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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT OF COMPETITION POLICY DEVELOPMENTS IN HUNGARY

-- 2005 --

This report is submitted by the Delegation of Hungary to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 8-9 June 2006.

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1. Changes to competition laws and policies, proposed or adopted

1. The Competition Act was amended in 2005 due to three main reasons. First the Act on Administrative Procedures, which formed the background legislation of the Competition Act was repealed and new legislation was adopted. It was therefore necessary to adjust the provisions of the Competition Act to the new background legislation. This meant a thorough revision of a score of provisions in structural and substantial terms.

2. Secondly, the need for practical amendments identified by the practice of the GVH required changes in the Competition Act. As will be presented below e.g. provisions on complaints, on sector investigations were substantially restructured. Amendments affected the merger procedure and the notification threshold as well. A number of ambiguities challenged before court by parties fined by the GVH were also made unambiguous by new provisions.

3. The third main reason was to adjust the legislation to the changes of the EC competition regime (which abolished the ex-ante individual exemption possibility for restrictive agreements), and also to experiences gained in the application of EC competition law and in the cooperation within the ECN. The amendments entered into force at 1 November 2005 with the exception of the abolition of the system of individual exemptions that ceased to exist already in July.

1.1 Summary of new legal provisions of competition law and related legislation

4. The Act reorganised the system of complaints distinguishing between complaints (made by the submission to the GVH of a properly completed form issued by the GVH) and informal complaints (submitted in any other way). Any person may lodge both of them and the Act makes it clear that the procedure relating to complaints or informal complaints is not part of the competition supervision proceedings. The Act regulates the extent to which the provisions of Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services (hereinafter: PAPA) govern the procedures relating to complaints (similarly as they govern, to different extents, the sectoral inquiries and the competition supervision proceedings). The complainant may seek legal remedy against an injunction of the investigator rejecting the complaint with reference to the fact that it does not fulfil the conditions for the opening of an investigation. The costs arising in the procedures relating to complaints are advanced and born by the state. If in the course of the competition supervision proceedings an infringement committed by the conduct specified in a complaint is established, the costs of the procedure relating to the complaint must be borne by the parties whose conduct was found to infringe the law.

5. The threshold of merger notification was raised; accordingly, “an authorisation shall be sought in cases where the aggregate net turnover of all the groups of undertakings concerned and the undertakings jointly controlled by undertakings members of the groups of undertakings concerned and other undertakings exceeded HUF fifteen billion equalling to EUR 60 million” (opposed to HUF ten billion under the provision in force until the end of October 2005) in the preceding business year.

6. The Act regulated the operation of the legal institution of sectoral inquiry in a separate new chapter expressing this way also the increasing importance of this institution. Some new rules were introduced in addition to those already existing. Under one of the latter, the GVH has the obligation to publish its report about the inquiry and the parties concerned have the right to make observations and to orally express their views about the report.

7. The communication between the party and its legal representative is protected by legal privilege and is not accessible for the GVH until it is in their possession.

8. When carrying out an inspection, the investigator became entitled to make copies of, or seize, pieces of evidence, which are not relating to the subject of the investigation and are not covered by the authorisation of the court, but which are indicative of an infringement of the provisions of the Competition Act or of Article 81 or 82 of the EC Treaty. In respect of such pieces of evidence, the authorisation of the court must be obtained subsequently.

9. The rule on limitation was amended and instead of 3 years, the elapsing of 5 years is required as from the end of the infringement so as to avoid procedures against it.

10. The Act introduced the possibility of private enforcement of the Hungarian competition law. Courts shall notify the GVH about lawsuits. As the institution of *amicus curiae* introduced by Regulation 1/2003/EC relating to actions based on EC competition law was extended to purely national law actions as well, the GVH may submit observations to the court in each and every case. If the GVH also takes up the cases the courts are obliged to suspend their proceedings.

11. The President of the GVH has as a new task the responsibility for the development of competition culture. This task contains in particular in order to raise public awareness of competition, for the dissemination of knowledge about competition policy, including the provision of information about the benefits resulting from competition or with the aim of assisting compliance and the creation of a competitive regulatory environment, and for the contribution to the development of competition-related legal and economic activities of public interest. To this aim certain capacities are now dedicated within the GVH, the however non-institutionalised Centre for Competition Culture. It receives as a budget 5% of the fines imposed by the GVH and already paid into the Treasury.

