This power is supported by the state authorities' requirements for granting concessions, one of which is a letter of consent or support from the Union's taxi bases.

The CFC ruled that the procedures established by the Oaxaca State Government for the granting of concessions affected competition and free market access by hindering the entry of new suppliers and facilitating agreements between competing economic agents intended to restrict the supply of taxi services in the state. To bring about the lifting of these barriers to efficient market functioning and equal, non-discriminatory market access, the CFC resolved to issue an opinion on the aspects affecting competition and free market access contained in those procedures, under the power granted to it by section VI of article 24 of the FLEC. Thus, pursuant to section VIII of article 24 of the Commission's Internal Regulations, its President sent a recommendation to the Governor of Oaxaca, emphasizing greater freedom in access to concessions, their granting to holders of temporary permits, and the removal of Union recommendation from the concession requirements.

In May 1998, Oaxaca Governor notified the CFC the granting of taxi concessions in compliance of its resolution.

NETHERLANDS

Holdingmij de Telegraaf v. NOS and HMG

Parties:

De Telegraaf is a Dutch publishing company of newspapers and magazines.

NOS is a Dutch public broadcasting body, which acts as an umbrella for (other) Dutch public broadcasting organizations as well as candidate organizations that are officially granted broadcasting time under the Dutch Media Act. Each public broadcasting organization runs, at least one, so-called weekly TV guide.

HMG (now known as RTL Nederland) was a media company, owned by RTL Beheer B.V. (of which CLT and VNU are shareholders) with a 65 per cent share and by Veronica Holding B.V. (Veronica) with a 35 per cent share. Publishing company Veronica Uitgeverij B.V. (owned by Veronica for 80 per cent and by RTL Beheer B.V. for 20 per cent) runs two weekly TV guides, which are Veronica Blad and Veronica Satellite. HMG and NOS had signed a mutual agreement, under which NOS was allowed to publish its weekly TV listings in Veronica Blad and vice versa.

De Telegraaf claimed that it was refused access to the listings for publication in a weekly tv-guide.

Theory of harm:

Notwithstanding the intellectual property rights they own, or claim, broadcasting organizations have a de facto monopoly when it comes to the production and first publication of their weekly TV listings. This is because TV schedules are by-products of the programming process, which is controlled by the television producers and which is only known to them. Furthermore, the listings only become marketable products once the schedules have become final, right before the actual broadcast. Third parties are therefore unable to compile reliable listings for publication in their own weekly TV-guides.

Instead, they need to obtain these listings directly from the broadcasting organizations or from undertakings to which the rights of these listings have been transferred.

In addition, the de facto monopoly of all broadcasting organizations regarding their own TV listings is elevated to a legal monopoly, insofar they claim copyright protection under copyright laws, or insofar as parties to which they have transferred their rights claim the same kind of protection.

The arrangement between HMG and NOS meant that HMG and NOS made reciprocal agreements such that HMG made available to NOS its own TV listings, in principle under the same restrictive provisions.

This means that consumers in the Netherlands are thus only able to get the complete TV listings by buying one of the TV guides of the broadcasting organizations directly from them. As a result of the selective licensing policies of NOS and HMG regarding the TV listings, they keep the supply on the market for weekly TV listings artificially to themselves (closed shop). Third parties, such as De Telegraaf, that are not broadcasting companies, but who want to enter this market as suppliers, are thus excluded.

Conclusion:

The NMa ruled that HMG and NOS abused their dominant positions by not making their TV listings available to De Telegraaf, which, as a consequence, was unable to include this information in its newspapers' weekly sections. By imposing an order subject to periodic penalty payments, the NMa forced HMG and NOS to make available within 4 months the TV listings of its member public-broadcasting companies to third parties, including De Telegraaf, in return for a reasonable fee.

Appeal:

In its ruling, at first instance, the District Court of Rotterdam followed the NMa's line with regard to NOS. With regard to HMG, the District Court ruled that there was no evidence of a refusal to supply, since HMG had already made De Telegraaf an offer to supply when it was involved in the legal proceedings with the NMa.

In the appeals procedure, in 2002, the Dutch Trade and Industry Appeals Tribunal (CBb) stated, inter alia, that it did not agree with the line of reasoning that merely from the existence of a considerable demand for a yet-to-be-released product it can be inferred that it should be considered a new product. In this case, this would mean that a product could already be considered new if it were merely distinguishable from other products by having a substantially lower price or because it was offered in combination with another product. This could not be approved by the Court.

The CBb therefore ruled that, at the time of the appealed decision's publication, the requirements, following from the case-law of the European Court of Justice, (as interpreted at that time under *Magill*), had not been met in order to consider the refusal of NOS to make available the weekly TV listings to De Telegraaf an abuse of a dominant position within the meaning of Section 24 of the Dutch Competition Act.

Norsk Hydro Energy v. Samenwerkende Electriciteitsproductiebedrijven (Sep)

Parties:

Sep, a trade association of Dutch electricity companies, with certain regulated exclusive rights and obligations, was the owner of the Dutch interconnecting network, the transmission grid for public electricity supply. Norsk Hydro is a global player in, among other things, fertilizer, oil, gas, aluminium and magnesium.

Theory of harm:

Hydro Agri (Dutch daughter company of Norsk Hydro) wanted to import electricity. It then wanted to transport this electricity to its plant in Sluiskil (Netherlands). Such transportation would require Hydro Agri to make use of the transmission network, the so-called interconnecting network, which was owned by Sep. There were no viable alternatives for Hydro Agri to do so.

However, Sep had refused to facilitate transportation within the Netherlands, effectively blocking the import of electricity by Norsk Hydro. Sep justified its refusal to transport this imported electricity by invoking the Dutch Electricity Act 1989. Sep argued that Hydro Agri would supply, partially or completely, third parties with the imported electricity, in violation of the Electricity Act 1989.

Conclusion:

It was concluded that Sep had a dominant position with regard to interregional transportation of electricity using grids within the Netherlands.

Sep's interconnecting network was Hydro Agri's only viable option to have the imported electricity transported. The fact that Sep refused to cooperate or that it attached unreasonable conditions to such cooperation constituted an abuse of a dominant position.

Sep argued that Norsk Hydro would act contrary to the Dutch Electricity Act 1989, because it would supply electricity suppliers with the imported electricity. The NMa rejected Sep's arguments, because this Act actually did allow an importer to sell self-generated electricity to a third party and to import all electricity that it needed for personal use. It found that Sep should have investigated the facts further and if necessary, imposed conditions on the contract, rather than refusing outright to facilitate transport.

The NMa subsequently imposed a NLG 14 million fine on Sep (approximately €6.5 million).

Appeal:

The CBB upheld the NMa's decision on appeal. The Court made it clear that it was no defence for the Sep to refuse to facilitate transport on the grounds that Norsk Hydro might infringe the Electricity Act. It was not for SEP to police the enforcement of that Act. In its decision on appeal, the CBb reduced the fine to €3.5 million, taking into account the fact that it appeared plausible that Sep's violation of Section 24 of the Dutch Competition Act stemmed out of its misinterpretation of its regulatory obligations, and thus out of carelessness rather than on purpose (Sep had made an error of judgement by treating its obligation to transport as secondary to what it perceived as the importance of the public supply of electricity).

Both decisions were challenged in court. The CBb annulled the decision of the NMa in. Holdingmij de Telegraaf v. NOS and HMG. The CBb upheld the decision of the NMa in the Sep case, but reduced the sanction.

NEW ZEALAND

Unconditional refusal to deal

Commerce Commission v Bay of Plenty Electricity Ltd

One of the two litigated cases, Commerce Commission v Bay of Plenty Electricity Ltd (unreported, High Court, Wellington, 13 December 2007), involved a district electricity retailer, Bay of Plenty Electricity Ltd (BOPE), that effectively denied access by competing electricity retailers to the electricity meters that BOPE owned and that were used to measure the units of electricity used by consumers. The Commission concluded that BOPE had used its dominant position in the metering services market for the purpose of preventing or deterring other electricity retailers from engaging in competitive conduct in the electricity retailing market. The Commission commenced litigation in the High Court. The Court held that BOPE was not dominant and did not have a substantial degree of market power. The Commission did not appeal this decision. The High Court's decision is unreported.

Northport Ltd

In the other unconditional refusal to deal case, a provincial port company, Northport Ltd, was preventing another cargo handler provider from competing in the supply of general cargo marshalling services with the incumbent sole supplier, Northport Services Limited, Northport's own affiliated provider. The Commission concluded that Northport had taken advantage of a substantial degree of market power in respect of certain port services with an anti-competitive purpose of preventing a competing cargo handler providing marshalling services. The Commission sought, and by consent with Northport Ltd obtained, a cease and desist order requiring Northport Ltd to allow competition to occur in general marshalling services at the port. A link to the Commission's press release/decision can be found at: www.comcom.govt.nz under 'Media Centre'.

Price/Margin squeeze

Baycorp Advantage Holdings (NZ) Ltd

This case involved the actions of a credit reporting and debt collection company, Baycorp Advantage Holdings (NZ) Ltd. Baycorp introduced a fee for each piece of credit default information loaded into its credit default database by competing debt collectors. The result was that independent debt collectors were unable or unwilling to load default information, and this had some effect on their ability to compete with Baycorp. The Commission concluded that Baycorp had taken advantage of its substantial degree of power in the credit reporting market to deter competitive conduct in the debt collection market. As Baycorp ceased the conduct, thereby limiting the detriment, the Commission concluded the case by issuing a formal warning to the company.

A link to the Commission's media release on the Baycorp case can be found at: www.comcom.govt.nz under 'Media Centre'.

Telecom 'data tails'

Elements of a margin squeeze were also present in the *Telecom* 'data tails' case, described immediately below, in that wholesale prices set by dominant vertically integrated data transmission services provider, Telecom, were often higher than the retail prices charged by Telecom.

