Annual Report *Summary* 2005

English version

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The Conseil de la concurrence : litigation activity

Anticompetitive agreements (Art. L. 420-1)

Public passenger transport

The *Conseil de la concurrence* fined the companies Kéolis, Connex and Transdev to 12 million euros for entering into a nationwide anticompetitive agreement between 1996 and 1998. The purpose of the agreement was to distribute public transport markets (urban bus services) during solicitation for bids launched by local and regional administrations (decision 05-D-38).

The *Conseil* unveiled the rule of conduct adopted by the cartel, under which the three companies in question refrained from competing whenever a contract held by any of them came up for renewal.

Numerous local markets have been affected by the national agreement, such as local public transport contracts in Bordeaux, Bar-le-Duc, Épernay, Laval, Chalon-sur-Saône, Saint-Claude, Oyonnax and Sens. The extreme seriousness of the practices justified exemplary penalties, and all the more that they were committed by some of the most well-known groups in France. The *Conseil de la concurrence* decided to impose the maximum fines provided for by the French code of commercial law *(code de commerce)* in force at the time of the facts (i.e. 5% of their national turnover).

Disney video cassettes for children : vertical price agreements

The *Conseil de la concurrence* imposed penalties on the company BVHE (Buena Vista Home Entertainment), the exclusive distributor of Disney video cassettes in France, and the retailers Casino and Carrefour and the wholesaler SDO (Selection Disc Organisation) for engaging in a price fixing agreement on the retail price between 1995 and 1998. Total fines amounted to 14.4 million euros (decision 05-D-70).

By negotiating with retailers a set of discounts and rebates with false conditions (i.e. the discounts

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were assumed not to have been acquired at the time of invoicing), BVHE artificially raised the retailers' below-cost selling thresholds which mechanically led them to raise their own retail prices. This practice effectively maximized the profits made by the producer and the retailers, to the detriment of the consumer and was complemented by a common policy on collecting, sharing and monitoring information aimed at consolidating the system.

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

In determining the amount of the fines, the *Conseil de la concurrence* also took account of the fact that the offending practices were based on an abuse of the legislation prohibiting below-cost selling, and that they were partially committed by retailers who claim to have aggressive pricing policies.

Consumer electronics: the manufacturers Philips, Sony and Panasonic penalized for imposing a compulsory minimum retail price scheme on their distributors

Following a referral by the firm Avantage (trade name TVHA), the *Conseil de la concurrence* penalized the consumer electronics manufacturers Philips, Sony and Panasonic for entering into a vertical agreement with each of their distributors in an attempt to fix the retail prices of their branded brown goods. It imposed fines totalling 34.4 million euros (decision 05-D-66).

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It took into account the following evidence:

• The communication of « recommended » retail prices to wholesalers and retailers.

• The observed alignment in the sale prices of a number of products sold by all the distributors of the brands concerned (with, for example, one particular model of television set found to be on sale at the same price in all the retail outlets, with just a few exceptions).

• The existence of monitoring and retail price control mechanisms (with telephone warnings from manufacturers or wholesalers to "boost prices " visits to retail outlets by regional representatives of the brand, and threats to halt deliveries or reduce the financial conditions offered to retailers).

• The existence - in the case of Philips and Sony - of cooperation agreements between their retailers, by which the manufacturers were able to control their pricing and advertising policies.

The *Conseil* estimated that the practices were particularly serious since they deprived consumers of the chance to acquire electronic equipment made by Philips, Sony and Panasonic at a more attractive price, which would have been the result of real price competition between distribution networks. The *Conseil* emphasized that the practices were implemented by the sector's three biggest manufacturers. Between them, over the period 1998-2002, they accounted for 55% of total hi-fi sales, almost 50% of television sales and nearly 40% of DVD player and VCR sales.

Mobile telephony: three operators Orange, Bouygues and SFR, penalized for anticompetitive agreements

Following the *Conseil's* decision to begin proceedings ex officio on August 28th 2001, and a referral handed down by the consumer association UFC Que-Choisir on February 22nd 2002, the *Conseil* fined the three mobile telephony operators Orange France, SFR and Bouygues Telecom for having exchanged confidential and strategic information on the one hand, and entering into an agreement aimed at stabilizing the development of their respective market shares. The fines amounted to a total of 534 million euros (decision 05-D-65).

France Télécom

Sharing information

Every month between 1997 and 2003, the mobile operators exchanged detailed and confidential information on the number of new customers signed up the previous month and the number of customers who opted to cancel their subscriptions.

On a market which is difficult to penetrate and comprising only three operators, information sharing of this kind is likely to distort competition, by reducing uncertainties over competitors' strategies and diminishing each company's commercial independence, particularly where – as has been the case in the mobile telephony market since 2000 – growth in demand is slowing substantially.

Agreement to stabilize the market shares

The three operators entered into an agreement aimed at stabilizing the development of their market shares between 2000 and 2002. The *Conseil* uncovered a number of pieces of serious, specific and corroborating evidence pointing to the existence of such an agreement. These included handwritten documents with explicit references to an "agreement" between the three operators, the "pacification of the market" and the "Yalta of market share". Certain similarities were also observed in the commercial policies implemented by the operators during this period, particularly in terms of acquisition costs and call rates.

The consumer, primary victim of the agreement

From 2000 onwards, the three operators simultaneously adopted strategies aimed at consolidating their existing customer bases.

This led, among other things, to a hike in prices and the adoption of measures such as giving priority to contracts with commitments over pay-as-you-go cards, or the introduction of billing per 30 second increments after a minimum first minute.

Theses measures, which were against the interests of the consumer, could clearly have led to a drop in sales (and therefore market share) for any operator who took the step of introducing them unilaterally. The collusion was therefore intended to make it easier for the operators to introduce this strategy, by enabling them to ensure that they all adopted the same policy simultaneously and that their market shares would consequently remain stable.

Parisian luxury hotels : a collusive oligopoly

Following a special report on Parisian luxury hotels (TV programme Capital on French channel M6), the *Conseil de la concurrence* began proceedings ex officio on 4th December 2001, and the Minister of Economy also referred the matter to the *Conseil* on January 6th 2003.

The *Conseil* decided to penalize the six Paris hotels: the Bristol, the Crillon, the George V, the Meurice, the Plazza Athénée and the Ritz for having regularly shared confidential information about their respective commercial activities. Given the oligopolistic nature of the market in question, the *Conseil* took the view that these practices had distorted competition by promoting a collusive equilibrium. Total fines amounted to 709,000 euros (decision 05-D-64).