12. A number of minor amendments also affected the procedure of the GVH. For instance in the course of the proceedings of the GVH, the party and other persons participating in the proceedings may not have access to internal documents of the GVH and to correspondence between the GVH and other authorities, or between the latter, unless those internal documents are used in evidence when establishing the facts of the case.

13. The Act, on the basis of Regulation 1/2003/EC, has introduced as a new type of decision the commitment resolutions. Where, in the course of competition supervision proceedings started *ex officio*, parties undertake commitments to ensure, in a specified manner, compliance of their practices with the provisions of the Competition Act or of Article 81 or 82 of the EC Treaty, the competition council bringing proceedings in the case may by injunction make those commitments binding on the parties, terminating at the same time the proceedings, without concluding in the injunction whether or not there has been or still is an infringement of the Competition Act. In order to check compliance with the commitments specified in the injunction, the investigator will hold a post-investigation. Where the parties are found to have failed to comply with the commitments, the competition council bringing proceedings in the case may impose fines.

14. Act No LXVIII of 2005 (hereinafter: the Act) amending the Competition Act abolished the individual exemption system maintaining at the same time the criteria for exempting agreements from the prohibition on restrictive agreements. The abolishment of the system served to avoid possible conflicts between individual exemptions brought under national competition law concerning an agreement that might later be considered illegal under community law by the Commission or any of the Member State authorities.

1.1.1 Amendments of related legislation

15. The prohibition of cartel agreements concluded in public procurement and concession procedures was introduced into the Penal Code. The Code foresees an imprisonment up to five years for the

infringement of the provision. In order to secure the effective functioning of the leniency policy of the GVH no sanctions can be imposed on the first person notifying the infringement of the Penal Code to the authority including the GVH as well.

16. The Act on Public Procurement was also amended. According to its previous provision undertakings found to be party to an infringement of the competition act could have been excluded from the tender. The amended legislation foresees this possibility only if fine was also imposed on the undertaking. The amendment served to further decrease the negative consequences for whistleblowers.

17. A new Act on Commerce was also adopted in 2005. It introduced specific rules on undertakings of significant market power and empowers the GVH to apply the rules on abuse of dominance in case of the infringements of the prohibitions enumerated by the Act on Commerce.

1.2 Other relevant measures

18. Following changes in the legislation the Notices of the GVH on merger procedure and on the imposition of fine were also amended.

19. The GVH published for the fourth time a collection of principles established in its case law. Though courts are not obliged to follow these statements the collection serves as a guidance for the business community.

2. Enforcement of competition laws and policies

2.1 Action against anti-competitive practices, including agreements and abuses of dominant position

a) *Summary of activities of:*

- Competition authorities

20. In 2005 the GVH initiated 197 competition supervision proceedings, 191 of which were closed by a formal decision of the GVH.¹ These proceedings concerned 77 cases brought against unfair manipulation of consumers' choice, and 112 antitrust and merger cases.

21. In its decisions on the substance of the case fines were imposed in 58 cases. These fines amounted to HUF 3,353.7 million (EUR 12.9 million).

22. Altogether 23 cases were initiated at least partly under EC law since the accession. In five of these cases the GVH brought decisions. Only one case ended up in prohibition.

Actions against restrictive agreements

23. In 2005, 25 decisions were made on restrictions of competition. 19 proceedings were initiated *ex officio* and six were based on applications for exemption. The GVH intervened in 13 cases and it imposed fines in seven of those cases. The total amount of the fines was 2854.7 million HUF (app. 11 million EUR).

¹ Formal decisions on the merit are brought by the Competition Council, the decision making body of the GVH.

24. Notice No. 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council on the application of a leniency policy to promote the detection of cartels was applied in 3 cases.