Access pricing

Commerce Commission v Telecom Corporation of New Zealand Ltd and Telecom New Zealand Ltd

This litigated case, Commerce Commission v Telecom Corporation of New Zealand Ltd and Telecom New Zealand Ltd (High Court, Auckland, 9 October 2009), arose in the telecommunications industry. It concerned high-speed data transmission services, wholesale access to 'data tails' and backbone transmission services, centred on the price for data tails. Data 'tails' are parts of the connection to a customer that Telecom's competitors must acquire from Telecom where the competitor's network does not reach the customer. They are required for high-speed data transmission services that allow businesses to transmit information in digital form between sites across established private networks or to other businesses.

The Commission concluded that Telecom Corporation of New Zealand Ltd had used its dominant position and substantial market power to price data tails to downstream competitors at a level that contravened the Efficient Component Pricing Rule (ECPR), and that it did so for an anti-competitive purpose. The Commission considered that Telecom's wholesale prices for the data tails exceeded the price of an "end-to-end" data service and the price that Telecom charged itself for the use of the tails. The Commission took the case to the High Court, which found in October 2009 that Telecom had used its dominant position/market power for a proscribed purpose. The High Court confirmed that ECPR was the appropriate economic model to apply in access cases under s 36 of the Commerce Act. At the time of writing, the Court has yet to consider the details of relief sought, including the quantum of any pecuniary penalty. It is not known at this time whether Telecom will appeal. The High Court's judgment is unreported, but the Commission's media release is available at the following link: www.comcom.govt.nz under 'Media Centre'.

***Telecom Corporation of New Zealand Ltd v Clear Communications Ltd,* [1995] 1 NZLR 385 (Judicial Committee of the Privy Council, 19 October 1994)**

When asked to rule on what was an appropriate test for access to an incumbent network, the Privy Council noted that the Commerce Act "provided no explanation" as to the distinction between lawful and unlawful conduct. Until 1 January 2004, New Zealand's court of final appeal was the Judicial Committee of the Privy Council in London. From that date New Zealand's highest court became the newly created Supreme Court of New Zealand. The judgment adopted a 'counterfactual test' (explained in next section below) to assess the connection between market behaviour and the allegedly restrictive behaviour. The Privy Council held that the only correct economic standard to test whether pricing by an incumbent of an essential input will preclude competition to the detriment of consumers is the Baumol-Willig rule. (This is more usually known as the Efficient Component Pricing Rule 'ECPR'.) The appropriateness of ECPR was confirmed by the High Court in the recent Telecom data tails case referred to above.

Carter Holt Harvey Building Products Group Ltd v Commerce Commission, **[2006] 1NZLR 145**

In this case, the Privy Council reiterated that the counterfactual test was the only way to differentiate anti-competitive behaviour compared to a vigorous competitive response from an incumbent. The Privy Council held that it followed that a firm could not be using its dominant position if it was acting as a non-dominant firm otherwise in the same position would have acted in a competitive market. The relevant quote is as follows:

"In approaching the issue of whether s 36 had been breached it was therefore necessary to consider how the hypothetical seller would have acted in a competitive market (the counterfactual test). The test asked whether a hypothetical firm not in a dominant position but otherwise similarly placed could rationally have acted as the dominant firm did."

The Commission considers that the counterfactual test laid down by the Privy Council can cause difficulties in analysing conduct under s 36. On 30 October 2009 the Supreme Court (which had replaced the Privy Council as New Zealand's highest judicial authority) granted leave to the Commission to appeal the judgement of the Court of Appeal in the *Telecom 0867* case. In August 2009 the Court of Appeal found that Telecom Corporation of New Zealand Ltd had not breached section 36 of the Commerce Act through the introduction of a dial-up prefix in 1999. The Commission will ask the Supreme Court to reconsider the counterfactual test and whether it is necessary or appropriate in all s 36 cases.

***Union Shipping NZ Ltd v Port Nelson Ltd* (1990)**

Union Shipping challenged the access terms imposed upon it as a competing stevedore by the incumbent port company. The court concluded that a serious issue had been raised and ordered a cost accounting inquiry as a precursor to any further relief. Following that inquiry the parties are believed to have resolved the matter.

***Chatham Islands Fishermen's Coop Co Ltd v Chathams Islands Packing Co Ltd* (1988)**

The Fishermen's Coop Co alleged that the Packing Co was excluding them from using the only practicable wharf available. While the court did not issue an interim injunction, it decided there was a serious issue to be tried under section 36 of the Commerce Act. The parties subsequently resolved the issues through negotiation.

PAKISTAN

Karachi Stock Exchange (Guarantee) Limited

In the first case of refusal to deal and refusal to access essential facility In the Matter of Show Cause Notice Dated April 10, 2008 for Violation Of Section 3 Of The Competition Ordinance, 2007, M/s Karachi Stock Exchange (Guarantee) Limited it was found that commonly listed securities on all the three exchanges Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange in Pakistan constitute approximately 90% of the total trading volume of listed securities in Pakistan. Out of 90% around 87% of the market share is with the KSE (Karachi Stock Exchange) while the combined share of ISE (Islamabad Stock Exchange) & LSE (Lahore Stock Exchange) is only 13%. For historical reasons the best price for a particular security is mostly available at the KSE only. Bids and offers of investors entered into trading systems of other stock exchanges cannot be matched with those entered at KSE, even if the security being traded is listed at both exchanges. LSE and ISE offered KSE a proposal for united trading platform which was out rightly refused by the KSE.

KSE's refusal to deal clearly has a negative effect on competition as it contributes to price disparity and prohibits price discovery for the consumers not placing their orders through KSE. There was no "objective justification" for refusal on the part of KSE of 'best price' to ISE and LSE, because its preeminence does not arise from any peculiar effort on part of KSE's members. The Bench held that the trading platform of KSE is an essential facility being controlled by KSE which cannot reasonably be duplicated. The option of setting up a substitute for such a facility does not appear possible and viable. KSE has failed to establish or provide any convincing arguments that access to best price can be provided through any other facility or in any other manner as things presently stand. Therefore, KSE's refusal to allow access to its platform through which all the customer/investors in the relevant market would have equal access to the "best price" available in the market amounts to exclusionary and anticompetitive conduct and lacks a reasonable business justification.

Full text of the order in English language is available at
http://www.cc.gov.pk/Downloads/Latest%20KSE-Order%2029-5-09.pdf.

Murree Brewery Company Limited Vs. SIZA Foods (Private) Limited

In the second case In the Matter of Murree Brewery Company Limited Vs. SIZA Foods (Private) Limited (File No. 03 /Sec-3/CCP/08) of refusal to deal, a local company manufacturing beverages filed a complaint that McDonald's franchisee SIZA Foods (pvt) Ltd had refused to entertain its offer to sell non-alcoholic beverages, *i.e.*, Malt 79, Cindy, Lemon Malt, Original Lemonade and Big Apple, as McDonald's had exclusive arrangements with Coca-Cola company. During investigation it was found out that McDonalds enjoys dominant position in the market of foreign fast food chains. It also revealed in the investigation that requests for supply of soft-drinks were made by McDonalds only to the Coca-Cola Company. However, having understood the concerns of the Commission, SIZA volunteered to give the undertaking that in conformity with the requirements of its franchise agreement, other beverages will also be placed in a chiller/beverage cooler within its restaurants and at kiosks.

Full text of the order in English language is available at
http://www.cc.gov.pk/Downloads/Final%20Order-Siza%20Foods.pdf.

In these two abovementioned orders passed by the CCP, order in SIZA Food case was a consent order and the undertaking was also submitted by the firm whereas in the KSE case an appeal was filed before the Supreme Court of Pakistan which is *sub-juidice*.

POLAND

Local public utilities

Typical cases concern the practices exercised by local public utilities: cemetery operators, waste dump ground operators or bus-stop network operators. These operators usually have a dominant position in their local market and are often present in the downstream market: burial services, waste collection services or local passenger transport, respectively. Refusals to deal take various forms: from plain refusals to margin squeeze.

Electrical power grid operator

In the regional-market case, an electrical power grid operator refused (constructively) to connect a new wind-power generator farm to their grid. The operator was owned by a major power company, active in the power generation market. Unlawful conduct was found in this case.

Telecommunications company

In the national-market case, the (formerly monopolistic) telecommunications company, which had a dominant position in the Internet access services, was degrading the quality of IP (Internet Protocol) traffic, which originated in competing Internet service providers' (ISPs) networks. Unlawful conduct was found in this case.

ROMANIA

Romanian Shareholders Registry (RSR), **Decision no. 247 [1999]**

The case came into the competition authority's scrutiny, as a result of the complaint filed by seven independent stock registers against RSR. The complaint related to RSR's refusal to transfer the registers of shareholders from the client companies.

In this case, the competition authority defined the relevant market as the market of registering services on RASDAQ (National Securities Market was officially launched in October 1996, in order to address the need for a transparent, institutional and technical trading environment dedicated to companies that had become public following the Mass Privatization Program), service which did not have substitutes at that time. Beneficiaries of this service were companies listed on RASDAQ which had the legal obligation to keep a shareholders' register, as well as the evidence of shares issued and traded on this market. From the analysis carried out on this market, the Council found that in 1997, RSR held a dominant position, determined by its market share, respectively 100%, and in the following year, RSR held a market share of 96,4%. RSR owed its high market share to the circumstances of its establishment. Thus, RSR was set up in 1996 as a stock company, with the financial and logistical support of USAID, and took over, unconditionally and without charge, shareholders lists held by the National Agency for Privatization in a computerized register. This register included about 5700 companies. During 1997-1998, the Romanian National Securities Commission authorized another ten private independent register companies to operate on this market.

The investigation established that, once the other private independent register companies entered the market, client companies had the possibility either to continue to use the services provided by RSR, or to transfer their shareholders list to another private Register Company. However, only 236 out of 585 companies that had requested the transfer effectively accomplished the transfer. The explanation of this phenomenon consists in RSR's discriminatory behaviour. Thus, while for several companies that had not concluded a contract with RSR, the transfer was executed unconditionally, in other cases client companies were compelled to conclude a contract in order to have their shareholder lists transferred. Besides, RSR gave up charging the services performed to the companies that consented to enter into a contract. If client companies did not follow through with their intention to transfer, RSR wrote off their debts.