The investigation revealed that the six luxury hotels had regularly exchanged confidential information about their respective activities and also about certain elements needed to put together their respective marketing plans. These exchanges took place in the form of regular meetings and e-mail correspondence. The information was shared weekly and monthly on past activities, but in some cases also included business forecasts.

The information exchanged enabled the luxury hotels to monitor one another effectively by sharing details of their performances and following each other's developments very closely.

By sharing this information, the luxury hotels were able to ensure that their respective performance levels did not differ too greatly, and that none of them was seeking to adopt strategies likely to endanger the positions held by the other members of the oligopoly.

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The prohibition of anticompetitive agreements in the construction sector

Unfortunately numerous anticompetitive agreements still exist in the awarding of procurement contracts and usually involve the same construction companies. In 2005, the *Conseil de la concurrence* issued several decisions relative to cases of anticompetitive agreements in procurement markets. Here are some examples.

The construction of motorway A84

The *Conseil* penalized 21 building and civil engineering companies to pay a total of 17 million euros for entering into agreements for the awarding of contracts to build engineering structures along the A84 motorway, known as the "Estuaries Road", in the Manche *département* of France (decision 05-D-19).

The companies concerned are : Eiffage Construction, SNC CBO, Chantiers Modernes, Demathieu et Bard, Dodin Nord, GTM Construction, INEO, Vinci, Entreprise Marc SA, ETPO, Vinci Construction, Lépine TP, Quille, Razel, SND, Eiffage TP, EGC Ouest, Sogea Nord Ouest, Spie Batignolles TPCI, Spie Batignolles Ouest and TPC.

The companies had participated in a very large scale agreement, engaging in illegal practices such as exchanging information prior to submitting bids, submitting covering bids and offering compensation to companies which agreed to abstain from bidding, resulting in the contracts being divided up.

J. Hardy-PhotoAlto

Public works in the Meuse *département*

The Conseil penalized 11 building and civil engineering companies to pay 7 million euros for entering into an anticompetitive agreement for the awarding of public works contracts (engineering structures, roads, drinking water supply and drainage installation) by the State and local and regional administrations in the Meuse *département* between 1996 and 1998 (decision 05-D-26).

The companies concerned are Céréda, EJL Est, Colas Est (legal owner of Axima), Berthold, Eurovia Lorraine (legal owner of Eurovia Champagne Ardennes Lorraine), Monti, Nicora, Sade CGTH, SEETP Robinet, Sotrae and Société Routière de l'Est.

Some of these companies had agreed to divide up the contracts between them, others had exchanged information before submitting bids or had submitted what they claimed were competing bids, when in fact they had not been drawn up independently.

Road works in Seine Maritime

The *Conseil de la concurrence* penalized 6 building and civil engineering companies specialized in the supply of bitumous material to pay total fines of 33.6 million euros for entering an agreement to share the markets during the awarding of public road works contracts in the Seine-Maritime *département* (decision 05-D-69).

The companies concerned are : Colas Ile de France Normandie, Eurovia Haute Normandie, Gagneraud Construction, Le Foll Travaux publics, Appia Haute Normandie and Buquet.

Abuse of dominant position (Art. L. 420-2)

ADSL Broadband Internet Access : France Telecom penalized for abuse of dominant position

Following a referral by the company Neuf telecom, the *Conseil* fined France Telecom 80 million euros for preventing its competitors from acceeding the wholesale ADSL Internet market until October 2002 (decision 05-D-59).

On the one hand, this decision on the merits follows a decision of interim measures (February 2000) ordering France Telecom to propose a new technical and commercial offer that would enable other operators to compete effectively in the market. On the other hand, the decision follows a breach of injunction procedure which led to a 20 million euro fine for France Telecom in May 2004 (fine doubled by the Paris court of appeal).

The *Conseil* observed that if France Telecom had agreed to offer Internet Service Providers (ISPs) these wholesale services, provided they were implemented entirely in its own installations (option 5). However France Telecom refused to allow competing telephone operators, like 9 telecom, the possibility to partly use their own installations instead, according to the conditions set out in option 3. In doing so, it prevented the competitors from making wholesale offers to the ISPs.

France Telecom then agreed to permit its competitors to replace France Telecom's installations by theirs (option 3), but at prices that prevented them from making the ISPs offers that were competitive with those made by France Telecom under option 5.

The *Conseil* considered that these practices were extremely serious and had caused significant damage to the economy. By refusing access, France Telecom was able to remain the sole supplier of services routing broadband Internet (ADSL) traffic between subscribers and ISPs until 2002, whilst preventing potentially more innovative and efficient competitors from entering the market. The ISPs were unable to take advantage of competition in the market and therefore to pass the advantage on to consumers.

Market for water supply in the Île-de-France region

In its decision 05-D-58, relative to practices observed in the drinking water sector in Île-de-France, the *Conseil de la concurrence* penalized the behaviour of Lyonnaise des Eaux and the Syndicat des eaux d'Île-de-France (Sedif). Total fines amount to 500,000 euros.

The *Conseil* described as anti-

Véolia

competitive the tied reduction implemented by the Lyonnaise des Eaux group, which consisted in offering the Syndicat du Nord-Est de l'Essonne (NEE), a wholesale water price -for supply alone- that was some 17% higher than the price offered in its global "supply + distribution" bid. This combined reduction, which was clearly intended to handicap any competing bid for distribution only, since it enabled Lyonnaise des Eaux to act in a discriminatory manner, offering a price lower than that offered as part of its separate wholesale bid.

The *Conseil* also penalized the behaviour of Syndicat des eaux d'Île-de-France, which put pressure on the final negotiations for a water supply contract between one of its main clients, Semmaris (the company managing the Rungis National Interest Market) and its competitor, Sagep, which was prepared to deliver wholesale water supplies to the Rungis National Interest Market at a price 22,5% lower.

Publishing this decision, the *Conseil* wished to draw the attention of the region's local administrations to the importance of introducing real competition into the upstream market for water supply. The *Conseil* stressed that municipalities in the Île-de-France region have a special role to play in introducing greater competition into the market for the supply and transportation of water and that they have, from now on, the option to separate the water supply market from the water distribution market when they call for competing bids for new public service water distribution concessions.

Parallel trade in medicines

Following a referral by several exporting companies regarding practices implemented by 21 pharmaceutical laboratories*, the *Conseil de la concurrence* has handed down a non-suit decision, considering that the laboratories did not abuse their dominant position in restricting or refusing to supply pharmaceuticals to exporters wishing to purchase them in France at an "administered" price, and then selling them abroad at a higher price (decision 05-D-72).