Abuse of dominant position

25. Twenty five decisions on the substance of the case were reached during the year 2005 in proceedings conducted against suspected abuses of dominant position. In 17 of these cases the existence of a dominant position was proven, and in 6 of these latter cases an abuse of the position could also be proven which thus made intervention by the GVH necessary. Fines were imposed in 3 cases summing up to 39 million HUF (app. 150.000 EUR)

Consumer fraud

26. Sections 8-10 of the Competition Act prohibit the deception of consumers. Deception of consumers is presumed, for example, if false declarations are made with respect to prices or essential features of the goods, or if the fact is concealed that the goods fail to meet legal requirements or if a false impression of an especially advantageous purchase is created. It should be underlined that these provisions are not aimed at consumer protection in general but are rather restricted to those deceptions, which may influence the process of competition. The interventions of the GVH further ensure the appropriate functioning of the market. In 2005, 79 decisions were made, in 54 of which an intervention of the GVH was necessary. The overall fine imposed in consumer fraud cases was 438.5 million HUF (app. 1.7 million EUR). It is noteworthy that the amount of the fine increased substantially also in this case-category – this is an intentional policy of the competition councils proceeding in these cases to indicate the undertakings infringing these provisions of the competition act that a more severe fining policy will be applied also for this type of cases.

- Courts

27. In 2005 the tendency of previous years continued that approximately 50% of prohibition decisions were appealed. However in the case of decisions terminating the procedures where 20% of the decisions were appealed last year, this share reduced to 10% in 2005. The decrease was mainly due to the fact that a number of appeal court decisions were repealed on second instance because the plaintiffs' standing proved not to be well based. In the repeated appeal court proceedings the court applied a stricter view towards plaintiffs, which being only complainants, were not party to the administrative procedure.

28. Decisions brought in consumer fraud cases were mainly accepted and not appealed. This is mainly because the level of fines imposed on the parties was rather moderate. However it should be added that the more severe sentencing policy of the GVH adopted recently is expected to bring changes on this field in 2006.

29. Contrary to the situation concerning the fraud cases almost all prohibition decisions were appealed in antitrust cases even if fines were low or not significant. In the case of cartels only those cases were not appealed which were based on leniency application.

30. Up today more than two-thirds appeals concerning decisions brought under the present (1996) competition act were closed. Upon the 231 cases the courts overturned the decision of the GVH in 15 cases and reduced the amount of the imposed fine in another 16 cases.

31. The appeal court upheld the decision of the GVH establishing that the simultaneous price increase of multiplex cinemas constituted a hard core, price fixing cartel. The importance of the case is that

this was among the first investigations initiated on a pro-active basis and under the new sentencing approach of the GVH. The parties appealed the first instance judgement.

b) Restrictive agreements

32. In 2005, cartels affecting public procurement proceedings in the construction sector remained a focal point for the GVH. Two proceedings were terminated this year. One case related to 40 different construction works in Budapest submitted to tender by the Municipality. The overall value of the works was around 12 billion HUF (app. 46 million EUR). The GVH considered the rigging of the bids proved in 19 cases when 8 participating undertakings determined the winner and its subcontractors before submitting the tenders. The GVH imposed a fine of 593,9 million HUF (app. 2,3 million EUR) on the parties.

33. Similar agreements were concluded in 2001-2002 concerning the construction of six main roads. Works and subcontracts were divided among the parties and to this end, sensitive business information was exchanged. An overall fine of 1.3 billion HUF was imposed (app. 5 million EUR). The GVH considered the great number of cartels characterising the construction industry as an attenuating factor.

34. The leniency policy of the GVH was applied in three cases in 2005. An agreement restricting competition affected the market of animal feed additives for 15 years. The cartel was organised on a European level and related to price fixing a quota sharing. It was extended to Hungary between 1991 and 2003. As the two affected undertakings actively contributed to the initiation of the investigation and cooperated during the whole procedure merited immunity from fines and a reduction of 90%, respectively.

35. The national manifestation of an other international cartel was discovered due to leniency application on the market of high voltage gas insulated switchers as well. While one of the parties to the cartel, ABB was exempted under the leniency notice, a fine of 702 million HUF (app. 2.7 million EUR) was imposed on Alstom, Siemens, VA Tech and Areva. Though this case was investigated also by the European Commission, as the infringement terminated before Hungary's accession to the EC a parallel procedure under national law was necessary.

36. The third cartel was also a European wide cartel and affected one Hungarian undertaking, a customer of benzyl-butyl-ftalat. The cartel aimed at to share the market.