At that time, according to the specific legal framework (The regulation of this market is accomplished by the Romanian National Securities Commission (RNSC)), RSR was bound to transfer to other independent private register companies the shareholders lists, within a five day period from the day of registering the company's request. The transfer should have been executed unconditionally, except in case when the issuer company is bound to pay to the register company the charge for the services provided by it. If contractual relations were binding the issuer company and the register company, the transfer had to be executed unconditionally and without the imposition of a charge for that service.

Following the investigation, the Competition Council found that RSR abused its dominant position by imposing unfair contractual terms in the contracts concluded with beneficiaries. The abuse consisted also in the refusal to deal, namely by refusing to transfer shareholders lists to the independent private register. RSR's manoeuvres of conditioning the transfer's execution with the payment of services allegedly performed prior to the conclusion of the contract induced either the forgoing of the transfer and entering into an agreement with RSR, or the transfer's execution, but at higher cost and in a longer period of time.

The Competition Council also found that RSR applied to the issuer companies a discriminatory treatment. In that sense, the following anticompetitive practices were identified: charging differentiated tariffs for equivalent services; the issuer companies' coercion to conclude a contract, while other companies, under the same circumstances, had their transfer unconditionally executed; requiring for the payments of services performed outside any contractual relations. In its decision, the Competition Council's Plenum sanctioned RSR for the infringement of art. 6 lit. a) and c) of the Competition Law.

In order to re-establish a normal situation on the affected market, the Competition Council's Plenum imposed on RSR to allow transfers in strict observance with RNSC regulations, without imposing additional conditions. The Competition Council also forbade RSR to grant additional facilities, other than those laid down in the contract, when the issuer companies manifested the intention to transfer their lists to another register company, so as to prevent or to limit the clients' transfer to other register companies.

***National Company for Freight Railway Transport*, ("CFR Marfa") Decision no. 119 [2006]**

In a 2006 decision of the authority, the national railway freight carrier was sanctioned for refusing to grant access to the round houses in its property to other private carriers. In this case, the analyzed market included services of exploitation, maintenance, and repairs of locomotives, specific services for locomotives personnel (access of locomotives personnel to sleeping rooms in the locomotives depots), and all the other activities required for the proper functioning of railway freight transportation. The geographical product market was defined as regional, given by the location of regional units owned by CFR Marfa where it performs these services. As far as the entry barriers were concerned, the access on the relevant market is regulated, in the sense that it requires getting a license from Romanian Railway Authority. In addition, the locomotive shedding requires a depot; the same requirement was applied for the provision of locomotive staff access to sleeping rooms, as staff accommodation in other types of spaces would have contravened the specific legal framework.

RCC's investigation showed that, initially, the current depots were under the possession of the two State-owned railway operators, namely CFR Marfa and CFR Calatori (passengers transport). For that reason, the market had the structure of a duopoly and the clients had the possibility to opt for the services provided by one of two operators, with mention being made that CFR Calatori was charging tariffs much lower than CFR Marfa. Subsequently, the Ministry of Transports issued an order whereby the depots was passed either under CFR Marfa's patrimony, or under CFR Calatori possession; as a result of that decision, the market was very much shaped as a monopoly, since there was only one depot in the end-of-line stations, except for Bucharest and Ploiesti, where each of two companies held a depot.

Examining the behaviour of the two undertakings acting on the same product market – CFR Marfa and CFR Calatori, RCC found that the tariffs charged by CFR Calatori were the same for all its beneficiaries, while CFR Marfa was charging differentiated tariffs laid down in an internal order, based on the beneficiary 's ownership (State-owned or private railway operators). The non-discriminatory tariffs charged by CFR Calatori were considered by RCC as a benchmark on the relevant market. In comparison with this benchmark, the tariffs charged by CFR Marfa for private operators were, until contracts expired, from 5 up to 20 times higher. By incurring differentiated charges, much higher than those applied to spin-offs from the former SNCFR (The state-owned national railway carrier, until 1990), the private operators, as competitors of CFR Marfa, were disadvantaged on the market and determined to compete less aggressively.

Based on all the evidence, RCC's Plenum decided that CFR Marfa infringed the provisions of art. 6 lit. a) and c) of the Competition Law, abusing of its dominant position on the relevant market and resorting to anticompetitive deeds consisting in:

- application, towards private operators, of unequal conditions on similar services, namely the application of distinctive charges as compared to the same services provided to companies split from the former SNCFR;

- refusal to deal with certain business partners, namely privately-owned railway freight operators.

In order to ensure a normal competition environment for freight railway transport, RCC decided to recommend to the Ministry of Transportation to guarantee equal conditions for all undertakings, irrespective of their nature.

RUSSIAN FEDERATION

TOK

FAS imposed a fine of more than 10 million roubles on Sakhalin based supplier of aviation fuel TOK Joint-stock company for monopoly high pricing for aviation kerosin in Youzhno-Sakhalinsk aipost and technologically unjustified refusal to entering into contract with Vladivistok Avia Open joint-stock company on storing aviation fuel. TOK challenged the FAS decision in the court, however, the court upheld the FAS decision.

This case is provided as an example because it is rather typical violation by the aviation fuel suppliers that refuse to provide storage copacity for customers or other suppliers, i.e. for providers of the kerosin competiting with their own supplies. Similar cases were brought by FAS in other regions.

SLOVAK REPUBLIC

Vychodoslovenská vodarenska spolocnost, a.s. [Eastern Slovak Water Management Company]

In August 2000, Vychodoslovenska vodarenska spolocnost a.s. Kosice (hereinafter referred to as "VVS a.s. Kosice") stopped supplying unprocessed water to the company DAMIJO KOMPLET, s.r.o. Svidnik (hereinafter referred to as "DK s. r. o."), which used the unprocessed water to produce table water. Despite the demonstrable effort on the part of DK, s.r.o to settle business relations, VVS a.s. Kosice refused to resume unprocessed water supplies.

The Office conducted an investigation and arrived at the conclusion that VVS a. s. Kosice was an entity having the character of a natural monopoly, which was the administrator of the water distribution sewerage systems in the territory of eastern Slovakia and a dominant supplier of water. This company was the only possible unprocessed water supplier for DK, s.r.o.

The Office also found out during the investigation that it was, and still is, fully viable for DK s. r. o. Svidnik to connect to the unprocessed water distribution channels of the company VVS a. s. Kosice. No restrictions in terms of technology, safety, capacity, or other restrictions were found due to which it would be necessary to stop unprocessed water supplies. DK, s.r.o. also met all technical, administrative, and business conditions related to unprocessed water supplies.

Therefore, the Office assessed the refusal of the company VVS a. s. Kosice to supply unprocessed water to DK s. r. o. Svidnik and its failure to resume these supplies after the attempts of DK s. r. o. Svidnik to conclude a new agreement in 2003 as abuse of a dominant position of the company VVS a. s. Kosice on the relevant market; a fine was imposed on the company, and it was ordered to remedy the illegal state of affairs within 30 days.

The Court upheld the Office’s decisions.

The Office has information on the only case (Vychodoslovenska vodarenska spolocnost a.s. Kosice – see above), when the injured party brought a suit against the company having been committed abuse of a dominant position. Suit has been brought pursuant to the general rules on damages assigned by the Slovak civil law (hence not in the matter of the Articles 81 and 82 application).

Cintoriny Komarno, spol. s r.o.

In this case, the Office assessed the conduct of the company Cintoriny [Cemeteries] Komarno, spol. s r.o. toward the competing funeral services and stonemasons. The undertakings - providers of funeral services complained about being prevented access to the Roman Catholic cemetery in Komarno, in addition to complaints about the exacting of the provision of services consisting of preparation of transported mortal remains for funeral and the undertakings - stonemasons complaining about the application of different fees for permission of access to the cemetery and exacting of payments for supervision over the construction process. Following an investigation of the aforementioned case, the Office issued a decision on the violation of the law.

In 2006, the Office decided that the undertaking Cintoriny Komarno, spol. s r. o. (hereafter referred to as Cintoriny Komarno) had violated the law because it failed to provide funeral homes with access to the Roman Catholic cemetery in Komarno for the purpose of providing funeral services. Access to the cemetery where a client wishes the burial service to take place and the deceased to be buried represents the main input for funeral homes, without which this service cannot be provided. The company Cintoriny Komarno thus excluded all its competitors from the provision of funeral services at this cemetery. In the final analysis, such a violation of the law also has a negative impact on customers – clients who need a burial service, because they do not have the opportunity to choose from the individual providers of funeral services.

Case is still pending.

Margin squeeze

***Slovak Telecom, a.s.* -- Virtual private network**

In 2005, the Antimonopoly Office of the Slovak Republic decided on the violation of the Act on Protection of Competition by the company Slovak Telecom, a.s. in the process of a tender for a solution to the "Integrated Communication Platform Ludová Banka, a.s. [Volksbank]."

The case concerned a virtual private data network (VPS) for Ludová Banka, a.s. VPS is a closed computer network built in the open environment of public networks, particularly the internet, using various encryption devices.

Restriction of competition consisted of the application of a price bid of August 2004 by the company Slovak Telecom, a.s. (ST) in the tender in connection with prices charged by ST for the lease of networks to competitors according to the General Conditions and Tariffs effective at the time of the tender, because the amount of the wholesale price for the lease of networks and the retail price offered to Ludová Banka, a.s. by ST, as a vertically integrated company, did not create room for competitors to offer a competitive price in this tender. It was not possible to compete with the retail price offered by ST, unless a competitor incurred a loss even if it were equally effective as ST. This procedure may be described as the so-called "margin squeeze."

A "margin squeeze" is a form of abuse where the difference between the retail price charged by the dominant and the wholesale price charged to its competitors for comparable services is negative or insufficient to cover the costs specific to the product of the dominant, which also provides its own retail service in the related market.