"Parallel trade in pharmaceuticals" is based on the existence of different prices for medicines between European countries. The price level of French medicines is close to the European average. However it is 20% lower than the one practised in the United Kingdom and Germany, to the extent that France is an export base for both these markets. A number of French companies have based their business exclusively on exports, purchasing pharmaceuticals from laboratories at an "administered" price and then selling them abroad at a higher price.

The *Conseil de la concurrence* considered that delivery restrictions and/or refusal to sell products opposed by laboratories to exporters were not anticompetitive.

The *Conseil* considered that it is not an abuse for a laboratory to defend its commercial interests by refusing to deliver a product at an administered price, where that product is only sought on the grounds that it would make a profit to resell it on a foreign market, and where the product will certainly not be sold on the national market for which the administered price has been fixed.

The *Conseil de la concurrence* took the view that the delivery restrictions concerned by the complaint constituted reasonable and proportionate measures which, given the limited activity of the exporters, were unlikely to prevent parallel trade.

*Glaxo-Wellcome now GlaxoSmithkline (GSK), Lilly France, Boehringer Ingelheim, Wyeth Lederlé, Leo France, Ferring, Abbott Medisense France, Novartis Pharma, Pfizer, Merck Sharp and Dohme-Chibret (MSD), Norgine Pharma, Fournier, Sanofi-Synthelabo, Smith Nephew, Janssen-Cilag, Schering Plough, LifeScan, Aventis, Bayer Diagnostics, NovoNordisk and Astra Zeneca.

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The Conseil penalizes Royal Canin

An example of hybrid decision : Royal Canin penalized for abuse of dominant position in the dog food market

Following a referral by the Minister of Economy, the *Conseil* penalized Royal Canin for abusing its dominant position in the market for the sale of dry dog food in specialist stores (decision 05-D-32).The company and other members of its distribution network have been penalized for engaging into anticompetitive practices on the retail market with the aim to impose a sale price on consumers. Total fines amounted to 5, 000,000 euros.

Foreclosure of intra-brand competition

Royal Canin set up a network of 19 distributors throughout France to distribute its products. These products were distributed in 13,000 specialist outlets, providing the brand with an incomparable presence in the market. Relations between Royal Canin and its distribution network were formalized with specific contracts, which kept mass market distribution and the specialist distribution sector perfectly separate, thus prohibiting any intra-brand competition.

• Exclusivity agreements imposed on distributing wholesalers to restrict distribution exclusively to the specialist distribution sector, professional breeders and vets.

• Resale prices, which were monitored through a system of feedback, were imposed on wholesalers.

As a result, any retailer wishing to purchase Royal Canin products was unable to take advantage of competition between suppliers, and had to deal with the wholesalers appointed by Royal Canin at a single set price, which increased considerably the retailers' supply costs.

The *Conseil* considered that Royal Canin was responsible for instigating a series of vertical anticompetitive agreements within the retail market, notably with the aim of imposing sale prices on consumers. The *Conseil* noted that Royal Canin established and published indicative retail prices which, in fact, were fixed retail prices. These prices were then passed on to retailers by the wholesalers and franchisers, then scrupulously implemented by retailers.

Foreclosure of inter-brand competition

The *Conseil* also judged that the system of loyalty discounts implemented by Royal Canin was anticompetitive. The company awarded discounts at the end of each year to some members of its network –and notably franchisers'cash and carriers, i.e. passed on to retailers in the end- depending on their turnover and/or tonnage of Royal Canin products sold. When implemented by a company in a dominant position, this sort of system tends to prevent new competitors from entering the market, as it requires of a competitor wishing to take market share from Royal Canin to reduce its prices considerably and endanger its economic stability.

B. Serguef-Sircom

Negotiated procedures

Negotiated settlement

Since the entry into force of the New Economic Regulation Act (May 16th 2001), the *Conseil de la concurrence* may reduce any penalties imposed on a company, which does not dispute the validity of the objections made against it. This is the so-called "negotiated settlement" procedure, permitted under Article L. 464-2 of the code of commercial law *(Code de commerce*).

Two negotiated settlement procedures were implemented in 2005.

Disney video cassettes

In the above mentioned case of Disney video cassettes for children, the fines imposed on the company BVHE and Carrefour were reduced by approximately 25% and 40% respectively from their actual theoretical amounts (decision 05-D-70).

On the one hand the companies agreed not to dispute the objections stated against them and also gave commitments regarding their future behaviour that were likely to restore proper price competition on the market for children's videocassettes.

BVHE gave a commitment to overhaul its general conditions of sale to retailers and wholesalers and agreed to restructure its discount system.

Carrefour offered a commitment to alter the criteria according to which it accepts discounts from wholesalers-distributors with all the suppliers on the video cassettes and DVD market. Both companies stated their intention to keep the *Conseil de la concurrence's* executive case officer informed about the actual implementation of the proposed commitments.

Franking machines

Following a referral by 4 companies against practices implemented by the companies NEOPOST, SATAS and SECAP (PITNEY BOWES group) in the sector of franking machines rental, the *Conseil de la concurrence* penalized three companies for engaging in vertical agreements and the first two for abuse of collective dominant position for a total amount of 1.3 million euros (decision 05-D-49).

The operators had concluded very restrictive contracts with their respective customers (users of franking machines). These contracts led to market foreclosure: renewal by tacit agreement for 4 more years, strict cancellation conditions with fixed compensation in case of early withdrawal.

Given the market structure -the three operators represented more than 95% of the national market- the entire national territory was affected by cumulative effect, the entry of new operators on the market, present in other member states was potentially hindered by the clauses in question.

Considering that these clauses had entailed restrictive effects in implementing market foreclosure and in preventing the diffusion of technological progress, the *Conseil* penalized the three operators.

However, since the three companies sought a negotiated settlement, the amount of the fine imposed on each of the three

companies was reduced by approximately 50%. In return, the companies agreed not to dispute the objections stated against them and gave commitments in order to change their current and future contracts.

Commitments

The year 2005 was marked by the beginning of the commitment procedure, introduced in the commercial code *(Code de commerce)* by ordinance of November 4 th 2004, article L. 464-2.

The *Conseil* is now able to "[...]*accept commitments proposed by companies or organizations and likely to put an end to anticompetitive practices"*. Proposed by the author(s) of the anticompetitive practices, the commitments are submitted to the *Conseil* at any time of the litigation procedure. When necessary, the *Conseil* issues a communication on the proposed commitments via its Internet website in order to collect the potential comments of third companies or organizations for the procedure.

If the *Conseil* considers that the proposed commitments are likely to meet the competition issues raised, the *Conseil*, noticing that their is no need for action any more, can decide to close the case while taking act of the commitments, which then take a binding character.