37. A number of cases related to provisions established by professional chambers. Such provisions regulated the prices of the meat of games, the prices of graphic and those of medical services. Restrictions on advertisements of medical services were also prohibited.

38. A vertical agreement concluded between the largest sport arena in Budapest and a ticket seller agency. According to the exclusive agreement only one agency was authorised to sale tickets to the events organised in the Arena. Organisers of events were therefore obliged to deal with that given agency though better offers were available on the market. The GVH considered that the agreement had an unjustified exclusionary effect covering a significant segment of the market.

c) Abuse of dominance

39. A number of complaints derived from the allegedly abusive provision of secondary services connected to network energy markets. Prices of utilities are established in regulation but providers are free to establish the prices of connected services such as change of metering devices, turning off and on of gas or electricity supply etc. Consumers however cannot change supplier and often face charges considered unjustified. Complaints related to high increases in prices and to unidentifiable elements of the issued bills. Though the competition supervision proceeding initiated by the GVH did not result in prohibitions the complaints identified a number of issues requiring regulatory interventions. The GVH issued a declaration

jointly with the Energy Office, the Office for Consumer Protection and the ombudsman directing the attention on the identified problems and possible abuses.

40. Cemetery services repeatedly appeared before the GVH. In a case it related to the high level of the price of funeral parlours. The vertically integrated owner charged a high price to its downstream competitors but this cost did not or only partly appeared in its own cost structure. Such a practice had exclusionary effects and was found to be abusive by the GVH.

41. As in the previous year cable TV services were subject to consumer complaints in great numbers. Objections related to the extent of increase of monthly subscription fees and to changes of the composition of programme packages, which they said were disadvantageous to them. The unilateral modification of the program package, without prior consultation with consumers constituted an abuse of dominance in the Fibernet case.

42. Other sectors of the telecom market were also subject to antitrust scrutiny. The GVH initiated proceedings against two mobile phone operators concerning the operation of their voice mail services. According to their practice the voice mail service turned on automatically without prior warning. The consumers were therefore unable to avoid the charges of a service not even with an immediate interruption of the call. Data underlined however that a great number of calls were terminated in the first few seconds of such calls and no messages were left for the addressee. The GVH found that such a practice was against consumer interest and qualified as an exploitative abuse. The GVH gave 90 days for the operators to amend their system and to enable consumers, in case of such preference, to avoid the use of the voice mail services. However it also established that having regard to the differing practice of the different mobile and fix telephony operators the problem cannot be solved through competition supervision procedures and needs regulatory intervention.

2.2 Mergers and acquisitions

43. In the year 2005 the Competition Council reached decisions about concentrations in 70 cases but the imposition of conditions was necessary in only one of these cases. No concentrations were prohibited.

44. The structure of control over Duna-Dráva Cement Kft. owning 50% share on the cement market has changed as the former joint control exercised by **Heidelberg Cement AG** and Schwenk Zement KG ceased to exist when the latter sold a share of 0.01% to the former. At the evaluation of the merger the GVH took into account that the Heidelberg Group, due to its assets in the neighbouring countries could restrict the potential competition from cement import. However it considered that the marginal role of import and the great number of importers such a possibility would not justify the prohibition of the merger.

45. On the milk market as Új MiZo was acquired by Sole with a share of 30% it became a market leader causing an appreciable lessening of competition. This change however, taking into account the unused capacities of competitor milk processors, did not result in the establishment of a buyer side dominance in face of milk producers.

46. The first vertical integration in the milk market happened in 2005 when Alföldi Tej, the joint company of 82 raw milk producers acquired certain assets of the bankrupted Parmalat Rt.

47. The concentration of the energy sector continued in 2005. The GVH authorised in a two phase procedure the acquisition of control of E.ON Hungária over two gas supply companies. Through the transactions E.ON's share has risen above 50% on the national market of gas distribution. The GVH primarily analysed the foreseeable portfolio effects of the merger. The concentration did not increase the market power of E.ON on the electricity market where it already had around 50% share. Despite the increase of market power on the gas market the GVH, taking into account that a number of undertakings

have similar possibilities as E.ON to enter the gas trading market, did not consider that the merger could have negative effects on competition.