Case is still pending.

Slovak Telecom, a.s. **- Fixed voice**

Slovak Telecom, a.s. (ST) is a former state monopoly with the most extensive telecommunication network for fixed lines, which covers the entire territory of Slovakia, and has been a member of Deutsche Telekom Group since 2000. ST is a vertically integrated company providing a wide range of telecommunication services through a network of fixed lines both at the wholesale and retail level.

If an undertaking with a dominant position, operating in the entire territory of member state abuses its dominant position in the form of exclusion, this conduct usually also influences trade between member states, because it makes it difficult for competitors from other member states to penetrate the market. Trade between member states is generally influenced by the conditions of access to telecommunication infrastructure and wholesale services of an operator that was a state monopoly in the past. These conditions determine what the other undertakings can offer in the market and their competitive ability.

The conduct assessed within these administrative proceedings created a barrier to entry into the Slovak market and made it difficult for the existing and potential competitors to enter or remain in the market. This negatively influenced the structure of the relevant market, where a potential negative effect (a "reputation" of an immediate reaction to competitors' activities was established) on future endeavours of other competitors who would be interested in providing telecommunication services should also be taken into consideration.

Voice services were liberalized de jure on 1 January 2003. Entry into the market and the commencement of activities of an operator were conditional upon signing connection agreements between ST and alternative operators (hereafter referred to as "AOs"). How ever, these agreements were signed only at the beginning of 2005 and the first AOs entered the market on 1 August 2005.

The Office defined a total of 12 relevant markets at the wholesale and retail level. The effects of the conduct subject to assessment primarily concerned the provision of the telephony service via the public fixed line network to household and non-household customers.

In its decision, the Office defined several instances of abuse and one of them was margin squeeze.

In 2004 and 2005, ST introduced in the retail market, as part of individual calling programs, tariffs enabling customers to make 30-minute telephone calls for SKK 1 (EUR 0,03) at certain times and tariffs enabling customers to telephone free of charge at certain times. These tariffs were introduced in the market shortly before AOs' entry. From 1 August 2005, when AOs entered the market, they had to pay a wholesale price -connection fees to ST for each telephone call made by their customers through an operator. The Office stated that the setting of wholesale and retail prices by ST represented a margin squeeze, closed the market, and prevented AOs from competing effectively.

In the area of voice services, all of the aforementioned practices were concurrently applied during a certain period, due to which there was a high risk of the market closure and creating barriers to entry into the market. This did not result in a complete exclusion of competition in the market, but such conditions were created in the market that competition did not develop after AOs entered the market. Competition in the market, particularly in the segment of households, remained at a "symbolic" level. By setting these conditions, ST made it difficult for its competitors to enter the market and operate there.

AMO decided in 2007 and case is still pending.

<u>Essential facility</u>

Slovak Telecom, a.s. -- Denial of access to local loop

Slovak Telecom, a.s. (ST) is the sole owner and administrator of the fixed public telecommunication network in the entire territory of the Slovak Republic, which includes local lines, also called the "last mile," connecting the end point of the network on the premises of a customer with the main switchboard or an equal device in the fixed public telephone network.

The fixed public telephone network with local lines represents an essential facility, which is essential for doing business in related markets and whose duplicate construction is not objectively possible in view of large investments, a long period of return, and the risk of incurring "sunk costs." ST as the owner and administrator of this essential facility is an unavoidable business partner for undertakings for which access to infrastructure is essential for their own business activities in view of the nonexistence of an equal alternative. Therefore, in order to create competitive pressure, it is necessary to make sure that access to these facilities is provided.

By failing to provide access to local lines, ST, as a vertically integrated company owning local lines, imposed restrictions on its competitors operating in related markets. The failure to provide access to local lines caused the liberalization of the telecommunications sector to be considerably postponed, despite the establishment of a legal framework for the full liberalization of the sector. Access to local lines enables undertakings to compete in offering high-speed data transmission services for permanent access to the internet, as well as in the area of DSL-based multimedia applications and the voice service - provision of the public telephony service (local calls, long distance calls, and international calls). As ST failed to voluntarily create and publish an offer regarding the establishment of contractual relationships with entities interested in access to local lines, it excluded potential competition and restricted the expansion of the existing competition, by which it artificially prolonged the possibility of obtaining the so-called monopoly rent.

The behaviour of ST deformed the competitive environment in the market of electronic communication services for a long time, which also had negative impacts on consumers, who could not benefit from competitive pressure in the form of lower prices, better-quality products and services, implementation of new technology, and so forth.

The seriousness of this behaviour is increased by the fact that the conduct of the company ST concerns services provided within the sector of electronic communications in the territory of the Slovak Republic. Electronic communications are the key factor on the path toward an information society and, at the same time, they create basic conditions for undertakings, public institutions, and individuals to access modern communication networks and services within information infrastructure worldwide.

AMO decided in 2005 and 2008 and case is still pending.

M. R. Stefanik Airport – Airport Bratislava, a.s. **- denial of access to an essential facility**

In 2005, the Office assessed and decided on the conduct of the company M. R. Stefanik Airport – Airport Bratislava, a. s. (hereafter referred to as "LMRS, a.s."), which denied the company Two Wings, s.r.o. access to the check-in area of the Bratislava airport intended for transporting, loading, and unloading of refreshments onto/from aircraft by air carriers. Two Wings, s.r.o. asked the undertaking LMRS, a.s. to allow it access to the check-in area of the airport, but LMRS, a.s. did not permit it to access this area before the Office issued a first-instance decision on the matter.

The Office arrived at the conclusion that the check-in area of the Bratislava airport, where services of transporting, loading, and unloading refreshments onto/from aircraft were provided, was an essential facility. The company LMRS, a.s., which operates the Bratislava airport, is its sole owner, a fact that gives it a dominant position on the market of the provision of access to the check-in area of the Bratislava airport. For the company Two Wings, s.r.o., the undertaking LMRS, a.s. represents an exclusive business partner and the only entity that can allow it access to the check-in area of the airport. The company LMRS, a.s. is exclusively operating on the market of transporting, loading, and unloading of meals and drinks onto/from aircraft in the check-in area of the Bratislava airport (in addition to the company Slovak Air Services s.r.o., a subsidiary of the Czech Airlines air carrier, which provides these services to its aircrafts), where the company Two Wings, s.r.o. also tried to establish itself.

The company Two Wings, s.r.o. fulfilled all the conditions for being permitted access to the check-in area of the Bratislava airport. Moreover, no capacity, technical, security, administrative, or other reasons existed in the reported period for which it could, or should, be denied access.

By its conduct, the company LMRS, a.s. abused the ownership of an essential facility, which resulted in LMRS, a.s. maintaining and/or strengthening its position on the vertically connected market of transporting, loading, and unloading meals and drinks onto/from aircraft at the Bratislava airport, where it is impossible to enter and remain without having access to the check-in area of the airport. By the aforementioned conduct, the company LMRS, a.s. restricted competition in the vertically connected market, which resulted in the elimination of competitive pressure on the part of the company Two Wings, s.r.o. and prevented effective competition in this market.

On September 18, 2009 the Regional Court in Bratislava dismissed a suit of company Letisko M. R. Stefanika – Airport Bratislava, a.s. and upheld the decisions of the Office and of the Council of the Office.

SOUTH AFRICA

Links to all of the publicly available decisions on refusals to deal, including decisions relating to private litigation (and conducted under interim relief provisions of the Competition Act), are available as follows:

Refusal to deal

Competition Tribunal decision in: ***The Bulb Man (SA) (Pty) Ltd and Hadeco (Pty) Ltd***, case number 81/IR/Apr06, available at: http://www.comptrib.co.za/list_judgement.asp?jid=579, hereafter referred to as *Bulb Man.*

Competition Tribunal decision in: ***York Timbers Ltd and SA Forestry Company Ltd***, case number 15/IR/Feb01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=19, hereafter referred to as *York Timbers.*

Competition Appeal Court decision in: ***York Timbers Ltd and SA Forestry Company Ltd,*** case number 09/CAC/May01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=516.

Refusal to supply an essential facility

Competition Tribunal decision in: ***National Association of Pharmaceutical Wholesalers & Others and Glaxo Wellcome & Others***, case number 45/CR/Jul01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=106 , hereafter referred to as *Glaxo.*

Competition Appeal Court decision in: ***National Association of Pharmaceutical Wholesalers & Others and Glaxo Wellcome & Others***, case number 15/CAC/Feb02, available at: http://www.comptrib.co.za/list_judgement.asp?jid=521

Margin squeeze

Competition Tribunal decision in: **Competition Commission and Senwes Limited**, case number 110/CR/Dec06, available at: http://www.comptrib.co.za/list_judgement.asp?jid=724 hereafter referred to as *Senwes.*

Competition Appeal Court decision in: **Competition Commission and Senwes Limited**, case number 87/CAC/Feb09, available at http://www.comptrib.co.za/list_judgement.asp?jid=1099.

Bulb Man, York Timbers, and Glaxo

There have been at least three private actions on refusal to deal: *Bulb Man, York Timbers,* and *Glaxo.* Two of these were litigated (and lost by the complainant) under the interim relief procedure (*Bulb Man* and *York Timbers*). *Glaxo* was litigated in the ordinary course by referring the complaint to the Tribunal after the Commission's investigation period expired.

Both the *Bulb Man* and *York Timbers* failed at the Tribunal stage because in both cases the complainant that was refused supply was not a *competitor* of the respondent in question. Section 8(d)(ii) explicitly requires that the dominant firm in question refuses to supply a *competitor*. It is not clear whether the Tribunal has extended this requirement to section 8(c); invariably, section 8(c) is pleaded alongside section 8(d)(ii). Nonetheless, the Tribunal and CAC place a greater onus on complainants to prove an 8(c) contravention, in that the onus is on complainants to show that the anti-competitive effects of the exclusionary conduct complained of outweigh its pro-competitive effects, while an 8(d) contravention places the onus on respondents to show that pro-competitive effects outweigh anti-competitive effects; complainants need only prove the latter. At the Competition Appeal Court ("CAC") stage, the court ruled in *York Timbers* that indeed there was no refusal to deal, since in fact the complainant could buy saw logs (the essential facility or scarce good in question) on the open market; the 'refusal' was in respect of volumes supplied under contract at lower prices to open ('spot') market prices.