This new procedure enables to change rapidly and directly the behaviour of market players. The procedure met a real success since six procedures were already launched in 2005 as part of this new negotiated right, and four of them were closed in the course of the year.

Free newspapers and EUROPQN

The companies *" 20 Minutes "* and *" Métro "*, publish daily general interest newspapers that are distributed free of charge and financed exclusively by advertising. Both companies filed a complaint with the *Conseil de la concurrence* concerning the refusal by the association EUROPQN (which represents the major national daily newspapers) to include their publication in its market study on the readership of the national daily press. They claimed that the association's decision prevented them from entering the advertising market under normal competitive conditions.

In its preliminary assessment, the *Conseil de la concurrence* observed that the EUROPQN study was a reference used by professional advertising space buyers and media planners. Therefore the inclusion in EUROPQN's readership study was an undeniable competitive advantage in the national market for the sale of advertising space in the national daily press. The *Conseil* indicated that there was reasonably strong grounds to assume that the rules governing the conditions for inclusion in the EUROPQN study were defined and applied in a non-objective, non-transparent and discriminatory fashion.

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EUROPQN applied to benefit from the commitment procedure and offered proposed commitments in order to include the daily newspapers in its readership study. Considering that the commitments satisfy the competition concerns expressed, the *Conseil* accepted them and therefore closed the proceedings (decision 05-D-12).

The haras nationaux

The professional association FADETEQ, which is made up of around fifty officially accredited private equine reproduction centres, filed a complaint with the *Conseil de la concurrence*, regarding practices implemented by *the haras nationaux* within the equine reproduction market.

Following an inquiry completed in 2004, the *Conseil* noted that in 2000, despite the fact that the department of the Ministry of Agriculture responsible for the studs was transformed into an autonomous public establishment called *« Les haras nationaux »*, the organization's merchant activities and public service activities continue to be intertwined in such a way that it is difficult to ascertain whether its trading activities are developing without cross-subsidies, and whether or not the *haras* are abusing their dominant position within the equine reproduction market.

The *Conseil* also noted that the haras'cooled semence transportation service charged much higher prices to users of private insemination centres than users of the public centres managed by the *haras nationaux*.

The *haras nationaux* which requested the implementation of the commitment procedure, subsequently submitted a number of proposals to the *Conseil*. They agreed to set up an analytical accounting system so as to identify the costs of services with administrative aim and those of its trading activities, and to establish a non-discriminatory pricing policy for their artificial insemination services.

After examining them, the Conseil accepted the commitments proposed by the *"haras nationaux"* considering that they satisfied the competition concerns. The *Conseil* therefore decided to close the case (decision 05-D-29).

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Collector postage stamps listing

The Dallay company had submitted a referral to the *Conseil* against the company Yvert & Tellier, accused of hindering the development of the market for catalogues listing collector postage stamps. The complainant company claimed that Yvert et Tellier unfairly refused to allow its direct competitors access to the numbering system used in its catalogue, thereby preventing them from establishing a correspondence with their own numbering systems or using it as a common system.

In its preliminary assessment, the *Conseil* identified real competition problems in the market for postage stamp valuation catalogues.

The *Conseil* observed that the profile of Yvert et Tellier, which has been present in this market for more than a century, is such that its numbering system acts as a de facto standard for valuing and dealing stamps. The *Conseil* also took the view that Yvert & Tellier's refusal to grant other market operators licences to use its numbering system could constitute an abuse of dominant position. This is because it effectively forbade the production of correspondence tables between the different numbering systems, a new product for which there could be a demand, and this restriction could also prevent the development of fair competition for new stamp valuation catalogues.

The company Yvert & Tellier proposed to grant valuation catalogue publishers a license to create correspondence tables between their own numbering system and that of Yvert & Tellier, in exchange for payment of reasonable royalties and provided that Yvert et Tellier's intellectual property rights concerning its numbering system and brand are respected.

The *Conseil* accepted the commitments and closed the case (decision 05-D-25).

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Collective management of copyrights

As part of a litigation procedure against the SACD (Society of Dramatic Authors and composers), the *Conseil de la concurrence* accepted the commitments offered by the company.

The SACD made it compulsory for its members to combine the management of the rights of their theatrical performance together with their audiovisual rights through a statutory clause. Authors were thus forced to entrust the SACD the management of all their rights, without any possible division.

The *Conseil* expressed concerns about competition since authors, who had no other choice concerning the management of audiovisual rights, were also forced to entrust their theatrical performance rights' management to the SACD -in a monopoly position on the market- even though it is not the same market and they could have had them managed by another collective management society or manage them themselves.

The SACD undertook to amend its statutes during its next general meeting, in order to allow authors to divide their works into three different categories : dramatic works, audiovisual works and images. This dividing option was nevertheless subject to some restrictions in order for the SACD to accomplish its mission of collective management under conditions of reasonable economic balance.

The *Conseil* examined the commitments, and required that they should be amended so as to fully satisfy the competition concerns raised. The *Conseil* eventually accepted them and decided to close the case (decision 05-D-16).

The Conseil de la concurrence : advisory activity

Opinions relative to mergers

Acquisition of Dolisos Laboratories by Boiron (opinion 05-A- 01)

Following a referral by the Ministry of Economy, the *Conseil de la concurrence* analysed the effects on competition of the acquisition of Dolisos laboratories by the Boiron company (opinion 05-A-01).

The business of the companies Boiron and Dolisos is almost entirely focused on the manufacturing, the distribution and the marketing of homeopathic medicine for human use. Two relevant markets have been identified by the *Conseil*, which had to study for the first time the specificity of homeopathy.

On the market for homeopathic medicines of non-proprietary name (MNC *médicament à nom commun*), the *Conseil* observed that the new company would hold a quasi monopolistic share of the market and that there would be substantial barriers to entry.

Beyond patent distribution and registration costs, this situation results from the fact that the prices and the margins of medicines, which are refundable by the National Health Service, are strictly controlled and have remained unchanged since 1988. However the *Conseil de la concurrence* has not issued any unfavourable opinion, notably given the commitments taken by the parties to the operation in order to avoid risks to infringe competition.

The *Conseil* considered that, given the unchanged regulation, the new company would not be able to use its market power to influence prices since their level is fixed by decree. The company would at the most be able to weigh on the quality of the service and the scope of the offered range. The *Conseil* emphasized that the company, alone on the market, could be tempted to serve only the most profitable preparations. However the competition authorities have obtained that the new company commits itself, with a few precautions, to continue to sell all the unitary preparations with non-proprietary names registered in the Boiron and Dolisos nomenclatures.