48. The GVH brought its second decision on a concentration in the newspapers market. The first decision prohibiting the merger was dismissed by court on appeal. Maintaining its opinion on possible portfolio effects, but accepting certain arguments of the court and taking into account a structural separation adopted by the Ringier Group, the GVH finally cleared the merger subject to conditions.

3. Role of the competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

49. Relating to the act on railways the GVH emphasised that a liberalised market requires a more detailed regulatory background than the established system. It also stood up for an appropriately empowered regulatory authority.

50. The GVH underlined the necessity of a thorough amendment of the Act on Advertisements. The amendment is especially needed in the case of pharmaceutical products. The clarification of the relation among sector specific and competition regulation concerning foodstuffs is also required as the parallel power of different authorities works against an efficient supervision.

51. A draft regulation of the Municipality of Budapest concerning taxi services envisaged the imposition of fixed prices. The GVH submitted a detailed opinion in which it established that though a number of issues require regulatory intervention on the market a distinction should be made among the different segments of taxi services. Certain segments are in fact competitive like long term supply contracts concluded by undertakings or services ordered by phone calls. In the case of these segments regulatory intervention into the existing price competition would damage the interest of consumers. Established prices would not solve the present problems in the case of less competitive segments either. The draft regulation was finally abandoned.

4. Resources of the activity, other information

a) Annual budget (in million HUF and EUR)

2000	million HUF	576.4
	million EUR	2.3
2001	million HUF	950.2
	million EUR	3.8
2002	million HUF	1179
	million EUR	4.7
2003	million HUF	1196
	million EUR	4.8

2004	million HUF	1164
	million EUR	4,7
2005	million HUF	1522
	million EUR	5,8

b) Number of employees (persons-year)

⇒ economists;

2000	2001	2002	2003	2004	2005
21	27	32	31	31	28

⇒ lawyers;

2000	2001	2002	2003	2004	2005
38	36	43	49	49	49

⇒ other professionals;

2000	2001	2002	2003	2004	2005
26	21	18	19	18	18

⇒ all staff combined.

2000	2001	2002	2003	2004	2005
104	120	120	120	119	116

5. References to new reports and studies on competition policy issues

52. Two sector enquiries were finished in 2005, one concerning mortgage loans, the other the electricity sector. The report on mortgage loans is available on the website of the GVH. Being under debate by market participants the second report is not yet finalised as observations are still under consideration, however it would be submitted shortly.

53. The investigation of mortgage loans for flat purchasing started in July 2004 because margins in the sector were considered high and it was suspected that price competition is not effective.

54. During the investigation the GVH has distinguished three main products: the government subsidised interest rate; the mortgage loan with a maximised interest; and loans made under market conditions.

55. According to the sector inquiry none of the credit institutions were in a dominant position on the market and the creation of such a position was not likely either. It was also excluded that joint dominance

might exist. The market itself was considered transparent and the offers of the competitors were easily available. The conditions applied by market actors were so differing that the GVH considered that the existence of a collusion is unlikely on the market. Similar price movements were considered to be due to the characteristics of the credit market.

56. However the GVH submitted a number of recommendations relating to problems of the present system, which could not be the subject of antitrust intervention. The GVH did not exclude on the other hand that the initiation of competition supervision procedures might be justified in the future.

57. The investigation into the electricity sector had its subject the analysis why so few purchasers left the utility market for the free market and that what was the reason for the return of a number of these undertakings to the utility market.

58. The investigation was initiated with the aim of clarifying the effect of the partial liberalisation of the market in January 2003. An answer was to be found for the question as to why so few eligible consumers left the regulated market for the free market and why many of those who had left had returned. It was also unexpected to find that those suppliers, who had only made available low capacities, were on the liberalised segment. A main conclusion of the investigation was that the present regulatory model should be amended. Though it was appropriate to ensure the introduction of competition into the sector but restricts its further development. It should be accepted that the adoption of only the minimum level of liberalisation established by the EC is not suitable for the market.

6. Activity of the OECD's Budapest Regional Centre

59. The Regional Centre for Competition (Centre) was established by the OECD and the GVH on 16th February 2005 in Budapest and is financially supported by the Republic of Hungary.