SPAIN

Dominant position:

Proceedings 508/00, Abogados Granada

The revision courts totally overturned the Competition authority's Decision of 30 November 2001, Proceedings 508/00, *Abogados Granada*, by arguing that the refusal by the *Colegio de Abogados de Granada* to grant clearance to a lawyer to exercise in Granada, could not be considered abusive. The reason was that the lawyer could anyway work in Granada since he had already been enabled by a different lawyer's professional body.

Proceedings 446/98, Arquitectos Madrid

In Decision of 19 November 1999, Proceedings 446/98, *Arquitectos Madrid*, the Competition authority held that the professional body's dominance was clear, since it was the only one able to grant the certificate needed to carry out the relevant activity. The refusal to grant such certificate was considered an abuse of dominant position for which the Colegio Oficial de Arquitectos de Madrid was imposed a fine of € 54.000 (the case was partially overturned, i.e. the fine was reduced to € 30.000).

Explicit request to supply:

Proceedings 498/00, Funerarias Madrid

The Competition authority dismissed Case 498/00, Funerarias Madrid, on the basis of the absence of an explicit request to access the incumbent's facilities, among other arguments.

Proceedings 638/08, Gas Natural 2

In Resolution of 26 March 2009, the Competition authority considered proven that the complainant had asked for connection to the incumbent's network.

Essential product/service/facility:

Proceedings 638/08, Gas Natural 2

In this just mentioned Resolution of 26 March 2009, Gas Natural was found to have abused its dominant position as owner on an essential facility -the network for gas transport and distribution-, by refusing access to it to Gas Alicante, a competitor in the downstream market for commercialisation of gas. The fine imposed on the infringer amounted to € 492.000. The Competition authority put the emphasis in the harm caused to competitors and to end users. Gas Alicante had failed to comply contracts with clients in due manner, at the subsequent reputation cost, and had to make additional investments in order to supply clients with other types of gas. On their side, clients suffered delays in the introduction of gas supply in their homes and were obliged to use energy sources of less quality.

Proceedings 616/06, Tanatorios Castellón

A group of funeral homes in Castellón were accused of refusing access to their premises to independent florists. Following the ECJ doctrine in Oscar Brönner, the Competition authority analyzed whether the refused product, service or facility was essential in the sense that its delivery or access was indispensable for the client to carry out its commercial activity, there was no real or potential alternative available, the product or service could not profitably be replicated, and by denying access the incumbent had the capacity to eliminate competition. The Competition authority ruled that these conditions were not met in this case.

Proceedings R 713/07, Special Prices/Binter Canarias

Binter, a regional airline that held a dominant position in the market for inter-island air passenger transport in the Canary Islands, refused to publish car hire advertisements on its magazine. The Competition authority ruled that such conduct did not prevent users to obtain the same information because the magazine was not the only means to obtain it, i.e. Binter's magazine was not essential.

Proceedings 621/06, CST/AENA

CST/AENA, CST alleged that AENA was abusing its dominant position by refusing to supply information about unscheduled (non-regular) flights, whilst it provided the same information to INECO, under the control of AENA. In Decision of 2 August 2007, the Competition authority considered that the information requested by CST was not essential as far as CST's operating market was the wider market for transport consulting, i.e. it had alternatives to compete, and the product it was planning to offer on the basis of that information had no proven demand, i.e. no harm to competitors or consumers could be proved.

Proceedings 513/01, Tubogas/Repsol

In case Tubogas/Repsol, Decision of 7 March 2002, the information owned by Repsol Butano as gas distributor was considered essential for the operators of the downstream market for end users' facilities periodic official revisions. Repsol Butano was found to have abused its dominant position by denying access to the information concerning the dates of due official revisions and was imposed a fine of € 300.000.

Real or potential effects:

Proceedings 627/07, Estación Sur de Autobuses

The incumbent was a concessionaire of an essential facility -a bus station-, the Competition authority took into consideration the fact that the legal monopoly had abused its dominant position by refusing access to the essential facility to a competitor, since the regular passenger transport firm who was denied access was a direct competitor of another over which the concessionaire held control. The Competition authority qualified the abuse as very serious. The fine imposed amounted to € 464.781, equivalent to 10% of 2005 total revenues. Press release:

http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=160&Command=Core_Download&Method=attachment

In case **Gas Natural 2**, already mentioned, the Competition authority put the emphasis in the harm caused to competitors and to end users. Gas Alicante had failed to comply contracts with clients in due manner, at the subsequent reputation cost, and had to make additional investments in order to supply clients with other types of gas. On their side, clients suffered delays in the introduction of gas supply in their homes and were obliged to use energy sources of less quality.

Objective justifications:

Proceedings R 611/04, Spain Pharma/Glaxo

The fact that a client suddenly and substantially increases the volume of its orders so that the incumbent cannot meet them, may amount to an objective justification for a refusal to deal (Decision of 13 October 2004).

Proceedings C586/04, Electromechanical Applications

The revision courts' Judgement of 14 September 2006, which dismissed an appeal against the Competition authority's Decision of 12 September 2005 on Case C586/04, Electromechanical Applications, concluded that there was no abuse because the defendant had an objective justification to deny connection of the complainant's installations to its electric power distribution network. The justification consisted in the complainant's failing to fully isolate its electric panels, as imposed by law.

Proceedings 442/98, Eléctrica de LLémana

In Decision of 28 September 1999, the Competition authority considered that the incumbent's refusal to increase its energy supply power lacked of an objective justification and therefore was abusive. The incumbent alleged that the power increase was not necessary, that the petitioner had requested it in previous years and had not used it, that the services provided by the petitioner were of bad quality, and that the petitioner had a previous unpaid debt with the supplier. In particular, the Competition authority argued that the alleged bad quality of the petitioner's services could not be proven and that contractual conflicts between the parties needed to be solved before a judge but did not constitute an objective justification for the refusal to supply.

Intellectual Property:

Proceedings 517/01, Iasist/3M

Agrupadores and analizadores are complementary software products that are jointly used. Thus, consumers -hospitals mainly- ask their suppliers to provide both products altogether. 3M and Iasist were the only competitors in the market for analizadores and 3M was dominant in the market for agrupadores -not only it held more than 65% of the market but its agrupador was dominating in a market that tends to homogenise due to network effects-. In its Decision, of 5 April 2002, the Competition authority found that 3M had committed an abuse of its dominant position in the market for agrupadores either by limiting the supply of the licences of its agrupador, or by refusing to provide Iasist with the price list for the agrupador unless Iasist disclosed the list of its potential clients, or by imposing prices that squeezed Iasist's margins.

Legal monopolies:

Proceedings 350/94, Teléfonos en Aeropuertos

In Decision of 1 February 1995, the Competition authority held that TELEFONICA's infringement had been particularly serious because the company had taken advantage of it holding a legal monopoly in the Spanish market for final services and telecommunications carriers, and abused such dominant position in a related market (the airports' telephones), by closing up such market to a competitor.

Constructive refusal to deal:

Proceedings 441/98, Electra Avellana

In Decision of 7 July 1999, the Competition authority found an abuse consisting on the change in the trade policy that a dominant electricity generator had applied to a distribution company (a customer in the upstream market with whom it competed in the downstream market). This generator had terminated the electricity supply contract and subjected the increase in contracted power to more onerous economic conditions (i.e. a surcharge on the fare and bank guarantee). The competition authority imposed a fine of €120.202.

<u>Cases which the Competition Authority doubt to classify as refusal to deal cases:</u>

Proceedings 518/01, Telefónica/Internautas

In the telecoms sector, the Competition authority imposed a fine of € 900.000 on Telefonica, based on an abuse of dominant position. Telefonica, having contracted access to the local loop -an essential facility necessary to enter the ADSL related market- to competitors in a certain moment, conferred its subsidiary, Telefonica Data, the same access earlier in time. The local loop was considered.

Proceedings 620/2006, Jazztel/Telefónica

Jazztel complaint that Telefónica had abused its dominant position in the wholesale market for broadband Internet access by continuously delaying access to the local loop. In Decision of 22 October 2007 the Competition authority ruled that the abuse had not been proved and that some or even all of the delays could have been due to objective reasons not attributable to Telefónica.

Proceedings 552/02, Empresas Eléctricas; Proceedings 602/05, Viesgo Generación; Case 601/05, Iberdrola Castellón; Proceedings 624/07, Iberdrola; Proceedings 625/07, Gas Natural[1]

In the electricity sector (cases 552/02, Empresas Eléctricas; Case 602/05, Viesgo Generación; Case 601/05, Iberdrola Castellón; Case 624/07, Iberdrola; Case 625/07, Gas Natural), taking advantage of the continuous and systematic market power that some generating stations hold in a particular region or at certain moments of the day, the incumbents remove their offer from the daily market giving place to the market for technical restrictions, where they can get higher prices for electricity. In this framework the Competition authority has imposed fines that altogether amount up to more than € 56.5 million. The Competition Authority's Decision on Case 552/02 has recently been overturned by the Judgement of the Supreme Court 27 January 2010; the other mentioned cases are still pending.

<u>SWEDEN</u>

Telecom – ADSL

Margin squeeze – case pending in court

Anticompetitive effect: In general, a margin squeeze implies that competition is distorted since as efficient competitors are foreclosed, or at least put a competitive disadvantage. In other words, a margin squeeze has likely negative effects on competition. It is not necessary to prove actual effects to find an abuse of a dominant position. Notwithstanding, in this case the SCA found that the dominant firm had more rapid growth in the market than its competitors and that the main competitor's market entry was delayed.