On the market for homeopathic branded medicines (MNM), the risk of the operation was linked to the range effect following the comprehensive nature of the range of non-proprietary name preparations (SNC) and covered by the new company and the notoriety of its branded products. The new company could be tempted to use its quasi monopolistic position on the non-proprietary name medicines in order to strengthen its position on the branded medicines market and thus to evict competitors or to prevent new players from entering the market.

That is the reason why the parties to the operation committed themselves to avoid any correlation between non-proprietary name medicines and branded medicines as part of their business relation with the pharmacies.

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Acquisition of France Handling by Vinci Services Aéroportuaires (opinion 05-A-13)

Following a referral by the Minister of the Economy, the *Conseil* issued an opinion on the consequences of the operation and examined the proposed commitments (05-A-13).

As far as the relevant market is concerned, the *Conseil de la concurrence* considered that –according to the studies already carried out in the sector by the European Commission- the operating of air freight between the warehouses located in the airport and the aircraft (runway side) had to be distinguished from the freight operating to the warehouses (city side).

The *Conseil* observed that the operation gives the new group a preponderant position on the market for aid to third parties in the field of freight operating in warehouses on the city side. Out

F. Roche-DGDDI

of seven French airports where the two parties to the operation were present, and notably on the biggest two: Roissy and Orly. The *Conseil* noted that particularly on the Roissy market, the difficulty to obtain warehouse areas constituted a barrier to entry likely to give the new group a dominant position.

The *Conseil* considered that the commitments proposed by Vinci Services Aéroportuaires, as far as Roissy is concerned (return of warehouses and refusal to rent new warehouses during four years), were sufficient, all the more that they were reinforced by a letter from Aéroports de Paris (ADP), willing to grant the available warehouses to the new group's competitors.

Nevertheless, as far as Orly is concerned, and although the areas of the warehouses were available, the *Conseil* observed that the low attractiveness of this airport for freight was likely to give the new group a hardly disputable dominant position and that only the sale of France Handling business could be a remedy for the situation.

The *Conseil* observed the positive effect on competition, generated by the sale of ADP by France Handling, which puts an end to a situation of vertical integration, which could entail anticompetitive risks.

Socpresse/Ouest France (opinion 05-A-18)

Following a request for opinion by the Ministry of Economy relative to the acquisition of the Pôle Ouest of Socpresse company and some businesses by the SIPA company, the *Conseil* issued an opinion, in which it recommended several commitments likely to limit the risks of infringement of competition (opinion 05-A-18).

The *Conseil* noted that the acquisition of Pôle Ouest of Socpresse by the SIPA group led to the creation of monopolies and quasi-monopolies on the market for readership, advertising and classified advertisements in the sector of regional daily press (*Presse quotidienne régionale PQR*) on four out of five *départements* concerned by the operation. However, the *Conseil* observed that the market of the new company was sufficiently limited by a number of economic or structural factors, so that the operation would not hinder competition on this market.

While emphasizing the existence of barriers to entry on the readership market (price constraint on the price of one issue, necessity of an effective distribution network, readers loyalty to one newspaper), the *Conseil* observed that the decline of this medium would limit the risks of price increases on this market.

Moreover, the presence of the Ouest France group on numerous related markets in the sector of media and advertising (weekly regional press, local radio and television, billposting, advertising leaflets, free press for news and ads) would also enable the new group to propose advertisers and purchasers of advertising space a broad range of products and notably combined offers, based on the essential nature of advertising in its regional daily press.

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The *Conseil* stressed the necessity for the parties to the operation to take commitments. The *Conseil* considered that the exception of the defaulting company could not be put forward to exempt the competition infringement caused by the operation, none of the Socpresse Pôle Ouest companies appear to be insolvent.

The *Conseil* however observed that the general situation of these companies, and in particular of the Presse Océan newspaper, required recovery measures and that the cost cuttings generated by the operation could ensure the newspapers' viability. The *Conseil* has yet considered that the commitments proposed by the Ouest France group were essential to insure that the operation does not infringe competition: preservation of the editorial autonomy of the newspapers, absence of compulsory combinations of advertising inserts and ads between headlines, absence of combinations between the different advertising media of the new group, reduction in the group's participation in the capital of TV Nantes Atlantique and Angers 7.

Other opinions

Universal banking service (05-A-08)

Following a referral from the Consumer Confederation for housing and Living Environments (*Confédération de la Consommation du Logement et du cadre de vie CLCV*), regarding the conditions in which a universal banking service might be set up, and whether such obligations would be compatible with competition rules, the Conseil issued the opinion 05-A-08.

The *Conseil* considers that the introduction of a universal service is not in itself incompatible with competition rules, but it is then necessary to ensure that the mechanisms used to select operators and provide financing do not distort competition in the banking sector.

The *Conseil* emphasized that any analysis of such a universal service competitive impact will depend on the way the service scope is defined. If a reasonably

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priced universal service is only open to a particular category of consumers, it will lead to the creation of two distinct consumer groups, paying different rates for the same services, with the disadvantages linked to the introduction of a threshold.

If on the other hand, the universal banking service is open to all with no conditions attached, it would be important to consider the potential disruption for operators of the competitive sector. If the universal service includes a wide range of banking services, there could be implications for competition and for the rates charged for services with non-regulated prices.

Regarding the implementation of universal service obligations, there are a number of possible pro-competition solutions, involving allocation mechanisms and financing methods. The *Conseil* looks at these solutions in its opinion.

The *Conseil* stresses the fact that the subject of the universal service has been carefully studied from the point of view of economic theory, and the main advantages and disadvantages of the various implementation methods are well-known. However, there is still no single model for a universal service. It is therefore not only possible, but even desirable from an economic efficiency standpoint to adapt the system to the objective conditions of the national market, and to opt for innovative solutions where necessary.

Motorway privatisation (05-A-22)

The Conseil de la concurrence received a request for opinion from the French Association for the Maintaining of Competition on the Motorway Network *(Association pour le maintien de la concurrence sur le réseau autoroutier Amcra)*, which is made up of independent public works firms The request concerned the potential competition problems that may be raised by privatisation of the mixed-economy motorway operators (Sociétés d'économie mixtes concessionaires d'autoroutes, SEMCA), particularly for motorway maintenance markets. In its opinion, the Conseil invites the public authorities to clarify and reinforce the planned system to control the private management of motorway operators (opinion 05-A-22).

The privatisation of the Semca will lead to a change in these operator's obligations under national and EC regulations on public procurement contracts. Although at present, the Semca are subject to very strict rules on competition for the awarding of tenders, they will almost certainly change status, once privatised. As a result, the *Conseil* stressed that it is very unlikely that the future operators will agree to submit to the same competition rules applied to the previous Semca for maintenance or improvement works on their networks, especially if they are financed by or in partnership with a public works company.