60. The Centre of the OECD is built on the expertise of the OECD and the GVH in order to develop competition policy and competition advocacy for the competition authorities in the Central-, Eastern- and South-Eastern European region. The principal aim of founding the Centre is to contribute to the development of competition policy, competition law and competition culture as well as to support the work of competition authorities.

61. It is also among the aims of the Centre to support the work of these competition agencies and thus contribute to the economic growth of the region. The main task of the Centre is to organise seminars and conferences in various themes of competition policy. The GVH attributes utmost importance to sharing its experience with those Central-, Eastern- and South-Eastern European countries, which are going through an economic transition similar to the one of Hungary. At the beginning of the 1990s those working for the GVH also participated at seminars and conferences in countries, which had a more developed legal system and competition policy and thus gained substantial and indispensable knowledge for their every-day work.

62. The topics to be addressed at the Centre includes competition case analysis; investigative techniques; competition principles in regulatory reform; judicial training; enforcement priorities; guidelines, policies, practices and procedures; frameworks for co-operation between enforcement authorities in the region; competition advocacy and communications tools; the relationships between competition authorities and sector regulators; and other themes within the general framework of competition law and policy.

Major events in 2005 were

- *Workshop on merger analysis and procedure, 28 February – 2 March 2005*

63. The workshop was organised for Western Balkans competition authorities in Budapest on merger enforcement procedures and techniques. It was built around a hypothetical case for which the OECD prepared a detailed case study of a hypothetical merger case. The participants had been provided with a case description and realistic documents related to the case prior to the workshop. They were asked to prepare for playing the role of the competition authority, parties to the case and third parties. A panel of experts facilitated their work during the workshop. The hypothetical case discussion format was highly successful. It provided a detailed environment for discussion and application of best practice techniques that would have been lacking otherwise. The work on the hypothetical case was complemented by presentations of real cases from countries in the region.

64. Under the Workshop partially funded by the OECD-Hungary Regional Centre for Competition in Budapest,

- *Seminar on supermarket related issues: buyer power and sale below cost, 21-22 April 2005*

65. The topicality of the conference was provided by the legislative process linked to the preparation of the Hungarian Trade Act. The conference has enabled the foreign and national participants to become acquainted with the theoretical background of sales below cost and buyer power, to exchange views on this issue.

- *Seminar on Abuse of Dominance, 7-10 June 2005*

66. The seminar was dedicated to competition authorities of seven countries of the western CIS (Armenia, Azerbaijan, Belarus, Georgia, Moldova, the Russian Federation, and Ukraine). The seminar focused on the “Abuse of a dominance” by discussing case studies and giving lectures. Abuse of a dominant position can arise either in markets where enterprises are subject to regulation or in markets where they are not regulated. Even where enterprises are regulated, they retain certain economic freedom which can be misused through abuse of dominance. This seminar aimed to improve the legal and economic analysis in cases involving either regulated or unregulated markets.

- *Opening Conference of the OECD RCC in Budapest, 26 September 2005*

67. The Opening Conference celebrated the launch of the OECD-Hungary Regional Centre for Competition in Budapest, (which had started its operations already earlier this year). It was attended by high level speakers including the Hungarian Prime Minister, and an audience comprising the heads of the competition authorities of the target countries of the Centre as well as representatives of economic life in Hungary. Presentations underlined the role of competition policy for economic growth from various perspectives. The event got considerable and very positive media coverage and was reported in prime time TV news. In sum, it was a great success in promoting the Centre and its visibility in the region.

- *Judges Seminar, 18-19 November 2005*

68. The seminar was the first event organised for national judges in co-operation by the OECD, the Association of European Competition Judges and the OECD-Hungary Regional Centre for Competition in Budapest. It was funded by the European Union and the OECD-Hungary Regional Centre for Competition in Budapest. The seminar was attended by judges from all EU Member States – with the exception of Cyprus, Malta and Poland – and by judges from Bulgaria and Switzerland. The aim of the seminar was to

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provide judges the opportunity to improve their understanding of competition law, and especially the implications for national judges of the modernisation of the application and enforcement of EC competition law under Regulation No 1/2003. This first seminar focused entirely on the topic of abuse of dominance under Art. 82 EC.