Case summary of the case mentioned above:

In December 2004 the SCA sent a summons application to the Stockholm District Court requesting that the telecommunications company TeliaSonera should pay fines amounting to 144 MSEK (approx. 14 MEUR) for having abused its dominant position. The SCA's investigation showed that from April 2000 to January 2003 the margin between the price charged by TeliaSonera for wholesale ADSL products and its retail price for ADSL services to consumers was insufficient to cover TeliaSonera's incremental downstream costs.

TeliaSonera is the incumbent telecommunications operator in Sweden and the company owns the nationwide copper based access network. The relevant downstream market was defined as the national market for broadband access to Internet to residential customers, including ADSL, cable and fibre networks. The relevant wholesale product is a reseller product, which includes both broadband access using ADSL technology and Internet connectivity. The reseller product was not subject to sector regulation, but was instead supplied voluntarily by TeliaSonera. TeliaSonera is required to give access

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to its fixed access network through local loop unbundling (LLUB). However, the opinion of the SCA is that access through local loop unbundling was not a viable alternative for rivals downstream during the time of the abuse.

The SCA used the “as efficient competitor test” and made the margin squeeze test by comparing the margin between retail and wholesale prices with TeliaSonera’s own long run incremental costs downstream.

The Stockholm District Court decided on 30 January 2009 to stay proceedings and to request a preliminary ruling from the European Court of Justice.

SWITZERLAND

Watt/Migros-EEF

In the case Watt/Migros-EEF, EEF appealed and the authority of appeal rejected this appeal. Then EEF appealed to the Federal Supreme Court which also rejected the appeal and confirmed the decision of the Swiss Competition Authority.

We dealt with a case of a refusal to grant access to an essential facility:

Migros is a Swiss retailer and is active in the food production industry. The production site of Migros is localized in the district of Fribourg.

EEF and Watt are two companies active in the production, transmission and distribution of electricity. The distribution network of electricity of EEF is also localized in the district of Fribourg. The network of EEF is connected through transformers to a high tension line, which crosses the West of Switzerland.

Migros broke its electricity supplying contract with EEF and decided to contract with Watt because the electricity offered by Watt was cheaper. The contract with Watt foresees that the electricity produced by Watt will be transported from its production site of electricity to the connecting point with the network of EEF. Then, the electricity will go through the network of EEF to the site of production of Migros. Watt asked EEF to access its network to be able to deliver electricity to Migros. EEF refused to transmit electricity provided by Watt to the site of production of Migros. EEF is, however, ready to discuss the price for electricity with Migros. Besides, EEF considers the behavior of Watt as illegal because it pushes Migros to break its current contract. Finally, Watt did not offer EEF reciprocity, i.e. the use of Watt’s network by EEF. Based on those facts, Watt and Migros decided to make a complaint to the competition authority. Watt was active on the same product market: production, transmission and distribution of electricity. But Watt was not active on the same geographic market. EEF was alone on the relevant market (as distribution is regional). Thus the market share was 100%. The Competition Authority established that EEF (in a dominant position) had behaved unlawfully in refusing to transmit electricity provided by Watt to the site of production of Migros. (Law and Policy on Competition, 2001/2, P. 255)

The Competition Authority has already pronounced provisional measure for a case of refusal to deal.

Teleclub AG is v. Cablecom

Teleclub AG is holder of a licence for Pay-TV Program. Cablecom is an operator of cable network. Teleclub asked Cablecom for an offer to broadcast the Teleclub signal. Cablecom who held a dominant position on the relevant market used a delay tactic for contract negotiation. According to the provisional measure pronounced by the Competition Authority, Cablecom was obliged to broadcast the digital TV-signal of Teleclub. (Law and Policy on Competition, 2002/4, P. 567)

ETA

In the watch industry, the investigation into ETA SA Manufacture Horlogère Suisse (hereinafter: ETA), a subsidiary of the Swatch Group, was concluded with the finding that ETA was abusing its dominant position. ETA has had the intention to discontinue its supply of ébauches (movement blanks) as from January 2006 and thereafter to supply only fully assembled watch movements (“phasing-out”). The investigations revealed that ETA held a dominant position in the market for Swiss made mechanical ébauches up to a unit price of CHF 300.-. The termination of supply has to be regarded as an unlawful refusal to do business and therefore as an abusive practice. For numerous competitors, the implementation of the phasing-out within such a short time meant in practical terms that they had been deprived of the basis for their business activity, as there was no alternative supplier. In an amicable settlement, ETA commited to supply the ébauches until the end of 2008 at the current volume and thereafter for two further years at a reduced volume. This will create a situation in which alternative production plants may be set up. In this case, the objective of the rules was to protect the competitive process by ensuring the deliveries of blanks to third parties. (Law and Policy on Competition, 2005/1, P. 128)

TAIWAN

***Chinese Petroleum Corporation* (the CPC)**

http://www.apeccp.org.tw/doc/Taipei/Case/D0524200.htm

In October 2000, the FTC decided that Chinese Petroleum Corporation (the CPC) misused its monopolistic position in aviation fuel provision market at the CKS Airport’s domestic routes to refuse deal with a new entrant Wen-Chiu Ltd. Co. with undue method.

The CPC was the only body charged with exploring, producing, importing, refining, and marketing petroleum products, including aviation fuel, in Chinese Taipei. In January 1999, the aviation fuel was opened for importation. Nevertheless, before the Formosa Petrochemical Corporation, another petroleum refinery in Chinese Taipei, was established and approved to provide aviation fuel on May 9, 2000, the CPC still owned monopolistic position in aviation fuel provision market.

Wen-Chiu was one of the aviation fuel filling companies which operated in the CKS International Airport. After the aviation fuel provision market for domestic routes at the CKS Airport being opened, Wen Chiu intended to enter this market and thus requested for price quotations from the CPC who was the sole provider. The CPC, however, asserting that it was in the process of studying and developing a pricing structure for domestic aviation fuel, delayed in offering the quotations. Meanwhile, the CPC actively negotiated and concluded the fuel-supply agreements for the year of 2000 with all of airline companies on domestic routes at the CKS Airport. The CPC then, in January 2000, refused to offer quotations to Wen-Chiu, stated there was no need to do so.

The FTC found out, in its investigation, the refining and transportation costs of aviation fuel at the CKS Airport were the same for international and domestic routes. The CPC also admitted that the primary difference between two routes was the taxes assessed, and other costs differed insignificantly. In its conclusion, the FTC decided that the CPC’s refuse to offer the price quotations to Wen-Chiu was unjustifiable. The CPC was obligated to facilitate the liberalisation of petroleum products markets. The refusal to deal with new entrant constituted an undue obstruction to competitor’s entrance, maintained its monopolistic position in the aviation fuel provision market, and thus violated the FTA.

TURKEY

***Teleon*, 06.02.2001; 01-07/62-19**

In *Teleon* case, the TCB examined the conduct of requesting a guarantee letter of 2 million USD to provide three-minute highlights from the matches by Teleon, a pay-tv company with a contract based monopoly over broadcasting and filming of super league football matches in Turkey.

During the investigation, as an interim measure, it was decided that Teleon had to deal under *reasonable conditions*.

As a result of the investigation, it was found that a guarantee letter of 2 million USD worked as a deterrent factor over the television companies requesting these highlights and thereby it resulted in the fact that rival television companies could not buy the needed three-minute highlights of football matches. It was also found that Teleon's alleged behavior did not have any objective justification. Thus such request for a guarantee letter of 2 million USD constituted a constructive refusal to deal and importantly this conduct had the potential to extent the monopoly of Teleon in pay-tv (decoded broadcasting) market towards general TV broadcasting markets in terms of sport programmes. Considering these facts, the TCB concluded that RTD by Teleon constituted an abuse under Art. 6 of the Act.

***Türk Telekom/Tissad*, 02.10.2002; 02-60/755-305**

In this case, the TCB initiated an investigation against the incumbent fixed line telecommunications operator and monopolist, Türk Telekom, after considering the following alleged conduct in ISPs markets as serious:

- Preventing directly or indirectly another undertaking from entering into the area of commercial activity, or carrying out actions aimed at complicating the activities of competitors in the market via tariffs and refusal to provide an opportunity to ISPs to offer a dial up internet access service without the local network users need to subscribe.

- Distorting competitive conditions in the internet services market via offering internet access below cost to internet users.

- Non-provision of Primary Rate Interface (PRI) lines demanded by ISPs to offer services to subscribers using local telephone network, obliging ISPs to use TTNet infrastructure, tying discount system in leased lines for ISPs to the condition to conclude 3-7 years-long contracts, and restricting production, marketing or technical development to the prejudice of consumers by preventing development of rival new networks in this way. TTNet is the name of both internet backbone owned by Türk Telekom and its internet service providing unit by the time of the investigation.

- Providing no response on time to applications by ISPs for lines, tying fulfillment of the demand for lines to the grant of the equipment to be used, denying ISPs other than revenue sharing partners and TTNet the opportunity to offer internet access through cable network, thereby putting forward different terms to ISPs with equal status for the same and equal rights, obligations and acts.

- Demanding from the ISPs information that have the nature of trade secrets and using them in favor of its own internet service, allowing return of maximum 10% of VPOPs (Virtual Point of Presence), obliging the ISPs, leasing basic telecommunications facility from Türk Telekom, to use products of certain firms in these facilities, and thereby carrying out actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market.

At the end of the investigation the TCB imposed fine due to the action of Türk Telekom, *inter alia,* for abusing its dominant position in the network market for broadband internet access by determining the tariffs for the access to network so high such that rivals cannot compete in the relevant market while determining the tariffs so low for the internet access.

The TCB grounded its decision on the assessment of predatory pricing, found an abuse in this context and imposed an administrative fine to Türk Telekom; however it seems that even if the TCB had not detected a pricing below cost, it would have found a violation via price squeeze. In fact, the TCB made implicitly a price squeeze analysis as it included essential facility and vertical integration issues in its decision.