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The *Conseil* highlights the need to regulate companies in a monopoly position. Most motorway routes will eventually constitute private monopolies. Consequently, the tolls should be subject to price regulation, as is currently the case. Concerning the possibility that some motorway operators may merge with public works firms, the *Conseil* calls for a clear accounting separation between the monopoly activity and activities subject to competition, so as to avoid, that cross-subsidy mechanisms distort competition on competitive activities. It also indicated that there should be effective regulation of the prices practiced by the monopoly.

In order to avoid the creation and use of a monopoly income, the *Conseil* recommended:

• To ensure the long-term existence of the privatised operators as distinct legal entities, which will prevent them from merging with other companies, or extending their business scope to cover services they do not currently provide themselves.

• To reintroduce explicitly, for public tenders, the requirement to comply with the selection criteria which applied to the Semca before privatisation, with setting the limits beyond which obligations in terms of advertising, competition and intervention by consultative commissions, in accordance with the appropriate procedures, should take effect, without neglecting tenders for services and supplies.

• To clarify the role of market commissions set alongside each company, by allowing them real powers of approval over decisions to award concessions.

New number system for directory assistance (05-A-16)

Having been referred to by the French telecoms and postal regulator Arcep (previously called *ART Autorité de Régulation des Télé-*

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communications) for an opinion on the conditions for ensuring fair competition during the transitional period leading up to the introduction of a single numbering format for all the directory assistance numbers which can be dialled up from a telephone, the *Conseil de la concurrence* has just released an opinion in which it examines the operation of the sector from the point of view of competition and stresses the risk of established operators gaining an advantage in the market (opinion 05-A-16).

The change in the numbering format would have a profound effect on the competitive environment of the sector and would encourage large-scale players specialising in the provision of telephone directory assistance, already operating on several other European markets, to enter the French market.

Nevertheless there is a real risk of established operators gaining an advantage in the market, particularly because they already have a market presence as network operators, as well as providing directory assistance services. The conditions of access for new entrants to services which only the network operators are in a position to supply (disclosure of lists of subscribers, access services, invoicing for the account of third parties) will have to be monitored.

This supervision will need to focus in particular on the problem of access to the telephone operators' networks, the tariffs for this access and retail tariffs of the operator of the overall service. In this respect the *Conseil de le concurrence* stresses the need to set up separate accounting within the integrated operators, in order to be able to check that there are no discriminatory pricing practices in respect of certain competitors, nor any cross subsidies.

The *Conseil de la concurrence* also stressed that the acquisition phase plays a very important part in the subsequent operation of the market : for this reason it is essential to pay particular attention to the communication strategies of operators during the initial months of launching new services. The *Conseil* therefore recommended, as a precaution, that references to the 12 as well as other "historical" numbers should be avoided in the promotional campaigns launched by operators.

The *Conseil* also recommended that potentially anticompetitive practices on the part of established network operators should be closely monitored: such as, for example, in the case of discriminatory use of back up material and equipment held for the purposes of providing a universal service (paper directory, white pages, telephone kiosks), the sending of short "targeted" text messages (sent for example after a network operator has detected a call to a number of the 118XYZ type), the automatic pre-registration of an operator's number on the subscriber's SIM card, the enclosure of promotional documents with invoices or the transmission of an advertising message when calls are made to the old numbers.

Long-term contracts for intensive industrial users (05-A-23)

Following a request by the Minister of Economy on the planned system to enable industries which are intensive users of electricity to benefit from special electricity pricing conditions, the *Conseil* published an opinion stating that it is not opposed to the principle of long-term contracts but considers that the selection of industrial users should be based on a competitive mechanism, rather than regulatory criteria (opinion 05-A-23).

The electricity industry has been progressively deregulated from June 2000 onwards. At that time, many "electro-intensive" industrial users (companies whose competitiveness is characterised by a high level of sensitivity to the price of their electricity purchases) left the regulated tariff system and opted, permanently, for the free market.

"Electro-intensive" users claim that the price levels reached on the free market are not compatible with the continuation of their activity in France, and claim they may be forced to delocalize their activity if they are not able to benefit from a purchase price for electricity which is lower than the market price.

The system envisaged by the Ministry, was a system based on a financial package, which would include a consortium of industrial users and which would be able to purchase electricity for a duration of 15 to 20 years. The consortium members would be determined through a joint decision by the Minister for the Budget and the Minister of Economy, subject to certain criteria being met, as set by decree.

The *Conseil* considered that the principle of a consortium and the creation of long-term contracts are not incompatible with competition law. The *Conseil* also stressed that the selection procedure for these industrial users is the major weakness of the proposed system and presents the risk of creating major distortions of competition.

The *Conseil* recommended alternative solutions to meet the industrial users' request. In the medium term, the Conseil suggested the creation of a liquid wholesale market for long-term products, so as to create favourable conditions for the emergence of competition on long-term offers to end users.

In the short term, the *Conseil* proposed that the general principle of the planned system be retained, but with a more competitive selection process, such as an auction procedure.

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Opinions given to Arcep

In accordance with the market analysis procedure introduced by the French code of postal and electronic communications law *(code des postes et communications électroniques)* (adaptation of the "telecoms package" to French law), the *Conseil de la concurrence* has given a series of opinions to the regulator ART (telecommunications Regulation Authority), now called Arcep (electronic communications and postal Regulation Authority) since June 2005. In its opinion, the Conseil analyses competition on the market concerned and points out the operators which exert significant power.

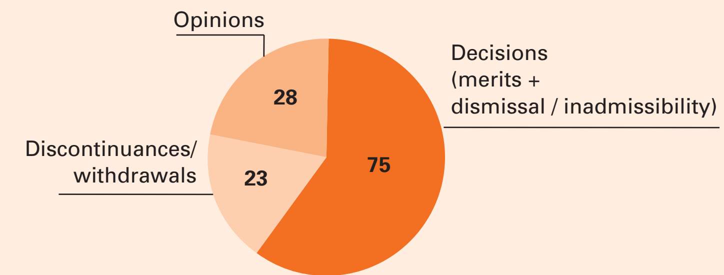
On the broadband internet markets (opinion 05-A-03) the *Conseil de la concurrence* stated that it was not in favour of ex ante regulation of the retail markets. However the *Conseil* agreed with the ART on the fact that ex ante regulation of the wholesale markets was necessary. The *Conseil* observed that France Telecom was a powerful operator on the wholesale broadband market, capable to act independently from its competitors, customers and consumers.