For the other allegations examined in the investigation and concluded not an infringement of the Art. 6 of the Act, the TCB permitted the defenses of the dominant undertaking as an objective justification or it took the regulatory provisions and interventions of the ICTA into account.

Ulusal Dolaşım **(National Roaming), 09.06.2003; 03-40/432-186**

In this case, the TCB assessed the claim that two incumbent mobile operators, Turkcell and Telsim, refused İŞ-TIM which was the new entrant mobile operator by denying the request for using their mobile infrastructure for national roaming.

In the analysis, the GSM infrastructure services market and GSM services market have been established as the relevant product markets; the relevant geographic market has been established as Republic of Turkey.

The assessment concerning (i) whether the TCB was empowered to resolve the issue in the face of cautionary judgments obtained from Courts of Law and (ii) the powers of TCA and ICTA about the subject matter of investigation were discussed in detail by analyzing the special legislation pertaining to national roaming. The latter subject was handled in two subheadings, namely general aspects of the powers of the TCA in the telecommunications sector and powers of the TCA pertaining to national roaming.

The key competition law concept that shaped the decision in this case was "essential facility". It was stated that in order for an input to be considered as an essential facility, the conditions required are;

- the undertaking possessing the input should be in a dominant position in the relevant market,
- alternative input cannot be developed under "reasonable conditions".

Once the presence of essential facility is accepted, in order for this matter to constitute an infringement from the perspective of competition law, the issues to be examined next would be (i) whether there exists a denial of access and (ii) whether this denial is based on valid grounds. The conditions that need to be satisfied in order to establish whether the owners of infrastructure are under obligation to conclude a contract were stated as:

- Access to the infrastructure was essential to provide services in the market,
- It was impossible or irrational to duplicate the relevant infrastructure for a time frame for the new entrant,
- Undertakings concerned refused to provide national roaming in different ways (like, by demanding excessive pricing, claiming technical difficulties and delaying negotiation process),
- There were no objective and valid grounds for the denial.

In the light of the conditions mentioned above the findings of the case were:

- Turkcell and Telsim were jointly dominant in the GSM infrastructure market.

- The infrastructures of Turkcell and Telsim were essential facilities for undertakings operating in the market for GSM services, at the stage of entering the market.

- Turkcell and Telsim denied the request of İŞ-TIM to benefit by way of national roaming from the infrastructure that they owned and the denial was not based on objective grounds.

In view of these findings, it was decided that Turkcell and Telsim abused their joint dominance in the GSM infrastructure services market through concerted practices by preventing their competitors from entering the GSM services market, thus violated Art. 6 the Act. The TCB imposed administrative fine on both of the defendants.

This case has great importance because of the remedy imposed by the TCB. As a remedy, it was decided that the ICTA would determine such conduct as regards how to bring about termination of infringement, and conduct required and conduct to be avoided to re-establish competition in the relevant market, as the relevant authority is charged with the duties to establish pertinent regulations in the relevant market. And it was also decided that, once the conditions determined by the ICTA, these conditions would also be subject to the approval of the TCB.

The decision was annulled by the Council of State as the legislation of the ICTA indicating the requirement for national roaming pointed in the case was annulled by the lower court.

***ÇEAŞ*, 10.11.2003; 03-72/874-373**

In this case, it was claimed that ÇEAŞ, which was active in electricity production, transmission, distribution and had concession on transmission and distribution in a region of the country determined by the concession contract, refused to buy and transmit the electricity produced by Enerjisa and Toros which were the rivals of ÇEAŞ in electricity production market.

The TCB defined two relevant markets. One of them was electricity production market and the other was electricity transmission market.

The TCB assessed the case on the notion of essential facility. In the case essential facility was defined as an element (i) owned by a dominant undertaking, (ii) which was not possible to be reproduced or duplicated in the case of other undertakings in terms of technical, legal or economic considerations or such was very difficult in a rational manner and (iii) which was a prerequisite for the competitive structure in a related market.

In the case, criteria for application of the EFD were defined as:

- essential element must be controlled by an undertaking which is a monopoly or in a dominant position,

- reconstruction or reproduction of essential element by another undertaking must not be possible under reasonable conditions.

The TCB also stated that the following conditions are sought in order to find an abuse in cases evaluated in the scope of EFD. These are:

- the undertaking in a dominant position has refused to let use of essential element or has prevented such a use,

- it is possible to make use of the relevant essential element, in other words; the action of refusal in question is not based on objective grounds.

In the light of above mentioned conditions the TCB decided that ÇEAŞ;

- possessed the essential facility and had dominant position in the electricity transmission market in the region determined in the concession agreement,

- prevented the complainants from having access to the infrastructure,

- lacked to set forth any legal and technical justification for the prevention,

- prevented actual and potential competition in the upstream market (electricity production market) by using its dominant position in the downstream market (electricity transmission market) and therefore, abused its dominant position. The TCB only imposed administrative fine to ÇEAŞ and did not impose any remedy.

***Kablo TV (Cable TV)*, 10.02.2005; 05-10/81-30**

In this case, the TCB examined whether Türk Telekom, holding monopoly rights in supply of the infrastructure for broadband internet services abused its dominant position by not opening cable network to rival internet operators.

In the decision, first of all, competences of the TCB and ICTA concerning the subject matter of investigation were discussed in detail. In this vein, the TCB concluded that (i) existence of a regulatory agency in the telecommunications sector did not undermine the competence of the TCB about competition issues and (ii) both of the agencies should work in a cooperative manner to maximize the consumer surplus. As regards the subject matter in the case, the there was no specific regulatory measure to remove the consumer harm. Therefore, the TCB was competent in investigating the issue.

The TCB mentioned about EFD, but did not apply this doctrine to the case. Rather, the TCB used some kind of "no economic sense test" finding that the sole rational explanation of Türk Telekom's conduct was to exclude rivals from broadband internet services market. According to the TCB, Türk Telekom would impede the rivalry in supply of broadband internet services, thus would extend its user network to a scale that secured the return of its investments in DSL infrastructure. The TCB also examined whether Türk Telekom's behavior had any technical or objective justification and found that the alleged conduct was neither a result of technical necessities nor had it any reasonable objective justification. Considering these facts, the TCB concluded that Türk Telekom's behavior constituted an abuse under Art. 6 of the Act and ordered Türk Telekom to open cable network to other operators immediately. However, the TCB's order did not articulate the details of the remedy, i.e. the wording of the order was so general such that it did not indicate under which conditions Türk Telekom should open its network to rivals.

***Bilsa*, 21.03.2007; 07-26/238-77**

In this case, it was claimed that Bilsa (a software company acting in school software systems) used an encryption which prevents rival companies from reaching students' data that was previously entered into the school automation system. The claim was also that through the encryption it was not possible to transfer data to rival systems, which resulted in schools being dependent to Bilsa. According to claimants, Bilsa either refused or asked excessive prices from companies demanding the abolishment of the encryption.

Taking demand and supply conditions into consideration, the relevant product market was established as software for schools.

Bilsa's defense was based on the argument that the encryption was aiming at protection of source codes which were subject to intellectual property rights.

Another claim raised by Bilsa was that in case of sharing of the encryption, a possibility of legal responsibility could occur due to any deterioration of information concerning the company's terms with the schools.

Another defense of Bilsa was that the data could be transferred manually; so that there was no need of sharing encryption.

By refusing all the defenses the TCB concluded that,

- Bilsa was in a dominant position in the software for schools market,

- Bilsa was acting in a way to prejudice competition in the market and violated Art. 6 of the Act.

For the reason of this violation, an administrative fine was imposed on Bilsa. Moreover, the undertaking was mandated to provide the schools their data in an unencrypted, correct, safe and concrete manner upon their request.

***Anadolu Cam*, 05.06.2007; 07-47/506-181**

In this case, the TCB assessed the claim that Anadolu Cam distorted the competition in glass home products market through terminating to supply some customers including Solmaz Mercan, which was a competitor of Anadolu Cam (via its affiliate Paşabahçe) in the downstream market. The TCB concluded that the conduct of Anadolu Cam could not be considered as an unlawful RTD.

The TCB defined relevant product markets as "glass package market" and "glass home product market" and determined that Anadolu Cam had dominant position in glass package market.

In its analysis; the TCB stated that four conditions must be satisfied to conclude termination of an existing supply relationship as an abuse of dominant position. These conditions were:

- The company which refused to deal must be dominant,

- There must be a refusal,

- Termination must not rely upon objective justifications,

- Termination must have restrictive effects on competition.

In this case, the TCB concluded that the first three conditions were satisfied. In other words, the TCB found that Anadolu Cam (i) had dominant position in glass package market, (ii) refused to supply and (iii) did not have sufficient objective justification for its conduct. However, the last condition was not satisfied. While evaluating whether the last condition was satisfied or not, the TCB focused on whether there was alternative suppliers of the complainant and whether the parameters such as price and quality in glass home products market were appreciably affected. As a result, the TCB found that Solmaz Mercan could find two alternative suppliers, so that refusal did not negatively influence on mentioned market parameters. So, the TCB concluded that despite Solmaz Mercan having been influenced by the refusal, refusal did not significantly harm competition in the market.

To summarize, the TCB did not hold Anadolu Cam's refusal to supply its competitor an abuse.

After the decision of the TCB, Solmaz Mercan appealed to Council of State. Accordingly, Council of State suspended the execution of the decision, and concluded that the conduct of Anadolu Cam should be considered as an abuse of dominant position, owing to the fact that the conduct had restrictive effects on competitors.

***CNR*, 19.09.2007; 07-74/896-333**

CNR decision was taken upon a dispute between two undertakings acting in the fair organization sector. The complainant undertaking, NTSR, was active in fair organization business and especially specialized on the organization of yachting and water sports fairs while the defendant undertaking, CNR was operating in both fair organization and fairground management businesses.

NTSR, which had a history of dealing with CNR for about 13 years claimed that CNR requested extremely high rental fee from NTSR for the lease of fairground to boatshow fair of 2007. According to NTSR, CNR's imposition of unacceptable conditions to its downstream rival was a constructive RTD and therefore constituted an abuse of dominant position under Art. 6 of the Act.

Upon this application, TCB opened an investigation against CNR and in the meantime decided for an interim measure about the rental fee which is effective for the year 2007. At the end of the investigation, however, the TCB concluded that the alleged behavior of CNR did not constitute an abuse of Art. 6 of the Act. by finding that the increase in the rental fee was due to the increase in the costs of CNR. It was also an increase which raised the abnormally low rental fees of the previous years to its market value.

***TTNet*, 19.11.2008; 08-65/1055-411**

In this case, the TCB decided that the single economic unit consisting of Türk Telekom and its wholly owned subsidy TTNet abused its dominance in the retail broadband internet access market by means of price squeezing and accordingly imposed an administrative fine. After its privatization in 2005, Türk Telekom has continued to operate in wholesale market whereas TTNet has started to operate in retail market.

Although investigation was opened against two separate legal entities of Türk Telekom and TTNet, in its decision the TCB concluded that Türk Telekom and TTNet formed a single economic unit and that this unit held a dominant position in both wholesale and retail broadband internet access market.

The relevant product markets were defined as wholesale broadband internet access market and retail broadband internet access market. The relevant market for retail side was decided to be consisted of internet access over cable network and ADSL. In its analysis, the TCB did not include bit stream access model and local loop unbundling model in the relevant market as they were not developed enough to become a substitute to the resale model. In addition to other factors related with market structure, considering that during the investigated period this economic unit had over 90% market share, the TCB concluded that it was in dominant position.

As establishing the abuse, the TCB took into account two decisions given by the European Commission: *Telefonica* and *Deutsche Telekom*. Accordingly, existence of (i) vertical integration, (ii) dominance, (iii) lack of substitutability of the input, (iv) unprofitable margins, (v) impediment to competition and (vi) justifications of the undertaking were scrutinized. The TCB found that the criteria set above were all present in this case and concluded the economic unit abused its dominant position through price squeezing.

In its profitability analysis, the TCB scrutinized "average" profits and costs of TTNet. Three sets of costs were taken into account. The first group of costs consisted of service payments to Türk Telekom for wholesale ADSL access under resell model. The second group of costs, i.e. operating costs, was calculated on average terms, i.e. total accounting costs were divided by average number of subscribers. The last group of costs, which included subscriber acquisition costs consisted of costs of free internet access, free modems, subscription fee that were not collected, discounts on the monthly fees and advertisements specific to the campaigns. Since these costs were incurred in order to get new subscribers and the inspected entity would enjoy the benefits over a long period, they were spread through a period of both 24 and 36 months separately. Accordingly, monthly profitability tables were prepared for 24 and 36 periods. For the both two periods TTNet recorded negative profits.

The method for calculating profitability was based on historic data, so discounted cash flows method was not applied. Moreover, the calculation method could be categorized as fully distributed costs. This method may not seem to be compatible with the Commission's practice of using incremental costs (or avoidable costs as proposed by the Discussion Paper); however, the fact that TTNet's only business practice was limited to the resale model and this model did not require fixed investments, all costs incurred by TTNet could be categorized as incremental or avoidable.

In addition to its own profitability analysis, the TCB considered also other evidence such as internal e-mails and memos circulated among the managers as indicators of intent. At the same time, the TCB evaluated the arguments introduced by Türk Telekom and TTNet by stating that the market was an emerging market and formation of a competitive market structure would take time, in this time they were trying to contribute this period and the actions subject to investigations are a matter of improving the broadband internet services in Turkey. The TCB did not accepted these arguments as an objective justification and rendered that the aims and targets towards improving the broadband internet services and expanding the use of internet in Turkey were essential, but achieving these aims and targets via anticompetitive behaviors could not be accepted as a justification. Moreover, the TCB stressed that, should Türk Telekom have such an aim it could achieve this aim through facilities (such as price discounts) in the wholesale internet market.

UNITED KINGDOM

Genzyme Ltd

Genzyme, the producer of a drug called 'Cerezyme' for Gaucher's disease was found to have abused its dominant position in the downstream market for delivering Cerezyme to patients' homes by squeezing the margin of its competitor, Healthcare at Home. The CAT also imposed a judgment relating to remedy as Genzyme had been unable to propose a price which would not amount to a margin squeeze.

http://www.oft.gov.uk/news/press/2005/184-05

http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/genzyme

http://www.catribunal.org.uk/238-862/Final-judgment.html

Harwood Park Crematorium/JJ Burgess & Sons

JJ Burgess & sons v OFT, Case No 1044/2/1/04 [2005] CAT 25, [2005] CompAR 1151

The CAT concluded that W Austin & sons had abused a dominant position by refusing to grant access to Harwood Park Crematorium for the purpose of conducting cremations; in doing so the CAT annulled the decision of the OFT that there had been no abuse.

http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/harwood

http://www.catribunal.org.uk/238-1201/Final-judgment.html

Welsh Water (Albion Water/ Dŵr Cymru)

OFWAT rejected Albion Water's complaint that Dŵr Cymru was guilty of a margin squeeze. The CAT held that Dŵr Cymru was guilty of margin squeeze in relation to Albion Water. The CAT suggested the following margin squeeze tests may be appropriate: (a) the dominant company's downstream operations could not trade profitably on the basis of the upstream price charged to its competitors; or (b) that a reasonably efficient downstream operator could not earn at least a normal profit when paying the input prices set by the vertically integrated undertaking. The CAT's decision was upheld by the Court of Appeal.

http://www.catribunal.org.uk/238-1526/Judgment-Dominance-and-other-issues.html http://www.catribunal.org.uk/238-1454/Judgment.html

EWS (English Welsh & Scottish Railway Ltd)

The ORR found that EWS had abused its dominant position in a number of ways, including discriminating between customers. ORR called the abuse one of discrimination, but it could have been characterised as margin squeeze.

http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf

UNITED STATES

***In re Intel Corp., FTC Dkt.,* No. 9288 (1999)**

Available at http://www.ftc.gov/os/caselist/d9288.shtm

In 1999, the FTC reached a consent decree to resolve charges that Intel illegally maintained its monopoly power when it denied three of its customers continuing access to technical information necessary to develop computer systems based on Intel microprocessors.

***Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973)**

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court upheld liability against an electric utility for refusing to sell power to municipalities trying to establish their own distribution systems and for refusing to transmit power to the municipalities from another supplier. The Court noted that "[t]here were no engineering factors" preventing Otter Tail from providing either power or transmission to the towns, concluding that the "refusals to sell at wholesale or to [transmit] were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378.

***Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,* 472 U.S. 585 (1985)**

In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co*., 472 U.S. 585 (1985), Aspen Skiing Co. ("Ski Co.") controlled three of the four skiing mountains in the Aspen area, and Aspen Highlands Skiing Corp. ("Highlands") owned the other mountain. After several years of cooperating with Highlands to issue ski passes that could be used at all four facilities, Ski Co. discontinued the arrangement. Ski Co. refused to sell Highlands any lift tickets, even at retail prices, and refused to accept retail-price coupons issued by Highlands for its lift tickets. Ski Co. offered to reinstate the four-area pass only if Highlands would accept a fixed percentage of the revenue, which was considerably below Highland's historical average revenue. The Supreme Court upheld a jury verdict that found Ski Co. in violation of Section 2 of the Sherman Act, noting that the "high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Id*. at 601. The court reasoned that the jury may reasonably have concluded that the defendant was forgoing short-term benefits from a joint ticket in order to reduce competition in the long run. *Id.* at 608. The Court also explained that this conclusion was strongly supported by Ski Co.'s failure to offer any efficiency justification for its conduct. *Id.*

***Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* LLP, 540 U.S. 398 (2004)**

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the plaintiff, Trinko, alleged that an incumbent local exchange carrier (ILEC), breached its duty under a telecommunications statute to provide its competitors access to its telephone network. The Court treated the allegation as a refusal to deal and ruled that the refusal did not breach any antitrust duty to deal. In holding that the case did not fit within the limited exception to a monopolist's right to refuse to deal recognized in *Aspen Skiing*, the Court observed that, unlike in *Aspen Skiing*, there was no prior course of voluntary dealing between the parties. Moreover, the *Aspen Skiing* defendant had turned down its competitor's proposal to sell at its own (presumably profitable) retail price, whereas the ILEC's reluctance to provide access at the cost-based rate of compensation available under the regulatory scheme did not provide a window onto its predatory intent. More fundamentally, the court noted that the *Aspen* defendant refused to sell a product that it already sold at retail; what the ILEC was alleged to have withheld was not even available to the public. Finally, the Court recognized the limited ability of courts to effectively remedy the conduct at issue, stating that that "effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree," and that an "antitrust court is unlikely to be an effective day-to-day enforcer of the detailed sharing obligations at issue." *Id.* at 415.

***MCI Communications Corp. v. AT&T,* 708 F.2d 1081 (7th Cir. 1983)**

In *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), MCI argued that AT&T had improperly refused to let it connect its telephone lines with AT&T's nationwide telephone network and that interconnection was necessary for competing against AT&T in the long-distance business. The Seventh Circuit concluded that AT&T's network was an essential facility; that it was feasible for AT&T to provide interconnection; and that AT&T's refusal to provide access to MCI constituted monopolization in violation of Section 2 of the Sherman Act. The court identified four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Id.* at 1132-33.

***Data General Corp. v. Grumman Systems Support Corp.,* 36 F.3d 1147 (1st Cir. 1994)**

In *Data General Corp. v. Grumman Systems Support Corp*., 36 F.3d 1147 (1st Cir. 1994), the defendant refused to license newly developed software to an independent service organization competitor, even though it had previously licensed other software to other independent service providers. In holding for the defendant, the court stated that a unilateral refusal to license a copyright may constitute exclusionary conduct, but "an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Id*. at 1187.