On the fixed telephony market (opinion 05-A-05), the *Conseil* considered that - contrary to the ART- the development of VoB offers (Voice on Broadband) had to be taken into account in the market analysis: distortions of competition could result from an imbalance in the implementation of the regulatory systems provided for by the Authority. The *Conseil* considers that the existence of different regulatory systems between narrow band telephony offers and VoB offers could encourage France Telecom to engage in practices aimed at winning back customers. For example, FT might be induced to approach pre-selection customers in zones which are covered by its broadband offers but are not yet unbundled, proposing bare ADSL offers enabling them to swap their telephone subscription for a VoB offer.

On the markets for access and call origination on public mobile networks (opinion 05-A-09), the *Conseil* indicated that it was favourable to an intervention by the regulating authorities in order to prevent the risks of insufficient competition on the wholesale mobile telephony market. The *Conseil* identified a number of obstacles to the effective development of competition in this market: MVNOs (Mobile Virtual Network Operators) are not yet in a position to compete with the three biggest telecommunications operators (Orange, SFR and Bouygues Telecom). Moreover the *Conseil* underlined the potential risk of Orange, SFR and Bouygues Telecom exerting a significant collective influence on the wholesale market. The *Conseil* therefore favours ex ante regulation to prevent the risk. In addition to the introduction of regulatory measures on the wholesale market, action should also be taken to deal with the obstacles identified on the retail market.

On the markets for geographic call termination on alternative landline networks (opinion 05-A-10), the *Conseil* confirmed the ART's markets' definition. In its view, alternative operators exert a significant influence on these relevant markets. Therefore the *Conseil* favours ex ante intervention by the ART in order to guarantee that the tariffs charged for terminating geographic calls on alternative landline networks are not excessive.

Activity in figures : division decisions/opinions



Activity overview

The activity of the *Conseil de la concurrence* was particularly intense in 2005.

It issued 98 decisions (decisions +discontinuances/withdrawals) and 28 opinions.

Litigation activity is in line with previous years.

The *Conseil* did not issue any interim measure, but in several cases the commitment procedure led to a rapid negotiated settlement of the competition concern.

Decisions

	2002	2003	2004	2005
Cases investigated	78	69	75	67
Interim measures (IM)	9	4	2	0
Dismissals of IM		3	4	8
Withdrawals/Discontinuances	10	26	22	23
TOTAL	**97**	**102**	**103**	**98**

Opinions

In 2005, the *Conseil* issued 28 opinions which break down as follows :

– 5 opinions on general competition issues (art. L. 462-1)

– 4 leniency opinions (art. L. 464-2 IV)

– 4 opinions on merger transactions (art. L. 430-6)

– 2 opinions on a draft regulatory text introducing a new regime (art. L. 462-2)

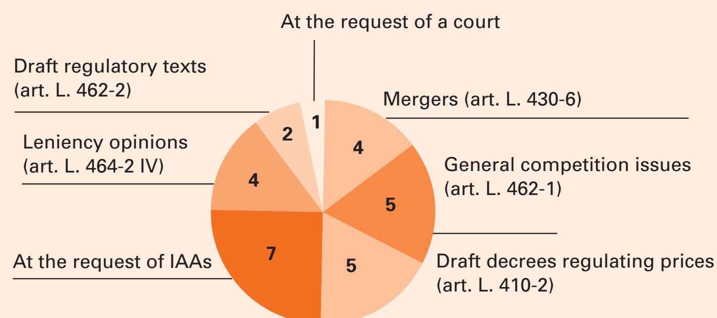
– 5 opinions on a draft decree regulating prices (art. L. 410-2)

– 7 opinions at the request of independent administrative authorities

– 1 opinion at the request of a court

The particular high number of opinions handed down to independent administrative authorities (IAA) can be explained by the fact that the Conseil handed in a series of opinions to Arcep (Telecommunications, electronic communications and postal Regulation Authority) as part of the market analysis procedure set up by the Code of postal and electronic communications (adaptation to French law of the "Telecoms package").

Opinions



Cases pending

Particular efforts were made to reduce the stock, which is now below 200 cases.

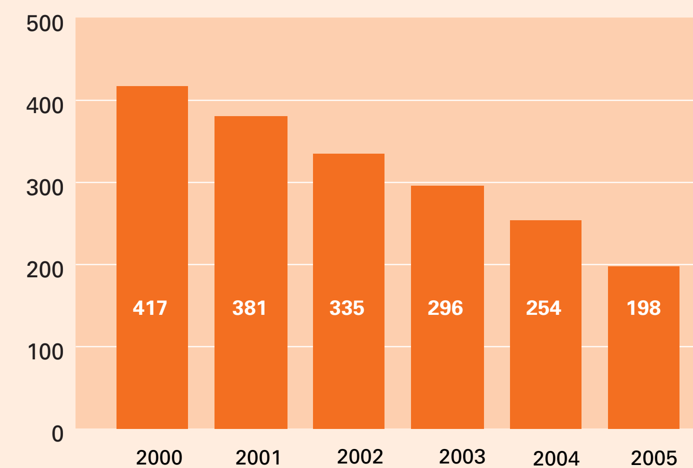
In 2005, the *Conseil* had the objective to reduce the stock of pending cases to a figure lower than the one corresponding to 18 months of activity. The aim was to give priority to the oldest cases. This objective has been met and even exceeded.

For the fifth consecutive year, the stock of pending cases has substantially fallen, as shown in the histogram below.

Cases pending

	Number of cases pending as of 31/12/04	2005 New cases	2005 Completed cases	Number of cases pending as of 31/12/05
Cases on the merits	231	56	110	177
Interim measures	4	14	13	5
Adherence to injunctions	6	0	4	2
Opinions	13	35	34	14
Total	**254**	**105**	**161**	**198**

Stock



Conseil's economic scope of intervention

Economic sectors	Number of decisions and opinions	Decisions and opinions references
Public buildings and works Construction Machine and equipment manufacturing Production of sands and aggregate	13*	**Decisions** 05-D-04 / 05-D-09 05-D-17 / 05-D-19 05-D-24 / 05-D-26 05-D-45 05-D-51 / 05-D-61 05-D-67 / 05-D-69 05-D-71/ 05-D-74
Distribution (retail and wholesale) Retail trade and repairs to household items Wholesale	12	05-D-06 05-D-07 / 05-D-08 05-D-14 / 05-D-30 / 05-D-32 / 05-D-33 / 05-D-34 / 05-D-50 / 05-D-62 05-D-66 / 05-D-70
Services and liberal professions Services to companies Personal Services	11	05-D-31 / 05-D-36 / 05-D-37 / 05-D-56 / 05-D-57 / 05-D-73 / 05-D-21 / 05-D-39 / 05-D-43 05-A-06 05-A-12
Transport Transports and related services	10	05-D-02 / 05-D-11 05-D-28 / 05-D-38* 05-D-53 / 05-D-60 05-A-02 / 05-A-13 / 05-A-15 / 05-A-22

Economic sectors	Number of decisions and opinions	Decisions and opinions references
Telecoms Postal and Telecommunication services	9	05-D-42 / 05-D-59 05-D-63 / 05-D-65 05-A-03 / 05-A-05 05-A-09 05-A-10 / 05-A-16
Energy-water Production and distri-bution of electricity, gas and heat Water extraction, water treatment and distribution	8	05-D-15 / 05-D-58* 05-A-04 / 05-A-11 05-A-14 05-A-19 05-A-23 / 05-A-25
Publishing - media-press Publishing, prin-ting and reproduction recreational, cultural and sporting activities,	6	05-D-01 / 05-D-12 / 05-D-25 05-D-44 / 05-D-13 05-A-18
Chemical /pharmaceutical Chemical industry	4	05-D-03 / 05-D-52 05-D-72 05-A-01
Agriculture/fishing Agriculture and hunting Fishing, aquaculture, related services production of essential oils	3	05-D-10 / 05-D-27 05-D-55

* procurement contracts

Penalties

2005 has reached a record number in terms of penalties.

The *Conseil de la concurrence* issued 31 penalty decisions for a total amount of 754.4 million euros.

If the decision penalizing the mobile operators (534 million euros) largely contributes to this record, it should be noted that, even without this decision, the year 2005 would have reached a record high (220.4 million Euros) since the date of creation of the *Conseil.*

2005 penalties

Decision Number-date	Sector	Amount of fines in €
05-D-03	Bleach sector	192 224 €
05-D-07	Market for weapons and munitions	75 000 €
05-D-08	Opticians in Lyons	4 700 €
05-D-09	Road signs	25 700 €
05-D-10	Cauliflower market in Brittany	45 000 €
05-D-14	Antiques fair trade	1 500 €
05-D-17	Road maintenance in Côte d'Or	525 000 €
05-D-19	Construction of the A84 (Estuaries Road)	17 309 950 €
05-D-26	Public works in the Meuse département	7 083 000 €
05-D-27	Sector of long fin tuna	3 500 €
05-D-32	Royal Canin	5 002 000 €
05-D-36	Respect of injunction Decaux	10 000 000 €
05-D-37	Lawyers in Marseille	50 000 €
05-D-38	Public passenger transport	11 950 000 €
05-D-43	Dental surgeons in Puy-de-Dôme	1 000 €
05-D-44	La Provence (Regional daily press)	20 000 €
05-D-45	Incineration plant in Issy-les-Moulineaux	73 000 €
05-D-47	Weapon destruction	68 000 €
05-D-49	Rental of Franking machines	1 360 000 €
05-D-51	Building works Strasburg Parliament	448 840 €
05-D-55	Essential Oils of Lavandin	5 000 €
05-D-58	Water Ile-de-France	500 000 €
05-D-59	Broadband Internet 9 Telecom /France Télécom	80 000 000 €
05-D-63	La Poste/mail consolidation	1 000 000 €
05-D-64	Paris luxury hotels	709 000 €
05-D-65	mobile telephony	534 000 000 €
05-D-66	Consumer electronics (TVHA)	34 400 000 €
05-D-67	Road works in Artois	1 384 500 €
05-D-69	Road works in Seine-Maritime	33 660 000 €
05-D-70	Disney video cassettes	14 400 000 €
05-D-75	Monnaie de Paris	100 000 €
Total		**754 396 914 €**

Penalties ruled : upward trend over 5 years

Penalties have increased substantially over 5 years.

This trend reflects the will of the *Conseil* to strengthen its repressive action and to use deterrence to improve the efficiency of its action.

Penalties

	2001	2002	2003	2004	2005
Number of decisions imposing fines	30	12	19	26	31
Number of companies or groups of companies penalized	116	103	57	91	131
Amount of fines /companies	51,2 M€	64,3 M€	88,5 M€	49,3 M€	754,1 M€
Number of professional associations fined	3	8	4	46[1]	6
Amount of fines/ professional associations	0,03 M€	0,5 M€	0,05 M€	0,9 M€	0,26 M€
Total amount of fines	51,2 M€	64,8 M€	88,5 M€	50,2 M€	754,4 M€[2]

(1) The particularly high number of professional organizations penalized in 2004 is mainly due to decision 04-D-49 , which concerned practices in the bovine insemination sector and implicated some 42 co-operative associations.

(2) of which 534 million following decision 05-D-65 (agreement in the mobile telephony market)

Types of practices penalized in 2005

Abuse of dominant position	7
Abuse of economic dependence	0
Agreements	22
Breach of injunction	4

NB: the number of practices does not necessarily match the number of decisions handed down, since one decision may penalize several categories of practices

Appeals to the Paris court of appeal

The decisions handed down by the *Conseil de la concurrence* « are notified to the parties concerned and to the Minister of Economy. Within a period of one month thereafter, the parties or the Minister may lodge an appeal with the Paris court of appeal, requesting that the decision be quashed or amended (article L. 464-8 of the code of commercial law).

Decisions on appeals against rulings handed down in 2005 are not yet fully known at the time of writing of the present document, since some are still pending before the court of appeal.

A qualitative summary of the last 3 years nonetheless shows that the vast majority of the *Conseil de la concurrence's* decisions are endorsed by the Paris court of appeal.

Appeals to the Paris court of appeal

	2002	2003	2004	2005 (1)
Number of appeals lodged	**27**	**19**	**23**	**28**
Number of decisions endorsed	**19**	**17**	**18**	**10**
• dismissals, withdrawals, inadmissibility	18	16	14	7
• partial amendment / endorsement on the merits	1 (5)	1 (4)	4 (3)	3 (2)
Amendment (partial or total)	**6**	**1**	**3**	**3**
Appeals quashed (total or partial)	**2**	**1**	**2**	**0**
Total appeals examined	**27**	**19**	**23**	**13**
Cases pending	0	0	0	15
% decisions endorsed/total appeals examined	70 %	89 %	78 %	77 %

(1) provisional figures (15 cases pending as of April 25 th 2006)
(2) decisions 05-D-19, 05-D-26 and 05-D-43
(3) decisions 04-D-07, 04-D-18, 04-D-39 and 04-MC-02
(4) decision 03-MC-02
(5) decision 02-MC-04

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